Law Institute of Victoria Property Law Conference 2018 – Keynote Address

The Honourable Associate Justice Derham

Remarks of the Hon. Associate Justice Derham at the Law Institute of Victoria Property Law Conference 2018, Melbourne

Friday 24 August 2018

Introduction

In April 2016 the Supreme Court of Victoria established a dedicated Property List to manage cases concerning disputes over land - real property. The move towards a comprehensive suite of case management lists in the Common Law Division was recommended by the Trial Division Review conducted by the Boston Consulting Group in late 2014.

Previously real property proceedings in the Common Law Division were managed either in the Practice Court (eg urgent caveat removals), in the Associate Judges' Practice Court (**Court 2**), or in the Civil Management List. A significant proportion of these matters fell within the jurisdiction of Associate Judges for final determination (eg summary possession, modification of restrictive covenants). Associate Judges also undertook the pre-trial management of other proceedings.

In truth some of the previous practices remain, as I will explain. Generally, however, the oversight of matters in the List enables better monitoring of the progress of matters and greater consistency in judicial management.

Proceedings suitable for inclusion in the List

Proceedings in relation to rights over real property are suitable for initiation in the List. These are generally proceedings arising under or involving the interpretation of the *Property Law Act 1958*

(***PLA***), the *Transfer of Land Act 1958* (***TLA***) or the *Sale of Land Act 1962* (except where the Victorian Civil and Administrative Tribunal has exclusive jurisdiction). They include:

- Applications for the recovery of possession of land, including the summary procedure under O 53 of the *Supreme Court (General Civil Procedure) Rules 2015* (***Rules***), other than those proceedings appropriate for judge management in the Commercial Court;
- Applications for the sale of land by order of the Court (O 55 of the *Rules*);
- Vendor or purchaser summonses under s 49 of the *PLA*;
- Applications for the discharge or modification of restrictive covenants (s 84 of the *PLA*);
- Applications for the removal of caveats against dealings under s 90(3) of the *TLA* and corresponding applications under s 90(2) of that Act;
- Applications arising out of the payment of monies into court pursuant to a power of sale under a mortgage or charge (s 77(3) of the *TLA* and s 69 of the *Trustee Act 1958*);
- Proceedings pursuant to s 89A(3)(b) of the *TLA*.

However note that mortgage default proceedings presently commenced in the Commercial Court will continue to be so commenced. Subject to the direction of a Commercial Court Judge, however, mortgage default proceedings will be managed by the Associate Judges in the Associate Judges' Practice Court (Court 2, 436 Lonsdale Street, Melbourne)(Court 2).

Proceedings should be initiated in the List by endorsing the heading of the originating process "Property List". The heading of all subsequent documents filed in the proceeding should also be endorsed "Property List".

After the initiation of a proceeding the Court may transfer the proceeding into the List if it appears to the Court that it is appropriate to have the proceeding managed in the List. Conversely, a proceeding initiated in the List may be transferred out of the List if it appears to the Court that it is appropriate to have the proceeding managed in a different list.

There are no additional fees payable for the inclusion of a proceeding in the List.

Management of proceedings generally

In a proceeding commenced by writ, a first directions hearing will be listed before an Associate Judge or Judicial Registrar sitting in Court 2. Such matters commonly include enforcing a contract for sale, actions for damages resulting from breach of a contract of sale, proceeding commenced to substantiate a caveat-able interest, adverse possession claims and disputes over easements.

The Court will generally notify the parties of the date and time of the first directions hearing within 14 days of the filing of the first defence. At the first directions hearing, the Associate Judge or Judicial Registrar will give directions for the future conduct of the proceeding. Directions hearings are held every Friday before a Judicial Registrar and every second Tuesday before an Associate Judge. Such directions will routinely include an order referring the parties to mediation and parties will need to provide a good reason as to why a mediation order is not appropriate.

Proceedings commenced by originating motion will be listed before an Associate Judge sitting in Court 2. At the first hearing the Associate Judge will usually give directions for the future conduct of

the proceeding. In some matters, such as applications for the recovery of possession of land under the summary procedure, and unopposed applications under s 103 of the *TLA*, the proceeding may be dealt with at the first hearing.

Proceedings will remain with the same Associate Judge for all future hearings on their relevant docket until allocated to a Trial Judge. In the event that the matter is within the jurisdiction of the Associate Judge, it will usually be heard and determined by them. Interlocutory applications may be listed by following the usual process for applications in the Associate Judges' Practice Court. Once a proceeding is under management by an Associate Judge, interlocutory applications may be made via the Principal Registry of the Court by contacting the Listings Coordinator or by mentioning the proposed application at a directions hearing before the Associate Judge managing the proceeding.

Parties should refer to the *Notice to the profession - Applications in Associate Judges' Practice Court 2* whenever seeking a return date for a summons before an Associate Judge.

Where appropriate, parties are encouraged to prepare proposed consent orders in advance of the hearings, with a view to obtaining orders by consent without the need for an appearance. Details of required format and where to email minutes of consent are include in *Practice Note SC CL 13*.

Use of technology

On 2 July 2018 the Court moved to electronic filing and new Court files are fully electronic. Practitioners are reminded of the recent amendments to the *Rules* which provide for electronic filing. In particular, note that r 27.03(13.1) requires pdfs to be fully text searchable and with accurate page numbering. This applies to expert reports and exhibits to affidavits which can be cumbersome for the Court to deal with electronically without this functionality.

Management of common types of proceedings

Recovery of possession of land (O 53 of the Rules)

As a general rule mortgage default proceedings should be brought in the Commercial Court, not the Common Law Division Property List.

Order 53 creates a special procedure for the summary recovery of land in certain restricted circumstances. These applications are commenced by originating motion in the Property List. This procedure was originally designed to remove squatters. But its wording enables a wide range of applications to be dealt with. For example in *Tajon Pty Ltd v Arvanitis* [2017] VSC 130, I concluded that the language of the rule is broad enough to capture the situation where a mortgagor licenses individuals to occupy land, the mortgagor loses (by its default under the mortgage) the entitlement to possession, and the mortgagee seeks to recover possession in order to sell the land and recover its secured debt.

In *Framlingham Aboriginal Trust v McGuiness and Chatfield*[1] I stated the following propositions that apply to the exercise of the power contained in O 53:

(a) It is intended to enable a speedy resolution in favour of the proprietor of land of a dispute whereby trespassers are keeping the proprietor out;[2]

(b) It is intended to apply only in clear cases where there is no question to try;[3]

(c) The existence of a factual dispute does not deny the applicability of O 53 where it is possible to resolve the dispute readily and fairly;[4]

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1 [2014] VSC 241 [34]–[45]. Affirmed on appeal in *Framlingham Aboriginal Trust v McGuiness* [2014] VSC 354.

2 *Pappas v Bowmark Pty Ltd* [1998] VSCA 120 [13].

3 *Palazzo v Pullen* (Unreported, Supreme Court of Victoria, Brooking J, 24 July 1992).

4 *Pappas v Bowmark Pty Ltd* [1998] VSCA 120 [13]; *Melbourne Anglican Trust Corporation v Greentree*

(d) While an order for possession may be made notwithstanding that there is a factual dispute between the parties, such an order will only be appropriate if the Court is able to satisfy itself as to the material facts that bring the case within O 53;[5]

(e) The jurisdiction should be exercised with great care;[6]

(f) Where an issue does emerge, the judge has discretion whether simply to dismiss the proceeding, to determine the issue or cause the issue to be subsequently tried. This includes giving directions as to the further conduct of the proceeding or ordering the proceeding to continue as if begun by writ pursuant to r 4.07 of the *Rules*;[7] and

(g) Where the Court gives judgment for possession under O 53, it may grant a stay of execution.[8]

Such matters frequently entail the recovery of possession of land from a family member, this is particularly the case in estate matters, or from an ex-partner after the breakdown of a relationship. This is also the order to use if you are trying to evict a squatter or someone else whose identity you do not know.

These applications will be listed in Court 2 for directions and if the application is undefended it may be heard and determined on the first return.

(Unreported, Supreme Court of Victoria, Vincent J, 29 May 1997); *Tolhurst Druce & Emerson v Maryvell Investments Pty Ltd* [2007] VSC 271, [193]–[195]; *Byrne v Ritchie* [2009] VSC 114 [17] (Unreported, Supreme Court of Victoria, Kyrou J, 3 April 2009).

5 *Byrne v Ritchie* [2009] VSC 114 [17] (Unreported, Supreme Court of Victoria, Kyrou J, 3 April 2009).

6 *Melbourne Anglican Trust Corporation v Greentree* (Unreported, Supreme Court of Victoria, Vincent J, 29 May 1997); *Max Moar & Queenbridge Pty Ltd v Shazia Duman* [2007] VSC 266 [2], (unreported, Supreme Court of Victoria, Pagone J, 23 July 2007).

7 *Palazzo v Pullen* (unreported, Supreme Court of Victoria, Brooking J, 24 July 1992, BC9200663).

8 See *Parker v Mielicki* [2003] VSC 263 and r 66.16 of the *Rules*.

Vendor or purchaser summonses (s 49 of the *PLA*)

Section 49 of the *PLA* provides for applications to the Court by vendors and purchasers seeking answers to specific questions arising out of or in connection with a contract for sale of real estate. Commonly known in practice as a vendor-purchaser summons, it was a means to obtain a quick resolution for rights under a contract, as long as there was no question concerning the existence or validity of the contract.

This section covers a broad range of matters. The very nature of proceedings under this subsection is such that the parties admit the contract. This section does not enable the parties to question the validity or existence of a contract. And application under this section is not suitable for matters which contain disputed questions of fact.

In *NGL Properties Pty Ltd v Harlington Pty Ltd*[9] Kaye J adopted the following principles about the scope of the Court's jurisdiction and the consequential relief under s 49(1), which have been summarised as follows:

(a) The Court may determine any short point of law or construction arising on the abstract, contract or requisitions;

(b) However, this procedure is not intended to enable the Court to summarily resolve disputed questions of fact; and cannot be used to determine claims for specific performance or rescission;

(c) The section empowers the Court to make such order as appears just, which enables the Court to give relief which is the ordinary consequence of the decision of the point submitted

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9 [1979] VR 92, 100.

to it. However, such an application cannot be treated as a claim for damages.[10]

The Court has a broad discretion in making orders to do justice between the parties.

Proceedings seeking the return of deposit moneys are brought under s 49(2). The discretion under s 49(2) is broad; but it must be exercised judicially and conditioned by what is just and equitable in the circumstances of the case.

Urgent applications under this section should be referred to the Practice Court Coordinator where they will be listed in the Practice Court. Practitioners are reminded to explain the urgency of their matters when seeking listing of the application and, in particular, note the relevant time frames in which an issue needs to be dealt with.

Non-urgent applications will be listed before an Associate Judge or Judicial Registrar for directions and, upon referral (pursuant to r 77.05 or r 84.03 of the *Rules*), for hearing.

Discharge or modification of restrictive covenants (s 84 of the *PLA*)

Section 84 of the *PLA* provides the Court with power to discharge or modify restrictive covenants affecting land.

The Court's website contains a detailed *Guide to Practitioners – Applications for the Modification or Discharge of Restrictive Covenants* which contains template orders which should be used.

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10 *Ten Boundary Street South Melbourne Pty Ltd v Ivanhoe Project Pty Ltd* [2016] VSC 755 [3].

Applications for discharge or modification of restrictive covenants are made by originating motion and the first return is an *ex parte* appearance before an Associate Judge for procedural directions under s 84(3) *PLA*. The Guide outlines the materials that must be filed with the Court before this appearance. These materials include an expert report and affidavits covering specified matters. At this first directions the Court will make orders relating to the notification of interested parties.

To allow proper notification to occur, a second directions hearing also before an Associate Judge usually occurs six to eight weeks after the first directions hearing. For that occasion, the plaintiff must file an affidavit proving compliance with the previous directions concerning the giving of notices. If the Court is satisfied that the applicant has complied with those directions, a declaration to that effect is made under r 52.09(3).

Thereafter the course of the matter will depend on whether there are landowners having the benefit of the covenant who object to the proposed discharge or modification and who seek to be joined as defendants. Assuming that there are willing defendants then the parties may be encouraged to consider mediation to resolve any objections. Ultimately however the power to make an order under the *PLA* resides in the Court, not the parties and the matter will proceed to trial.

If there are no objectors at the second directions hearing the Court may proceed to hear and determine the application on that occasion as unopposed, depending on the burden of the Court's business and the expected duration of the hearing. If the application is granted, orders may then be made.

The hearing of covenant discharge and modification applications are shared between all the Common Law Associate Judges due to the sheer volume of these matters. The law in this area is well settled and the outcome is heavily dependent on the facts. It is important to have an expert

report deposing to the matters outlined in the Guide.

Common practitioner mistakes

No getting evidence prepared early enough. The Court requires the expert evidence before the first return date to give it time to consider the contents and how this affects orders with respect to notification of beneficiaries. It is imperative that the expert report properly identifies the beneficiaries of the covenant.

Another common mistake is to produce an expert report pursuant to O 44. For s 84(3) *PLA* applications the expert report should be exhibited to an affidavit.

One recent change to the process which is yet to be reflected in the Guide is that the plaintiff themselves, or if a company the directors, are now required to file an affidavit supporting the application and deposing to the proposed development plans. These plans should be detailed. It has now been well established that the Court will refuse to modify a covenant where it has not been informed of the development plans. From a practical perspective the development plans help the beneficiaries understand what the implications of the modification of the covenant will be and may prevent unnecessary anxiety in the minds of the neighbours, especially in cases of a modest development.

Applications to remove a covenant on the basis of obsolescence should be made with great caution. The authorities establish that 'obsolescence' is a very high bar and very few covenants are removed for being obsolete. Modified covenants still have work to do even in modified form.

Several applications have been supported by statements to the effect that 'the building plans have been approved by council therefore the covenant impedes the reasonable user and should be

modified'. However, it is well established that conditional approval of a planning permit by council is not a factor for the Court to consider in deciding whether to modify or discharge a covenant.

Removal of caveats

Under s 90(3) of the *TLA*, a person who is adversely affected by a caveat may bring proceedings in the Court against the caveator for the removal of the caveat. The Court may make such order as the Court thinks fit.

Applications for removal of caveats should be referred to the Practice Court Co-ordinator who will list urgent applications in the Practice Court. Urgent applications are generally those where there is a proposed settlement of a sale of the land, or another transaction, that is about to take place and the caveator threatens to frustrate or hold up the transaction.

Non-urgent applications will be listed before an Associate Judge or Judicial Registrar. The same Associate Judge or Judicial Registrar will usually conduct the trial of the application.

The reverse of an application to remove a caveat is the application under s 90(2) of the *TLA* to delay registration of a later dealing lodged for registration.

Earlier this year I heard an application under s 90(2) in *TL Rentals Pty Ltd v Youth on Call Pty Ltd.*[11] In that decision I re-iterated that it is well established that an application under s 90(3) of the *TLA* is in the nature of a summary procedure and analogous to the determination of interlocutory injunctions. The burden is on the caveator to establish that there is a serious question to be tried that it does have the estate or interest in land as claimed. If the caveator establishes a serious

question to be tried in relation to the estate or interest claimed in the caveat, the caveator must further establish that the balance of convenience favours the maintenance of the caveat until trial.[12] This approach, although only generally stated here, has been accepted as the correct approach in applications to remove caveats by the Court of Appeal.[13]

I also pointed out that in an application under s 90(2) of the *TLA*, the same burden rests on the caveator if it is to maintain the caveat and delay the registration of the inconsistent dealing that provoked the notice by the Registrar under s 90(1) of the *TLA*.

The *TL Rentals*[14] matter was unique as it commenced as a s 90(2) application but transformed into an application for an injunction as the interest claimed in the caveat was a different caveatable interest to that advanced by the caveator at the hearing. Consequently I was minded to observe that the caveat procedure is essentially a statutory injunction that is granted upon consideration of the same factors as are applied when granting interlocutory injunctions in equity.[15] And that the Court ought to give effect to the substance of the parties' rights over formal or procedural matters.[16]

Great care needs to be taken in specifying in the Caveat the estate or interest claimed. The on-line caveat from has a drop down menu of potential interests. The first is 'freehold estate' and that is

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11 [2018] VSC 105.

12 *Sylina v Solanki* [2014] VSC 2 [43] (Elliott J); *Percy & Michele Pty Ltd v Gangemi* [2010] VSC 530, [38]–[48] (Macaulay J); *Piroshenko v Gosjman & Ors* (2010) 27 VR 489, [7]–[11], [13]–[20] (Warren CJ) ('*Piroshenko*'); *Schmidt v 28 Myola St* [2006] VSC 343; (2006) 14 VR 447, 457 [32] (Warren CJ); *Goldstraw v Goldstraw* [2002] VSC 491 [30] (Dodds-Streeton J).

13 *63 Buckley Street Pty Ltd v Keeron Nominees Pty Ltd* [2011] VSCA 289 [11]; *Carbon Black Lab Pty Ltd v Launer* [2015] VSCA 126 [35]-[36]; *Lawrence & Hanson Group Pty Ltd v Young* [2017] VSCA 172 [38].

14 [2018] VSC 105.

15 *Piroshenko* (2010) 27 VR 491.

16 [2018] VSC 105 [35].

often wrongly used where another interest is behind the caveat. It is important to specify the correct interest as amendment of interest claimed in the caveat is difficult and rare.[17]

Applications arising out of the payment of monies into court pursuant to a power of sale under a mortgage or charge (s 77(3) of the *TLA* and s 69 of the *Trustee Act 1958*)

Section 77 of the *TLA* deals with a mortgagee's power of sale under a mortgage or charge. Subsection 3 outlines the order and manner in which purchase money received from the sale is to be applied. After the payment of costs and expenses relating to the sale and default and the payment of moneys owing to mortgagees the residue is paid into the Supreme Court pursuant to the provisions of s 69 of the *Trustee Act 1958*. These funds make their way to Funds in Court administered by the Senior Master.

These applications deal with getting money out of Funds in Court and are commenced by originating motion. Generally there is more than one party seeking payment from the funds held by the Court so a first directions hearing is listed before an Associate Judge to make orders regarding the notification of all interested parties. Where the Court is satisfied that there are no other interested parties, the application may be heard at the first return. Otherwise the parties will be required to return at a later date for the hearing of the application, including any dispute as to priority and entitlement to the funds. These matters commonly involve priority disputes between successive interests the subject of caveats.

Proceedings pursuant to s 89A(3)(b) of the *TLA*

Section 89A provides a process whereby, upon application by a person interested in the land, the

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17 See *Percy & Michele Pty Ltd v Gangemi* [2010] VSC 530; *Martorella v Innovision Developments Pty Ltd* [2011] VSC 282.

Registrar will provide notice to a caveator who has lodged a caveat over the land that their caveat will lapse unless the Registrar is notified, within 30 days, that proceedings are on foot in a court or VCAT to substantiate the claim of the caveator in relation to the land.

These applications are generally commenced by writ and will be listed before an Associate Judge or Judicial Registrar for first directions. An Associate Judge will conduct the trial of the matter if time permits.

Applications under s 103 *TLA*

Section 103 of the TLA is a general provision relating to the correction of errors in the Register and provides, amongst other things:

> (1) In any proceeding in a court relating to any land or any instrument or dealing in respect thereof if the court directs the Registrar to make any amendments to the Register or otherwise to do any act or make any recordings necessary to give effect to any judgment decree or order of the court the Registrar shall obey such direction.

Such applications are ordinarily commenced by originating motion and will be listed before of an Associate Judge and, where unopposed and time permitting, will be heard on the first return.

Orders which can be made include directing the Registrar to make amendments to the Register. There are a number of authorities which deal with applications under this provision, and it has something of a chequered history, see *Dotter v Evans* [1969] VR 41; *Casella v Casella* [1969] VR 49; *Rizos v Rizos [1970] VR 150; Marshall v Williams* [1974] VR 592; *Haslam v Money for Living (No 2)* [2007] FCA 1981; *Oxley v Boon* [2009] VSC 222; *Marchesi v Registrar of Titles* (2010) 30 VR 397 (***Marchesi***); *Official Trustee in Bankruptcy v Registrar of Titles* [2015] VSC 563.

The section can be used in appropriate circumstances to order the Registrar to cancel a certificate of title and issue a new certificate in the name of the person entitled to be registered.

The section has, however, traditionally been a last resort when all attempts, for example, to find or require production of the certificate of title have been exhausted (See *Dotter v Evans*[18] and *Casella v Casella*).[19] In *Marchesi,*[20] Ferguson J (as she then was) adopted a less strict approach to such applications. She found that at [19]:

(a) the powers under s 103(1) of the *TLA* should be exercised with caution;

(b) if there are any practical steps that could be taken that would have a real prospect of resulting in the production of a Certificate of Title without the need for orders under s 103(1), those steps should be taken;

(c) it is not necessary to take steps to exhaust every other avenue, if such steps have no real prospect of success, and would only serve to delay the inevitable application under s 103(1) at a later time.[21]

The section has been used where the registered proprietor became bankrupt and refused to produce the certificate of title (*Marchesi)*, where the certificate of title is lost, cannot be found or the person in possession of it cannot be found (*Rizos v Rizos,*[22] *Marshall v Williams,*[23] *Official Trustee*

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18 [1969] VR 41.

19 [1969] VR 49.

20 (2010) 30 VR 397.

21 See also *Official Trustee in Bankruptcy v Registrar of Titles* [2015] VSC 563 [11].

22 [1970] VR 150.

23 [1974] VR 592.

in Bankruptcy v Registrar of Titles[24]).

Advisory Services Pty Ltd (t/as Ray White St Albans) v Augustin

In *Advisory Services Pty Ltd (t/as Ray White St Albans) v Augustin*[25] the Court of Appeal confirmed the decision of Judge Marks in the County Court that s 49A(4)(c) of the *Estate Agents Act 1980* required strict compliance.

In this case, the agent was Advisory Services trading as Ray White real estate. It sued to recover commission to which it claimed to be entitled on a sale of the respondents' property in Keysborough. The respondents' defence at trial was, among other things, that the applicant was not entitled to sue them for commission by reason of s 50 of the *Estate Agents Act 1980* (***Act***), which was said to be engaged because the sale authority under which the applicant was appointed did not comply with s 49A(1) of the *Act*. Specifically, the authority was said not to contain a 'rebate statement' as required under s 49A(4)(c), stating that the agent was not entitled to retain any rebate and must not charge the client an amount for any expenses that was more than their cost.

The agent used one of two forms approved by the Director of Consumer Affairs Victoria and available for download by real estate agents. The sale authority used was the form which did not contain the words in s 49A(4)(c).

At trial, the agent contended that it was sufficient that it had substantially complied with the *Act* and that s 49A(4) should be read in context so that the rebate prohibition statement in s 49A(4)(c) is not required to be included where the agent will not receive any rebate. Similarly, it contended that

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24 [2015] VSC 563.

25 [2018] VSCA 95 ('*Advisory Services*').

where, as in the present case, there are no expenses which the agent is to pass on to its client, s 49A(4)(c) is superfluous and the statement as to expenses it identifies is not required.[26] Judge Marks rejected these arguments and found that the authority did not contain the rebate statement required by s 49A(4)(c) and so the applicant had failed to comply with s 49A(1). As such, s 50 barred it from suing for, recovering or retaining commission.

That compliance with s 49A(4) requires a rebate statement both to be in a form approved by the Director and to contain the specified statements; and the consequence of non-compliance with s 49A(1)(c)(iii) was not in dispute in the appeal.

The grounds of appeal revolved around the agent's contention that the authority was compliant because there could be no rebate in the circumstances and therefore the requirement to include a statement that the agent is not entitled to retain any rebate is not enlivened.

The Court of Appeal considered the structure of the *Act*, and its consumer protection objectives and observed that the provisions of Pt IV are 'concerned with standards of conduct and transparency'[27] and are directed to the 'general protection of persons, including clients, dealing with estate agents'.[28] The Court of Appeal concluded that the *Act* must be interpreted strictly in favour of consumers. A statement that an agent will not retain any rebate was held to be materially different to a statement that an agent is not entitled to retain any rebate. This is irrespective of whether the agent was seeking to retain a rebate in any event. Strict compliance is required.[29]

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26 Ibid [11].

27 Ibid [39].

28 Ibid [39].

29 See also *Sutherland v Globe Real Estate Pty Ltd* [2018] VSC 408.

Justice Legislation Miscellaneous Amendment Bill 2018

As a significant number of Victorian real estate agents used the Consumer Affairs Victoria-approved forms, the government's response to the decision in *Advisory Services* has been swift. Legislative amendments have been introduced to retrospectively validate sales authorities that were used in good faith to ensure that clients cannot use this decision to refuse to pay commissions to real estate agents who have used the non-compliant sales authority for past sales. As the second reading speech explained, the relevant sections of the Justice Legislation Miscellaneous Amendment Bill 2018 amend the *Act* to provide that an estate agent is not to be taken to have failed to comply with their disclosure requirements only by reason that a sales authority they have entered into does not include the specific statements required by the *Act*, provided that the authority included a rebate statement in a form approved by the Director of Consumer Affairs Victoria.[30]

The amendments are specifically drafted to apply retrospectively however it will not affect the rights of parties in the *Advisory Services* case. It will only apply to sales authorities entered into prior to the day after the day on which the amendments receive the Royal Assent, including any that may be subject to ongoing legal proceedings.

The Bill was introduced in, and passed, the Legislative Assembly, and had its second reading speech in the Legislative Council on 26 July 2018. It is yet to pass the Legislative Council.

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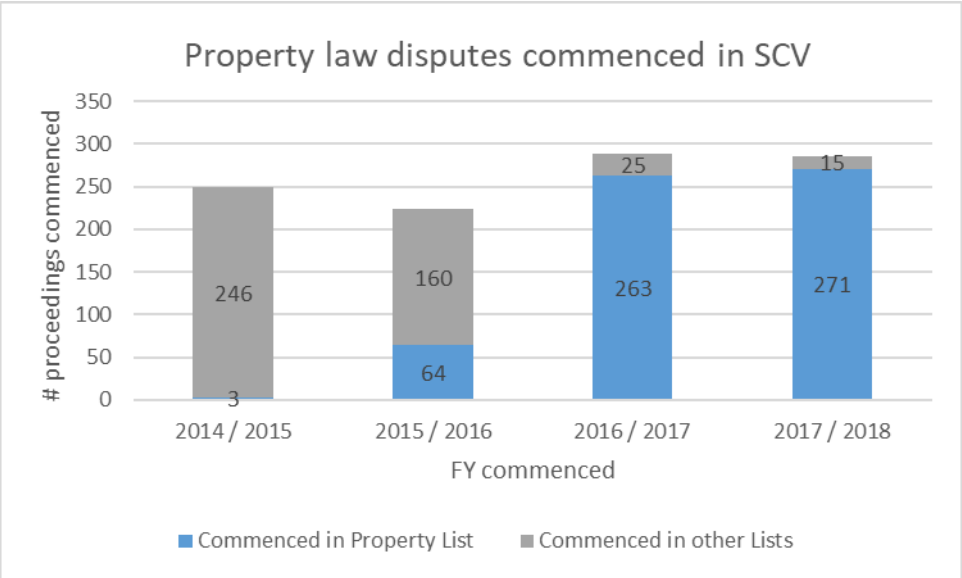
30 Victoria, Parliamentary Debates, Legislative Assembly, 21 June 2018, 2146 (Martin Pakula, Attorney - General).

Property List statistics

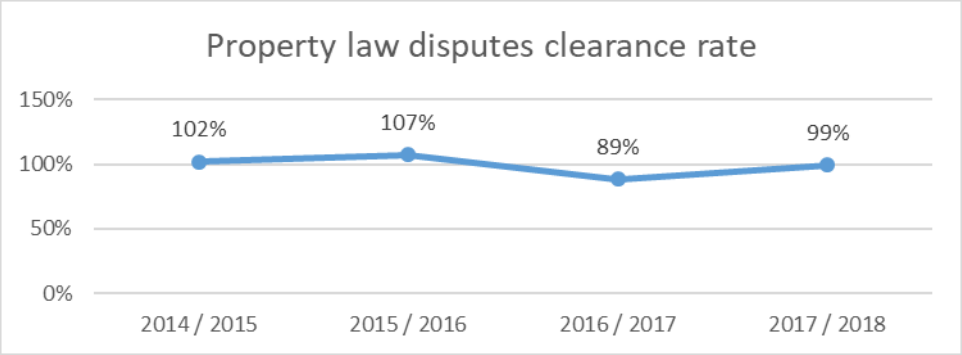
As at 13 July 2018 there were 145 cases in the Property List of the Common Law Division, including 26 applications in relation to restrictive covenants.

As the Property List is a relatively new list it is not really amenable to meaningful year on year comparisons, unless otherwise stated, the data below is based on proceedings concerned principally with rights over real property. Both Common Law Division and Commercial Court proceedings have been included.

While there has been modest growth in the overall numbers of real property law disputes in the Court, in line with the Court's policy of coordinated, specialist management these proceedings are increasingly managed in the Property List of the Common Law Division.



Despite growth in demand, the Court has maintained a high clearance rate (ie proceedings finalised vs proceedings commenced in a given period), achieving 99% (only slightly below the 100% benchmark) for 2017/18.



Of cases pending in the Property List, 75% are under 12 months old, 19% between 12 and 24 months old, and 7% over 24 months old.