SUPREME COURT OF QUEENSLAND

CITATION:	*Moreau v Moreau and Another* [2022] QSC 91
PARTIES:	**ZIA CASSANDRA MOREAU** (Applicant/respondent) v **ATALANTA MOREAU** (First Respondent/applicant) and **DAVID KAULKMAN** (Third Respondent)
FILE NO/S:	8751/19 and 924/20
DIVISION:	Trial Division: Application
PROCEEDING:	Applications (2)
ORIGINATING COURT:	Supreme Court of Queensland, Brisbane
DELIVERED ON:	18 May 2022
DELIVERED AT:	Brisbane
HEARING DATE:	20 April 2022
JUDGE:	Ryan J
ORDER:	**IT IS ORDERED THAT:** 1. **In 924/20:** **Pursuant to section 127(2) of the *Land Title Act* 1994 (Qld), caveat number 719698458, registered over the land described as lot 8 on registered plan 913578 and having title reference 50185356, be removed.** 2. **In 8751/19:** **Pursuant to section 127(2) of the *Land Title Act* 1994 (Qld), caveat number 719411678, registered over the land described as lot 6 on registered plan 159534 and having title reference 15809183, be removed.** 3. **The claims for compensation in each application are dismissed.** 4. **The applicant, Zia Moreau, is to pay the costs of the First Respondent, Atalanta Moreau, of each application, on the standard basis.**
CATCHWORDS:	REAL PROPERTY – TORRENS TITLE – CAVEATS AGAINST DEALINGS – REMOVAL – PARTICULAR CASES – where, decades ago, the first respondent mother offered to subdivide her large property and gift her son and

daughter (the applicant) a lot each – where son accepted the offer and mother subdivided her property to give a lot to him – where daughter did not accept offer when it was made – where, now, daughter wants to accept offer – where mother unable to meet her financial commitments – where mother has entered into an agreement to sell property to meet her debts – where daughter lodged caveats on property – where mother applied to have caveats removed – whether daughter had commenced "proceedings" within relevant period of time – whether daughter's claim gave rise to a serious question to be tried – whether balance of convenience favoured retention of the caveats – whether disconnect between interest claimed and land which daughter identified in caveats

Land Title Act 1994, sections 122, 126, 127
Property Law Act 1974, section 55
Uniform Civil Procedure Rules 1999 (Qld), rules 9, 22, 149

Allen v Synder [1977] 2 NSWLR 685
Bell v Graham [2000] VSC 142
Cousins Securities Pty Ltd v CEC Group Limited [2007] QCA 192
Goldstraw v Goldstraw [2002] VSC 491
Lloyd v Tedesco [2002] WASCA 63
Re Henderson's Caveat [1998] 1 Qd R 632

COUNSEL: C D Coulsen for the applicant/first respondent
Respondent/applicant self-represented

SOLICITORS: Sajen Legal for the applicant/first respondent
Respondent/applicant self-represented

OVERVIEW

[1] Zia Moreau's mother, Atalanta Moreau, owns property on the Sunshine Coast. The property comprises two lots – Lot 6 and Lot 8. In 1994, Atalanta[1] offered her two children – Zia and her brother – a block of land each, carved out of Lot 8. Zia's brother accepted the offer and received a block of land in 1997. Zia did not accept the offer at the time it was made but wishes to do so now. As recently as 2020, Atalanta acknowledged that she had promised Zia a block of land, but she is now unwilling, if not unable, to follow through on that promise.

[2] Atalanta's property is mortgaged to the National Australia Bank (NAB) and to an individual second mortgagee.[2] Atalanta cannot meet her commitments to the bank and is at risk of foreclosure.[3]

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1 Because this is a family matter, involving persons with the same surname, I will refer to the parties and other family members by their first names, for clarity. I intend no disrespect.

2 The third respondent in claim 924/20.

3 The NAB was removed as second respondent from each of the proceedings by orders of Dalton J (in 8751/19 on 18 September 2019) and Wilson J (in 924/20 on 5 February 2020).

[3] Atalanta has reached an "in principle" agreement with a friend which includes his purchasing Lot 6 and entering into a joint venture with her for the subdivision and development of Lot 8. Atalanta hopes that, thereby, she will be able to meet her obligations to the NAB.

[4] However, Zia has lodged a separate caveat over each lot, asserting an "equitable interest pursuant to a constructive and/or resulting trust in the property … by reason of … being the daughter of the registered owner and by reason of having contributed both directly and indirectly to the property". She acknowledged that her "contributions" were not financial ones.

[5] In respect of each caveat, Zia purported to commence proceedings in the Supreme Court to establish her entitlement to a portion of each lot by way of application (file numbers 8751/2019 (Lot 6) and 924/2020 (Lot 8)). Zia acted for herself in lodging the caveats and she acts for herself in each of the applications.

[6] Zia's caveats are interfering with the preparation and execution of the agreement to sell/subdivide the property and increasing the risk that the NAB will enter and sell the property as mortgagee in possession.

[7] Obviously, by means of the caveats, and the claims upon which they are said to be based, Zia seeks the enforcement of the promise. But a court cannot enforce a promise made by one person to another (the "promisee") unless there is a legal or equitable cause of action supporting the promisee's claim for enforcement and the promisee succeeds in that cause of action.

[8] The material put together by Zia to support her claim to the property and to resist the applications for removal of the caveats is disorganised and voluminous. It took some time to wade through it all. Much of it is irrelevant or misconceived. Nevertheless, I considered the matter on the basis of the material at its best for Zia. I ignored material which seemed likely to be the subject of the negotiations privilege, that is, the transcript of the "family meeting".

[9] Zia relies upon the notion of a "trust" as the basis of her claim to an entitlement to the land the subject of each caveat, but no trust arises in the circumstances of this case and there is no viable cause of action underpinning Zia's claim. That would be reason enough to order the removal of the caveats – but there are other bases for doing so too (discussed below).

[10] I therefore order the removal of the caveats. My reasons in detail begin at [12].

[11] I order that Zia pay her mother's costs of this application on the standard basis, there being no reason why costs ought not to follow the event. Although, as Atalanta's counsel observed, whether that costs order will be enforced or not is matter between mother and daughter.

REASONS

The property

[12] The property the subject of the application is at 93 King Road, Mooloolah Valley.

[13] After a subdivision in the 1980s, it consists of two lots – Lot 6 and Lot 8.

[14] Atalanta conducts a horse-riding business on Lot 8. That business has been operating since 1980 and continues to operate.

[15] In 1988, Atalanta opened a bed and breakfast business on Lot 6. The bed and breakfast accommodation includes several houses or cottages, one of which is Atalanta's residence.

[16] The NAB holds a registered mortgage over the property, securing a debt of about $1.7 million. Atalanta has struggled to meet her financial commitments under the mortgage for many years. She is in default and the bank has been in a position to take action since about 2019. Atalanta wishes to sell Lot 6 and subdivide Lot 8 (as part of the joint venture) to prevent the NAB from entering into possession of the property and exercising power of sale.

[17] On one view of things, the best argument for removing the caveats is that they are pointless. The NAB may sell through them as mortgagee in possession and it is reasonable to assume that it would not tolerate the reduction of its security by way of Atalanta disposing of a "block of land" to Zia beforehand. Atalanta made this point in the context of her argument that the balance of convenience favoured the removal of the caveats, which is discussed below.

The promise of land

[18] Atalanta is divorced. She has two children: Zia and her son Jacque. Zia is a musician.

[19] In 1983, she assumed ownership of the property as part of a property settlement with her ex-husband.

[20] In 1994, Atalanta told Zia and Jacque that they could each have a block of land, of equal size, "out of Lot 8" – as a gift. She happened to have the money to pay for a subdivision at that time. Her offer was not conditional on her children fulfilling any obligation in relation to the property. Indeed, in 1994, Zia was not living on the property.

[21] Jacque accepted the offer and Lot 8 was subdivided. Atalanta gave him "Lot 7" (title reference ending in #355), which was created on 4 September 1997.

[22] When Atalanta made the offer, Zia was living in New South Wales, where she had been since 1992 and where she remained until 1998. According to Atalanta, Zia told her she was not interested in the land because she'd prefer to live in northern New South Wales (where she had studied) to pursue her music interests and she wished to buy land there. Atalanta did not, therefore, subdivide Lot 8 further. In Zia's own evidence, she says that, in 1995, she asked her mother for help to put a deposit down on a property in New South Wales, but her mother declined.

[23] Zia says she never refused the gift of a block of land. She says that she worked on the property "on the understanding that [she'd] receive no payment for [her] activities and that [she] would eventually be given by my mother a block of land agreed on between us. Picaninny Cottage (bed and breakfast accommodation), the top cottage, and the land up the hill behind us was promised to me separately for the

work that I did for mum as authority for AFCA" (that is, work on a claim of alleged maladministration by the NAB explained below).

[24] According to Atalanta, Zia made no mention of the 1994 offer of a block of land until she lodged caveats over Atalanta's property in February 2019 (over lot 8); May 2019 (over Lot 6); and October 2019 (over lot 8).

[25] According to Zia, the promise was repeated often over the years.

Context for Zia's claims

[26] Atalanta has been struggling financially for some time. It seems that she was contemplating subdivisions of Lot 8 to improve her financial position from at least 2013.

[27] I have gleaned from the material that, in 2018, two persons were separately toying with the idea of subdivisions of Lot 8.

[28] The material tendered by Zia includes two "Proposed Plan[s] of Subdivision" dated 17 January 2018, each prepared by Murray and Associates. One was for a client called David Wrigley. In accordance with that plan, Lot 8 would be subdivided into a total of 8 lots, including the existing Lot 7, which is owned by Zia's brother. The other was for a client called Pitcher. In accordance with that proposal, Lot 8 would be subdivided into a total of 3 lots, including Zia's brother's Lot 7.

[29] The material tendered by Atalanta includes correspondence about the NAB's rights under enforcement notices sent to Atalanta. Read together, I infer that David Wrigley was involved in attempts to sell the property (or at least Lot 8) in the middle of 2018 which ultimately came to nothing.

[30] The material tendered by Zia includes an email from Andrew Pitcher to Atalanta Moreau, dated 3 August 2018. Relevantly, it reads (my emphasis) –

> Hi Atalanta,
>
> Thanks for meeting me today.
>
> I am pleased that you have two interested parties in your property. Do your research on their terms carefully. I think Kyle is a tremendous person to have in your corner.
>
> Assuming you accept David's offer, I won't do much in the short term. If you could simply let me know when his offer would become unconditional I would appreciate it. If it does come back to being on the market, I don't have the means to buy the entire parcel you currently own, so my interest would be in a straight purchase of either:
>
> - All the Rural Residential portion (subject to the requisite town planning)
> - The Rural Residential portion less the proposed Lot 1 and the area around the large shed (subject to the requisite town planning).

> The latter would be fine as it might also provide a new access point for your retained parcel and **give your daughter somewhere nice to live.**
>
> I will do some sketches on how many lots could be possible outside of the water, vegetation and slope constraints to see what sort of value I would put on it.
>
> …

[31] Ultimately, no one had any interest in either of the proposed January 2018 subdivisions and matters went no further.

[32] In some parts of her material, Zia asserted that her mother was aware of, and supported, her caveats. She points to a text message, apparently sent to her by her mother on 21 February 2019, in which her mother asked her whether she (Atalanta) should sign a contract "to keep Nab from reacting re the FAOC? Dan here now … intense pressure". She added, "We are OK if your caveat holds". However, even on the assumption that, in February 2019, Atalanta saw some benefit to herself in the retention of Zia's caveats, she was no longer of that view by 18 September 2019, when she wrote to the Supreme Court, stating *inter alia*, that she was "aghast" at the "necessity" for Zia to "seek a non-lapsing caveat". She said something similar in another note to the Supreme Court dated 4 February 2020. And of course, whatever Atalanta may have been thinking about the caveats in 2019 or 2020 – she has now applied for orders to remove them.

[33] There is also throughout the material evidence of Zia using the caveats in an unsophisticated attempt at leverage in the claim against the NAB for alleged maladministration – perhaps not appreciating that NAB may sell through the caveats. For example, in what I assume is a text message to her mother, dated 21 February 2019 (included in Zia's material) she says –

> I will willingly lift the caveat when I know and am advised by a lawyer who has your interest at heart and knows the full scope of the Maladministration case, and your situation (all of it) and it has been clearly clarified for all that you are debt free, will not lose Mango Hill your own property and lot 8 has its rightful owner and vision and is protected as best as possible.

[34] For what it is worth, I am not sure whether in that message Zia was asserting there that she was the "rightful owner" of Lot 8.

[35] By way of another example, in a letter seeking pro-bono assistance, dated 16 March 2022, and tendered by Zia, she said "I will not lift the caveats until it is beneficial for myself and all parties and all debt is cleared for my mum, and I am compensated fairly and appropriately and most of all I want NAB to be accountable for such grave wrongdoing and for this to never happen to anyone else again". (The alleged wrongdoing of the NAB is discussed below.)

[36] There are other examples of Zia's attempts to bargain, using the caveats as leverage, throughout her material. Nevertheless, Atalanta did not raise the prospect that the caveats were being used for a collateral purpose as the basis for their removal, and I will therefore say little more about it.

The caveats

First caveat on Lot 8

[37] On 13 February 2019, Zia lodged a caveat on Lot 8 (caveat number 719259841).

[38] She claimed an equitable interest in fee simple in "Lot 8 on RP 913578". She expressed the grounds of her claim as follows –

> The caveator has an equitable interest pursuant to a constructive and/or resulting trust in [Lot 8] by reason of the caveator being the daughter of the registered owner and by reason of having contributed both directly and indirectly to the property. I've worked for my mother for many years on the home property on the understanding that she was holding a block of land equal or more to the size that my brother was gifted on a block that was subdivided approximately 30 years ago. Please see email evidence attached from my mother to lawyer 12.02.19 9:18 AM & email dated 3 August 2018 at 2.41 pm verifying known intent. Thank you. Please note whilst I contributed to the property substantially I did not contribute financially. Please see sketch of 'Proposed Subdivision of Lot 8 on RP 913578' of the lot to which the Caveator is claiming crosshatched and border highlighted in pink.

[39] The 2018 email is the one to which I have referred from Andrew Pitcher above at [30]. I infer from it that, as at 3 August 2018, Atalanta was contemplating a subdivision of Lot 8 which would include somewhere for Zia to live.

[40] The 2019 email was sent from Atalanta to her lawyer the day before the caveat on Lot 8 was registered. I infer from it that: (a) Atalanta *understood* that Zia was making a claim for "ownership of part of the land, as promised to her, as was given to her brother"; and (b) *acknowledged* that the promise had been made.

[41] However, the answer to Zia's application does not lay simply in the court accepting that her mother promised her land. Promises may be broken, or become impossible of performance, without legal consequences. In other words, not every promise made by one family member to another is enforceable in a court of law.

[42] On the sketch plan attached to the caveat, Zia identified the land which was, in January 2018, proposed as 'Lot 2" in the subdivision prepared for Andrew Pitcher, as the land in which she claimed an interest.

[43] Zia did not commence proceedings in support of the interest she claimed in Lot 8 within the time required, and this caveat lapsed.

Caveat on lot 6

[44] Meanwhile, on 16 May 2019, Zia lodged a caveat over Lot 6. She expressed the grounds of her claim as follows –

> The Caveator has an equitable interest pursuant to a constructive and/or resulting trust in the property referred to in item 2 by reason of the Caveator being the daughter of the registered owner and by

> reason of having contributed both directly and indirectly to the property.

[45] The property was described in item 2 as "Lot 6 on RP 159534". The interest claimed was an equitable interest in fee simple. Zia attached to her caveat a sketch of Lot 6, which had been prepared by Caloundra Design and Drafting for Atalanta Moreau. The sketch shows the existing Lot 6 buildings and includes proposals for additional structures on the land – such as, for example, accommodation and a rotunda. On that sketch, Zia identified the portion of the lot she was claiming by drawing a border around the portion, in yellow highlighter, and cross-hatching it. She had essentially divided the lot into two pieces (roughly 60:40) and identified the smaller piece as the "lot" she claimed.

[46] On 16 August 2019, she filed an application (8751/19), purportedly to start proceedings to establish the claim made in the caveat. In her application, she sought an order *inter alia* that –

> … the portion of interest in the lot be transferred to [her] under *Land Title Act* Section 122(d).

[47] She also sought leave to "lodge a further caveat on an acceptable and permissible portion of Lot 8".

[48] Zia's reference to section 122(d) is entirely misconceived. Section 122 lists the persons who may lodge a caveat.

[49] She added, in her application, that she was "happy to lift the caveat" when it was "beneficial for all parties concerned, after AFCA [the Australian Financial Complaints Authority] determination/negotiated fair and reasonable resolution with NAB of alleged maladministration in lending" – reflecting, in my view, her collateral purpose.

[50] On 18 September 2019, Dalton J made orders removing the NAB from proceeding 8751/19 and granting leave to Zia to "lodge a second caveat over Lot 8 on RP913578 on the same or substantially the same grounds as are stated in caveat 719259841 registered on 13 February 2019".

Second caveat on lot 8

[51] On 25 October 2019, Zia lodged a second caveat over Lot 8, relying upon essentially the same grounds as those nominated in the caveat registered on 13 February 2019.

[52] On 24 January 2020, she filed an application (924/20) purportedly to establish the interest she claimed under the Lot 8 caveat. She sought by that application an order that the "portion of interest in [Lot 8] or the complete lot be transferred to her under section 122(d) of the *Land Title Act* 1994.[4] [5]

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[4] Her reference to section 122(d) is misconceived.

[5] She also applied for orders against the NAB. That part of her application was dismissed by Wilson J on 5 February 2020 – the day on which her Honour ordered that the NAB be removed from the proceedings.

[53] Zia filed an affidavit in support of her application (on 24 January 2020) in which she said she said that "ideally" she wanted the "block next to her mother's property (Lot 6) on Lot 8 so that [she] could in [the] future extend the Holiday Houses property to include this block". She said that the block next to her mother's was the block which was always intended for her. It allowed her to help her mother in her mother's old age; holiday houses could be included on it; and she could conduct "high end Song writing Retreats" there in the future. She said also that she would like to ensure that the NAB did not sell Lot 6 or Lot 8 without giving her a block of land or the financial equivalent. It is not clear to me that Zia is here referring to "Lot 2" as proposed in 2018.

[54] Throughout her material, Zia does not consistently lay claim to any particular part of the property. The theme that emerges from her evidence is that she wants "something" – either real property or its monetary equivalent – to be in the same position as her brother finds himself in.

The evidence

[55] Zia filed an affidavit on 19 April 2022, which was very similar to her January 2020 affidavit, but which also refuted several of Atalanta's assertions. I treated it at evidence in both applications.

[56] Zia asserted that she had "worked for [her] mother for many years on the home property on the understanding that she was holding [for Zia] a block of land equal or more to the size that [her] brother was gifted on a block that was subdivided approximately 20 years ago".

[57] According to Zia, as a child, she worked "unpaid" on the property and did whatever her parents asked her to do. Her parents "split" when she was 12 and a half years old. She said from then, she worked "significantly" in an adult capacity to support her mother, as a sole parent, in "maintaining" and "running" the properties.

[58] In her affidavits, she itemised her contributions to the properties. While those contributions were admirable, they were not the sort of contributions which directly added value to the property.

[59] Her alleged contributions were as follows –

A. gardening

B. mowing

C. checking fences and boundaries

D. assisting with the riding centre (rode for y ears, picked up poo, cared for horses, liaised with VETS, hosted children's parties, took out all day and half day picnic rides and pub rides, tourism guide for the horseriding business.

E. answering telephones

F. Attending to queries, making bookings, follow up with customers, general office administration, liaise with customers, phone bookings for horseriding and accommodation

G. dealing with customers

H. feeding animals (horses, birds, dogs, cats geese.

I. fixing fences, fixing holes moving trees and waste, weeding, general clearing,

J. liaised with council for regular inspections, which I have done most recently in December 2019 with Sunshine Coast Council for spa inspections, and legislation requirements.

K. helping settle neighbour disputes

L. Dealt with accidents and emergencies on the property

M. Organising workers, checking up with them throughout the days as needed and asked to by my mother

N. Advertising, distributing advertising leaflets on the Sunshine Coast, Noosa to Caloundra

O. Entertained at many special functions and events at the property including Aboriginal song and dance celebrations, Grand opening of the accommodation houses with Federal and Local parliament members present.

P. On-line research for my mother.

Q. shopping for my mum at Bunnings, Coles, Woolworths, Pool Shops, doing errands consistently for my mum off site as mum is so busy on site, that it's hard for her to leave the property.

R. Cleaning pools

S. Cleaning BBQ and entertaining guest areas etc

T. Assistant to masseuse for guests

U. Look after the properties when Mum visits her parents in NSW generally twice per year.

V. All rounder doing whatever mum asks and whatever is necessary on the properties.

W. Cooking and sharing meals with my Mum. I pay for these.

X. Some general office administration and computer work for mum for the property

Y. Hosted accommodation inspections

Z. Since February 2019 I have been working extensively on an alleged banking maladministration case and still working on it to try and save myself a block of land, and for my mother and family, and to service all and any debt after investigation including resolve of debt for investors of which David Kaulkan is one. I have a solution that will benefit all. I have been doing this alone and with legal advice that I am able to access.

AA. The hours I have worked equate to 15 hours on average per week including any time being away from the property from 1983 to today's date.

[60] When viewed in the context of the whole of the evidence (outlined below) if was clear that Zia assisted her mother around the property from time to time *when* she, Zia, was at the property, which depended upon her life circumstances. Speaking generally, on her own evidence, from about 1989 onwards, Zia stayed at the property when it suited her; and in 2007 or 2008, to assist her mother, when her mother injured her back.

[61] Zia estimated that from 1983 until 2020, she worked about 15 hours a week at the property – averaging it out over those years and taking into account that there were many years when she did not live at the property.

[62] From 1989 until 1992, she was at university. From 1992 until 1997, she lived in regional New South Wales. She lived in Sydney for one year (1997/1998). She visited and holidayed at the property whilst she lived away from it (from 1983 until 1998). During her touring years as a musician, from 1998 until 2004, she said she was at the property for six to nine months of each year, between tours.

[63] In 2005, she lived at the property and worked "extensively" for her mother whilst she wrote first album. In 2006 and 2007, she lived in Brisbane – "working" on the property "midweek, on weekends and in holidays". She also entertained at functions and events held at the property.

[64] In 2008, she found a property she wished to buy at New Farm in Brisbane. Atalanta agreed to guarantee Zia's loan but Atalanta's bank, the NAB, would not permit it because, as I understand things, they had recently lent a significant amount of money to Alalanta which she was struggling to repay. It was in this context that a claim was made against the NAB for failing to apply relevant lending criteria in deciding to lend the money to Atalanta – the alleged maladministration.

[65] Instead of buying the New Farm property, Zia moved back to her mother's property in 2008 and 2009 to study at the University of the Sunshine Coast. Also, in about 2008, Atalanta "broke her back". Zia attended to her needs. She said she ran the riding centre on weekends and around her university schedules because her mother was incapacitated.

[66] From 2009 until 2018, Zia lived in rental properties on the Sunshine Coast, but assisted her mother at the property. In 2017, whilst her mother was holidaying, Zia "liaised with the workers at the riding centre and guest houses" to ensure the property ran smoothly in her mother's absence.

[67] In 2018, she lost her Sunshine Coast accommodation because she was unable to pay her rent (having herself been unpaid for work she had done). She was also unable to pay her credit card debt – she says because of the time she spent on the maladministration case.

[68] She said that she put her career on hold after her mother suffered a stroke in November 2017. She asserts that, from this point in time, her mother's behaviour changed.

[69] She said that her mother promised her that she would be gifted a block on land on "Lot 8" just as her brother had been gifted such a lot, for her "significant and unpaid contribution to the property". She also claimed that her mother promised her "Piccaninny Cottage" during the first Covid-19 lockdown in Queensland (in 2020) for working on the alleged maladministration case. She said that, in the same conversation, there was another reference to the promised block of land.

[70] In further support of her claim, Zia attached, as exhibits to her affidavit filed on 16 August 2019, affidavits from other people attesting to the work she had performed on the property.

[71] She exhibited her father's affidavit, in which he relevantly affirmed that –

- He separated from Atalanta in 1983.
- The children were expected to work unpaid on the property.
- Zia's contribution (I assume as a child) included gardening, mowing, checking fences and boundaries, assisting with the riding centre, dealing with customers, and feeding animals.
- He worked at the property as a handyman in 2007 and 2008. In 2007, Zia "worked on the property on weekends and in the holidays". In 2008, while she was living at the property, she worked on it. (He made no mention of Atalanta's back injury).
- In 2007, Atalanta told him that she would give Zia "a block of land on Lot 8 which is adjacent to Lot 6, 93 King Road Mooloolah Valley".
- In 2008, he saw Zia "working doing any jobs that Atalanta requested".

[72] I infer that he can say nothing about the work done by Zia on the property since 2008.

[73] Zia exhibited the affidavits of two old friends. One friend affirmed that –

- She was aware of Zia's "significant contribution to the maintenance of the Property throughout the years and to this day" (that is, 15 August 2019).
- In January 2019, Atalanta told her that she had always planned to give Zia a block of land, as she had for her son, "in recognition of their contribution towards the property".

[74] The other friend affirmed that whenever she visited the property, and Zia was there, she saw Zia "working to assist Atalanta in the running of the property".

[75] Zia exhibited the evidence of a cousin who affirmed that, between 1988 and 1989, Zia did "maintenance" on the property every day. As I understand things, this was when Zia was in her final year of school and her first year of university in New South Wales. Her cousin also affirmed that, in 2012, Atalanta said that she intended to give Zia a block of land for her contribution to the property.

[76] I have already noted that Atalanta claimed that the 1994 offer of a block of land was unconditional. Also, Atalanta had a different view or recollection of Zia's contributions to the property and the time she spent there.

[77] According to Atalanta, Zia did not return to the property "with any frequency" while she was studying; nor did she live at the property between 1998 to 2004. Rather, after she left, she returned sporadically, for recreational visits. She did not, on her returns to the property, perform any duties or assist with the property or the businesses on it.

[78] There is no need for me to descend any further into Atalanta's evidence about the things Zia did or did not do on the property. Unsurprisingly, Zia refutes any suggestion that she has exaggerated or mis-characterised the work she did on the property.

[79] The only other things worth mentioning about Atalanta's evidence in this context are that on 13 October 2021 Atalanta withdrew her consent, given previously, for Zia to act for her in the matter involving the alleged maladministration of the NAB; and that Atalanta "banned" her from entering the property. Those matters reflect, obviously, the breakdown in their relationship.

[80] Zia's April 2022 affidavit attaches 77 exhibits, very few of which have any relevance to the present application. Those of relevance include exhibit 12, which is a copy of a statutory declaration by Atalanta, dated 29 July 2020, which relates to the alleged maladministration case against the NAB and refers to her signing certain loan documentation in 2008. The final paragraphs of that statutory declaration refer to the promise. They read (my emphasis) –

> In and around March/early 2008 Zia and I met with Simon Phillips … [the person who arranged the loan with the NAB, the subject of the alleged maladministration claim] as Zia had purchased a property in Brisbane with a deposit of $5K and she needed a guarantor for the property loan and I was willing to be Guarantor. Simon Phillips explained to Zia and I at the meeting that NAB had lent me too much money and so NAB could not approve me to be the Guarantor for Zia's loan for property purchase. **This meant I could not support my daughter as I had supported my son, to help them set up for a head start and secure future in life, just as I had been supported with, and as what was done in our family on my mother's side for generations.**
>
> **I always promised my daughter a block of land yet I cannot guarantee that now nor my own financial security nor to NAB lending me so much money beginning 2008 onwards through to 2012 and beyond**.

[81] Having regard to the evidence, I proceeded on the basis that Atalanta promised Zia a block of land more than once. But as I have said, the success of Zia's claim to an interest in her mother's land in this Court does not rest with proof that her mother promised it to her.

[82] In an application to remove a caveat, ordinarily it is not appropriate to determine disputes of fact. Here, there is a dispute about the nature and frequency of Zia's "contributions" to the property. I proceeded on the *assumption* that Zia's assertions about the work she did on the property were correct, as Atalanta asked me to.

The law

[83] The sections of the *Land Title Act* 1994 relevant to this application for removal are sections 126 and 127:

> **126 Lapsing of caveat**
>
> (1) This section does not apply to a caveat if—
>
> (a) it is lodged by the registered owner; or
>
> (b) the consent of the registered owner, in the appropriate form, is deposited when the caveat is lodged; or
>
> (c) an office copy of a court order mentioned in section 122(1)(d) or (e) is deposited when the caveat is lodged; or
>
> (d) it is lodged by the registrar under section 17; or
>
> (e) it is lodged other than under this division.
>
> (1A) However, this section applies to a caveat lodged by the registered owner of a lot if—
>
> (a) the lot is subject to a mortgage; and
>
> (b) the grounds stated in the caveat relate to the actions of the mortgagee in relation to—
>
> (i) if the mortgage is registered—registration of the mortgage; or
>
> (ii) the mortgagee's power of sale.
>
> (2) The caveatee of a caveat to which this section applies—
>
> (a) may serve on the caveator a notice requiring the caveator to start a proceeding in a court of competent jurisdiction to establish the interest claimed under the caveat; and
>
> *Note—*
>
> See section 131 in relation to the service of notices on the caveator. (b) if the caveatee serves a notice under paragraph (a)—must, within 14 days after the notice is served, deposit an instrument notifying the registrar of the service of the notice.
>
> (4) If a caveator does not want a caveat to which this section applies to lapse, the caveator must—
>
> (a) start a proceeding in a court of competent jurisdiction to establish the interest claimed under the caveat—
>
> (i) if the caveatee has served a notice under subsection (2)(a) on the caveator and has

complied with subsection (2)(b)—within 14 days after the notice is served on the caveator; or

(ii) otherwise—within 3 months after the lodgement of the caveat; and

(b) notify the registrar, by depositing an instrument, within the 14 days or the 3 months that a proceeding has been started and identify the proceeding.

(5) If the caveator does not comply with subsection (4), the caveat lapses.

(6) The caveator is taken to have complied with subsection (4)(a) if, before the caveat was lodged—

(a) a proceeding has been started in a court of competent jurisdiction to establish the interest claimed under the caveat; and

(b) the proceeding has not been decided, discontinued or withdrawn.

(7) The registrar may remove a caveat that has lapsed from the freehold land register.

127 Removing a caveat

(1) A caveatee may at any time apply to the Supreme Court for an order that a caveat be removed.

(2) The Supreme Court may make the order whether or not the caveator has been served with the application, and may make the order on the terms it considers appropriate.

[84] The principles which apply to an application to remove a caveat are well known.

[85] On the assumption that relevant proceedings have been commenced by the caveator to establish the interest claimed, within three months, as per section 126(4); to resist the application for removal, the caveator must show, on the evidence tendered at the application for removal, that –

- their claim to an interest in the property raises a serious question to be tried – in the sense that their claim has a sufficient likelihood of success as to warrant the preservation of the status quo; and
- on the balance of convenience, it would be better to maintain the status quo until their claim is resolved, by preventing the caveatee from disposing of their property.

[86] Thus, three of the issues for me in this application were: (a) whether Zia started proceedings as required; (b) whether Zia persuaded me that the facts prima facie supported her claim to an estate or interest in the land as identified in her caveats; and (c) whether Zia persuaded me that the balance of convenience required the retention of her caveats.

[87] Issue (a) immediately above and another issue for me in this application about the identification of the interest claimed, were in play in the decision of *Cousins Securities Pty Ltd v CEC Group Limited* [2007] QCA 192, the decision upon which Atalanta primarily relied, which is worth considering now.

[88] *Cousins* was an appeal against decisions at first instance to: refuse an application to remove a caveat; and refuse to strike out certain paragraphs of an amended statement of claim which was said to be part of a "proceeding" to establish the interest claimed under the caveat.

[89] CEC had agreed with *Cousins Securities Pty Ltd* (CSPL) and another company to enter into a joint venture agreement using Edmonton Projects Pty Ltd as the joint venture vehicle. Mr and Mrs Cousins were the principles of CSPL. Under clause 2.8.3 of the joint venture agreement, certain land was to be transferred by Edmonton to them. The land was described as Lot 1 as proposed on Layout Plan No. 9603/STGI, having an area of 2521 sqm.

[90] Edmonton had purchased the land on vendor finance terms but was unable to repay the debt which was secured by mortgage. Instead, CEC paid it, and the mortgage was assigned to it.

[91] On 23 May 2006, the Cousins and CSPL lodged a caveat, forbidding registration of any instrument over the land. The caveat described the land as Lot 9 on CPN15737. The interest claimed was "an equitable estate in fee simple over the above-described land to the extent of Lot 1 on proposed Layout Plan No. 9603/STGI having an area of 2521 square metres".

[92] The grounds of the claim were –

> As beneficiary under a constructive trust or otherwise by operation of law, pursuant to unconditional obligation assumed by the registered owner under clause 2.8.3 of a written contract dated 12 February [2004] between the registered owner and Cousins Securities Pty Ltd … (and others) as joint venture partners.

[93] The Cousins and CSPL filed a claim and statement of claim on 1 August 2006. Because of an oversight, the wrong versions of the documents were filed. The versions filed did *not* seek a declaration that the Cousins held an equitable estate. Further, the claim as filed did not claim any interest in the land. Neither did the statement of claim (SOC). But the SOC did plead, as the basis for the Cousins' claims, that clause 2.8.3 was a promise, within the meaning of section 55 of the *Property Law Act* 1974, accepted by the Cousins, in pursuance of which they acquired an equitable interest in the land, to the extent described in 2.8.3; that Edmonton had breached the clause; and that it had done so on behalf of CEC.

[94] An amended statement of claim (ASOC) was filed on 14 August 2006. The ASOC added a prayer for relief in the form of a declaration that Mr and Mrs Cousins held an "equitable interest in fee simple in Lot 9", described as "to the extent of Lot 1" as proposed on the layout plan. The claim was not amended at the same time.

[95] Later, on 5 September 2006, an application was made for leave to amend the claim to add a claim for the declaration, which was granted on 20 October 2006 – one of

the decisions the subject of the appeal. At the same time, the judge dismissed the application for removal of the caveat – the other decision the subject of the appeal. The primary judge decided *inter alia* that the Cousins had sufficiently shown an interest properly protected by caveat, and that the terms of the caveat lodged were not too wide.

[96] On appeal, CEC argued that the caveat had in fact lapsed, because the Cousins had not *started a proceeding* as required by section 126(4) of the *Land Title Act* – and there was, therefore, no discretion about its removal. CEC argued that because the claim – as distinct from the statement of claim – had not been amended to include the claim for a declaration of an equitable interest within the three-month period referred to in section 126(4)(a)(ii), the caveators had not *started proceedings* to establish their interest within the necessary time frame. Section 126(5) operated automatically – and the caveat lapsed.

[97] The caveators argued that nothing in section 126(4) required the interest in question to be identified in the prayer for relief. It would be enough if the interest claimed in the caveat were an essential element of the claim.

[98] It was accepted that if the Cousins failed to comply with section 126(4), the caveat simply lapsed. The question then was whether the Cousins had *started proceedings to establish their interest*.

[99] To answer this question, McMurdo P considered the requirements of the *Uniform Civil Procedure Rules* 1999 (Qld) (UCPR) for a valid claim to start proceedings. Those requirements included, as per rule 22, that a claim had to state briefly the nature of the claim and the relief sought by the plaintiff. Also rule 149 required a pleading to state specifically the relief claimed.

[100] McMurdo P explained that, as per the dictionary to the UCPR, a pleading included a claim and a statement of claim. Rule 22 did not require that the claim itself state the relief sought. Thus compliance with rule 149 would be achieved if the relief sought was stated in the statement of claim attached to the claim.

[101] Her Honour held at [10] that although neither the claim nor the statement of claim as originally filed claimed relief involving an interest in the specified land the subject of the caveat, the statement of claim pleaded the facts establishing the interest claimed for the purposes of section 126(4) of the *Land Title Act* 1994. The ASOC included the claim for relief by way of a declaration that the Cousins held an equitable estate in the land the subject of the caveats. In terms of rule 149, the pleadings, upon amendment, then claimed relief including an equitable interest in the relevant land. There had thus been compliance with section 126(4) within the three months as required.

[102] On the assumption that proceedings could be started by amendment, Holmes JA (with whom Mackenzie J agreed) held that the amendment to the claim on 20 October 2006 could not amount to starting proceedings within the three-month period.

[103] As to the inclusion (by amendment) in the statement of claim of the equitable claim in the prayer for relief, her Honour accepted that a statement of claim *could* be effective to start proceedings to establish the necessary interest – but the original

form of the statement of claim did not include, in the relief sought, the declaration of the equitable interest claimed under the caveat. Her Honour noted that the equitable interest was pleaded as arising from the promise contained in clause 2.8.3; Edmonton's failure to perform which constituted the breach of contract giving rise to the claim for damages.

[104] Her Honour referred to single judge decisions which supported a liberal approach to the question of what constitutes "starting proceedings to establish an interest". At [35], her Honour said she had "some doubt … that proceedings which incidentally assert the existence of an interest, or of the conditions necessary for its creation, are necessarily proceedings *to establish* that interest". However, it was not necessary for her Honour to reach a concluded view about that, because the claim to relief was made explicit by the ASOC.

[105] Her Honour concluded, at [37], that appropriate proceedings could be put "on foot" by amendment. Thus section 126(5) did not apply in the case before her Honour.

[106] At [58], Mackenzie J agreed with Holmes JA's reservation at [35].

[107] Another argument in *Cousins* concerned the "width" of the caveat. It was argued that the caveat ought to have been removed because it was too wide. It forbade the registration of any instrument affecting the whole of Lot 9 – 746.134 hectares, notwithstanding that the interest claimed was only 2,521 square metres. It also prevented registration of the plan of subdivision, so proposed Lot 1 (as claimed) could not be created in any event.

[108] Holmes JA held that the trial judge was correct in disposing of that argument by reference to *Re Henderson's Caveat* [1998] 1 Qd R 632. Her Honour summarised the effect of that case as follows at [49] and [50] –

> [49] …[T]he caveat was lodged over the entire 42 acre lot in which the caveator claimed to have purchased two acres, eventually to be excised, and it was argued that it was too wide. Macrossan CJ and Demack J held that since the two acre area had not yet been subdivided, nor had its boundaries been established on firm evidence, the court should not hold that the caveat was too wide.
>
> > "Until precision is established it seems correct to accept at the caveat stage that the respondent has an equitable interest sufficiently applicable to all of [the 42 acre lot]."
>
> [50] Davies JA put the proposition more broadly. Equitable relief would be available, by way of injunction or specific performance, to ensure that the registered proprietor dealt with the 42 acre lot in a way consistent with subdivisional approval being obtained for the excision of the two acre parcel. Any such order would be expressed to extend to any dealing with the whole of the larger block. It followed that "equity recognises the respondent's interest as extending over the whole of [the 42 acre lot] until subdivisional approval is obtained". Accordingly, the caveator had a caveatable interest in the whole of the larger parcel.

[109] Holmes JA explained that *Re Henderson* could not be distinguished from the situation in *Cousins*. In *Re Henderson* there was a copy plan showing the proposed excision of the two acres. The plan in *Cousins* similarly identified the portion the subject of the promise. President McMurdo agreed with Holmes JA's conclusions on this point.

The arguments of the applicant

[110] Atalanta argued that the caveats ought to be removed because –

(a) there was no serious question to be tried;

(b) the balance of convenience favoured their removal; and

(c) no "proceedings" had been commenced as prescribed.

[111] Atalanta also submitted that there was a disconnect between the entitlement alleged and the caveats themselves, which provided another reason why they ought to be removed.

Serious question to be tried?

[112] Zia has based her claim to "a block of land" on her lay understanding of trusts.

[113] In *Allen v Synder* [1977] 2 NSWLR 685 Glass JA explained trusts in this context. His Honour said:

> Trusts may be express, implied or constructive. An express trust of land is not enforceable unless it is evidenced in writing and signed by the party able to declare the trust … An implied trust (also called a resulting trust) arises where the legal owner has provided none or only part of the purchase price. A resulting trust is presumed in favour of the party providing the money. His beneficial interest is proportionate to his contribution … Constructive trusts arise where it would be a fraud for the legal owner to assert a beneficial interest. Unlike express and implied trusts, which reflect actual intentions, they are imposed, without regard to the intentions of the parties, in order to satisfy the demands of justice and good conscience …

[114] Zia has acknowledged that she made no financial contribution to the acquisition or maintenance or improvement of her mother's property. Obviously therefore, the trust Zia has in mind is a constructive trust. But the reference by Glass JA to a constructive trust being imposed in order to satisfy "the demands of justice and good conscience" is not to be interpreted as a suggestion that a constructive trust will be imposed simply because the court considers it morally just to do so.

[115] The constructive trust in Zia's contemplation is one raised by operation of law, contrary to her mother's wishes. She relies upon the promise made by her mother; her status, as Atalanta's daughter; the fact that her brother was given land by Atalanta decades ago; and the assistance she provided to her mother over the years.

[116] At the hearing, she elaborated on her position. But the thrust of her oral assertions did not really go higher than asserting that her mother had repeatedly promised her a block of land and that she considered that she was entitled to one.

[117] The answer to the question whether Zia has established a serious question to be tried requires a consideration of the circumstances in which a caveat may be validly based on a constructive trust.

A caveat may be validly based on a constructive trust in certain circumstances

[118] In *Goldstraw v Goldstraw* [2002] VSC 491, Dodds-Streeton J at [26] explained the circumstances in which a caveat may be validly based on a constructive trust (my emphasis) –

> An interest based on a constructive trust may form the basis of a caveat. Such an interest could arise in a wide variety of circumstances. Examples include part performance of an agreement for disposition of an interest in land, where parties have acquired land pursuant to a failed joint venture, where the claimant has made an indirect contribution to the purchase price of the property to which another takes title; or **there is a common intention that a person will acquire an interest in a particular property to which another party holds legal title, and the person acts on that belief to his or her detriment, such that it would constitute a fraud to deny the interest intended to be acquired.**

The contributions necessary to found a constructive trust must be related in some way to the generation of wealth as a joint effort

[119] The sort of contributions necessary to found a constructive trust must go beyond contributions to the material wellbeing of the parties to the relevant relationship. They must be contributions to the acquisition, maintenance, or improvement of the property in respect of which the trust is claimed.

[120] In *Lloyd v Tedesco* [2002] WASCA 63 at [30] and [31], Murray J (with whom Hasluck J agreed), explained (in the context of a marriage relationship) that the guiding principle was unconscionability. There needed to be *something more* than the performance of a valuable role in providing love, care or support. Such a contribution will be sufficient "only if it is related in some factual way to the generation of wealth as part of a joint effort or endeavour to provide for the parties' mutual material welfare and security". His Honour continued (my emphasis) –

> That need not, of course, be the only purpose of the provision of such assistance to the defendant, but it must be one of the material purposes because it is that which marks out the character of the joint endeavour as being one which will generate a claim, upon the failure of the relationship, without the fault of the plaintiff, to a share in the property created, acquired, maintained and improved during the course of the relationship, where the endeavour can be seen to be related to particular items of property, or will generate a claim for compensation representing the value of the contributions made by the claimant to the increased in the material wealth which was intended to be enjoyed by the parties jointly.
>
> A joint endeavour of this character is one which has the aim of adding to the parties' material wealth for their mutual benefit rather than being one where the plaintiff simply provides loving care and

> support to the defendant as a normal incident of a defacto relationship. In that sense it is right to say that **the joint endeavour must be one intentionally or deliberately entered into for the purpose of advancing the parties' mutual material wealth**. Only if it bears that character will it be unconscionable to allow the defendant to retain the entirety of the beneficial interest in that wealth. **To hold otherwise, and in particular to hold that it would be sufficient if in fact the efforts of the plaintiff advance the defendant's capacity to acquire wealth, would, in my opinion, be to commit the error to which Deane J adverted in *Muschinski* of giving undue rein to the Court's idiosyncratic notions of fairness and justice**.

A constructive trust may arise from proprietary estopple

[121] A constructive trust may also arise from proprietary estopple. Such a trust may arise if –

- there has been an *assumption* by X that he or she will acquire land in the future from Y;
- that assumption has been *induced by the representations of Y;* and
- on the strength of Y's representations, X has *acted to his or her detriment*.

A relationship alone is not enough

[122] A constructive trust does not arise simply on the strength of a family relationship.

[123] *Goldstraw v Goldstraw* concerned an ex-wife's caveat on property owned by her ex-husband, which claimed an estate in fee simple "pursuant to a constructive trust arising out of the marital relationship between the caveator and the registered proprietor [her ex-husband]".

[124] The caveator's ex-husband put his property on the market. She believed he would sell the property and re-locate in Asia for employment purposes. She instructed her lawyers to lodge the caveat "to protect [her] rights and legal remedies in respect of [her] application for a [Child Support] departure order in the Federal Magistrates Court". She said that she believed that the proceeds of sale would be transferred out of the jurisdiction, thereby rendering nugatory any order that her ex-husband pay for their daughter's maintenance. She said she would withdraw the caveat in exchange for payment of $40,000 as a contribution to their daughter's maintenance.

[125] The caveator's ex-husband was successful in his application for removal of the caveat.

[126] To support a caveat, the interest claimed must be an interest in respect of which equity would give specific relief *against the land itself.*

[127] At [27], her Honour explained that, while a constructive trust *may* arise by reason of the contributions of *money or labour with respect to the land*, the relationship of marriage alone did not create a caveatable interest pursuant to a constructive trust

(referring to *Bell v Graham* [2000] VSC 142). Nor does a mother/child relationship.

Zia has not established that her claim raises a serious question to be tried

[128] With respect to the claim in relation to each of Lot 6 and Lot 8, Atalanta argued that –

(a) the fact that Zia was her daughter did not give rise to an interest in land;

(b) the gift to Zia's brother 20 years ago did not give rise to Zia's interest in land;

(c) insofar as there was an *understanding* on Zia's part, it is not alleged that there was a declaration of trust or other conduct to be held against Atalanta;

(d) Zia made no financial contribution to the land. Her grounds, on their terms amounted to "nothing more than that [she] made nonfinancial contributions to the property on the basis of an understanding a block was being held because her brother got a subdivided lot". Her non-financial contributions were by way of assistance to her mother. She did not contribute to the acquisition or maintenance of either lot in a non-financial way. Her assistance was not such as to give rise to an equitable interest in the land her mother owned.

[129] Propositions (a) and (b) are undoubtedly correct. The simple fact that Zia is Atalanta's daughter does not give rise to an interest in her mother's land. Nor does the fact that her brother received land as a gift decades ago.

[130] As to (c), Zia does not allege that her understanding, that her mother would gift her a block of land, was on the strength of anything more than her mother's promise that she would do so.

[131] I am proceeding on the basis that Atalanta has, for a number of years, promised a block of land to Zia; and that, at least sometimes, she said that Zia would receive that land for all of the assistance she provided to Atalanta on the properties over the years.

[132] But Alatanta's promise *per se* – however genuine and heartfelt, and even if motivated by a desire to compensate or reward Zia for her assistance – did not give rise to a constructive trust over the land.

[133] Zia does not fall into any of the circumstances in which a constructive trust might be in contemplation by a court as a remedy for unconscionable conduct on the part of her mother. Indeed, Zia has not alleged any unconscionable conduct on her mother's behalf. For example, she has not alleged that she and her mother entered into a joint endeavour in relation to the property which her mother will not honour. She has not asserted that she and her mother entered into an agreement about her working or managing the property in exchange for an interest in it, which her mother has reneged on. She simply says that she understood that her work on the property would be rewarded by a block of land.

[134] I note that Zia does not assert that her brother received his land as anything other than a gift; and her own evidence includes her mother's reference to her wishing to "set Zia up in life": a notion which has the flavour of a bonus or a gift to it.

[135] Nor has Zia suggested that she has altered her position on the basis of an expectation, encouraged by her mother, that if she did certain things, she would acquire an interest in her mother's property.

[136] On Zia's own evidence, she pursued her music interests and her life in places other than the property. She contributed in various ways to assist her mother over the years. But she does not say that, in reliance of her mother's promise, she made choices she would not otherwise have made. Indeed, on the evidence, she could not say that. It was clear from her evidence that she lived her own life – as she was, of course, fully entitled to do.

[137] As to (d), Zia's "contributions" were in the nature of personal assistance to her mother, in a variety of ways, from time to time, over the years, depending on where she was in her own life and her other commitments and goals. Her contributions were not such as to give rise, in law, to an equity in the property – either because of their nature, or because they were not contributions in connection with a joint endeavour or an agreement for mutual material gain, or because they were not contributions made to Zia's detriment in a promissory estoppel sense.

[138] Thus, Zia's claim as expressed in the caveat and in her affidavit does not give rise to a serious question to be tried.

[139] That is reason enough to order the removal of the caveats.

Balance of convenience?

[140] If there is no serious question to be tried, there is no need to consider the balance of convenience. But in any event, I considered that the balance of convenience clearly favoured the removal of the caveats.

[141] The NAB has been holding off on enforcement action for years. There was no challenge by Zia to Atalanta's suggestion that the only way to protect her property from foreclosure was to proceed with the agreement she had reached with her friend for the sale of Lot 6 and the subdivision (in pursuance of a joint venture) of Lot 8 with a view to selling the subdivided lots. The proceeds of the sales would then be used to pay the NAB.

[142] Having regard to the amount owed to the NAB, there is no certainty about the surplus after the costs of sale are deducted. At best, it may be $250,000. If Atalanta is not able to sell/subdivide, then the NAB (who are not inhibited by Zia's caveats), will simply enter into possession and sell as mortgagee – risking Atalanta being left with nothing.

[143] Even if Atalanta wanted to still give a block of land to Zia – she does not in any real sense have it to give. Thus, Zia's claim to a block of land is pointless. The balance of convenience favours the removal of the caveats.

Relevant "proceeding" commenced?

[144] Atalanta submitted that Zia's originating applications, filed in purported support of the interest claimed in the caveats, were not "proceedings" for the purposes of the *Land Title Act*.

[145] Atalanta argued that –

- in accordance with the *Uniform Civil Procedure* Rules 1999 (Qld) (the UCPR), filing the *applications* did not amount to *starting proceedings* to establish the interest claimed. Zia was seeking, in effect, a declaration of trust in relation to a portion of her mother's land. A claim for such relief had to be started by claim – not application – see rule 9, and it had not been; and
- even if I were prepared to make allowances for the self-represented caveator, and order that the proceedings continue *as if* they had been started by claim (see rule 14) – a proposition which Atalanta resisted – in accordance with rule 22, Zia had to state in her application the nature of the claim made, or the relief sought and she did not do so,

therefore, relying on *Cousins*, the caveats had lapsed.

[146] Further, Atalanta argued, in effect, that it would be a step too far for the court to attempt to extract from Zia's affidavits the nature of her claim or the basis for the relief sought – referring to Holmes JA observations in *Cousins* that there was reason to doubt that proceedings which incidentally asserted the existence of an interest, or of the conditions necessary for its creation, were proceedings to establish that interest. Atalanta argued, in effect, that attempting to rely on assertions made in affidavits would go even further than attempting to rely on incidental assertions in proceedings.

[147] Zia's application in 8751/19 relevantly sought –

(a) an "order" that her Lot 6 caveat "be non-lapsing"; and

(b) an order than a portion of Lot 6 be transferred to her under section 122(d) of the *Land Title Act*.

[148] The application said nothing about the nature of the claim, or the relief sought under it, which would give rise to order (b). I have already observed that the reference to section 122(d) was completely misconceived.

[149] Zia's application in 924/20 failed in virtually identical ways. It relevantly sought –

(a) an "order" that her Lot 8 caveat "be non-lapsing"; and

(b) an order that some or all of Lot 8 be transferred to her under section 122(d) of the *Land Title Act* 1994.

[150] Being as generous to Zia (as a self-represented litigant) as I possibly could be, consistently with my duty to be impartial, nothing in her material – in any form (affidavit, caveat, application) – set out the conditions necessary to establish any interest in land.

[151] Thus, issues with the way in which proceedings had been commenced and their content provided another reason for ordering the removal of the caveats.

Issues with identification of the caveatable interest

[152] With respect to the caveat of Lot 6 – Zia has claimed an arbitrary parcel of land. With respect to Lot 8 – Zia claimed a yet to be (if ever to be) subdivided lot.

[153] The promise – upon which Zia relies – was a promise for some land subdivided from Lot 8. Zia cannot, on the strength of the promise, claim an interest in Lot 6. Her claim to what is roughly a 40 per cent interest in Lot 6 might be based on other conversations with her mother, or on Zia's own assessment of what she would "like". But the law of caveats and constructive trusts does not work like that.

[154] Further, with respect to her claim to proposed Lot 2 on Lot 8, it is impossible to understand how Zia may lay claim to a proposed block in a subdivision, which did not eventuate, in the absence of a contractual entitlement to it. Even if that were possible, as per *Cousins*, the correct claim would be to an equitable interest in the whole of the property until subdivisional approval were obtained.

[155] These issues provide yet another reason why the caveats ought to be removed.

Other matter

[156] Atalanta did not press her claims for compensation for Zia's lodging a caveat without cause and I dismiss those claims.

Formal orders

IT IS ORDERED THAT:

1. In 924/20:

   Pursuant to section 127(2) of the *Land Title Act* 1994 (Qld), caveat number 719698458, registered over the land described as lot 8 on registered plan 913578 and having title reference 50185356, be removed.

2. In 8751/19:

   Pursuant to section 127(2) of the *Land Title Act* 1994 (Qld), caveat number 719411678, registered over the land described as lot 6 on registered plan 159534 and having title reference 15809183, be removed.

3. The claims for compensation in each application are dismissed.

4. The applicant, Zia Moreau, is to pay the costs of the First Respondent, Atalanta Moreau, of each application, on the standard basis.