

# CONVEYANCING SERIES 2021

Mastering the essentials

## Conveyancing and Caveats

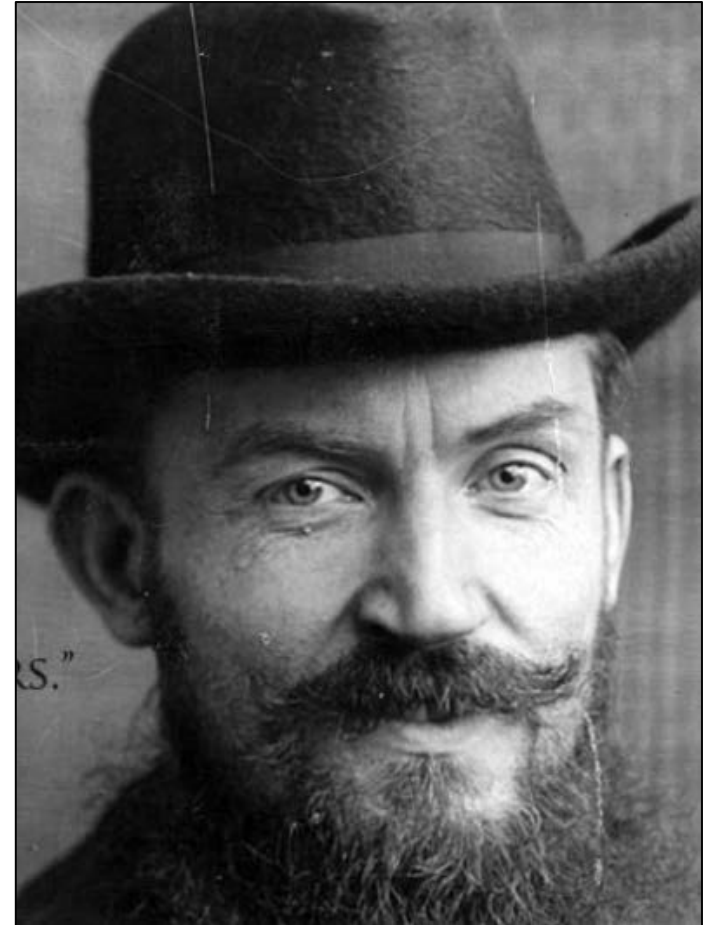
Presented by | Phil Nolan, Risk Manager, LPLC



# Quote

Beware false knowledge; it is more dangerous than ignorance.

*George Bernard Shaw*



# Introduction

One word – so many uses:

- Caveat emptor
- Caveat on a court file
- Caveat on a title



# Introduction

Over the years many caveats have been rejected by the Registrar of Titles.

## Zoom poll

Which of the following caveats have been rejected by the Registrar of Titles?

- a) By a registered proprietor who has lost their title.
- b) By a person entitled to an option to purchase under a will.
- c) By a legal practitioner claiming a general lien.





# Four key points

1. Establish a knowledge base and keep up to date about caveat issues
2. Double check that there is a caveatable interest
3. Consider the need to lodge / remove a caveat
4. Use a checklist to be aware of caveat issues.



# Agenda

1. Overview

3. Caveats and cases

5. Do the right thing

2. Caveats and Acts

4. Claims

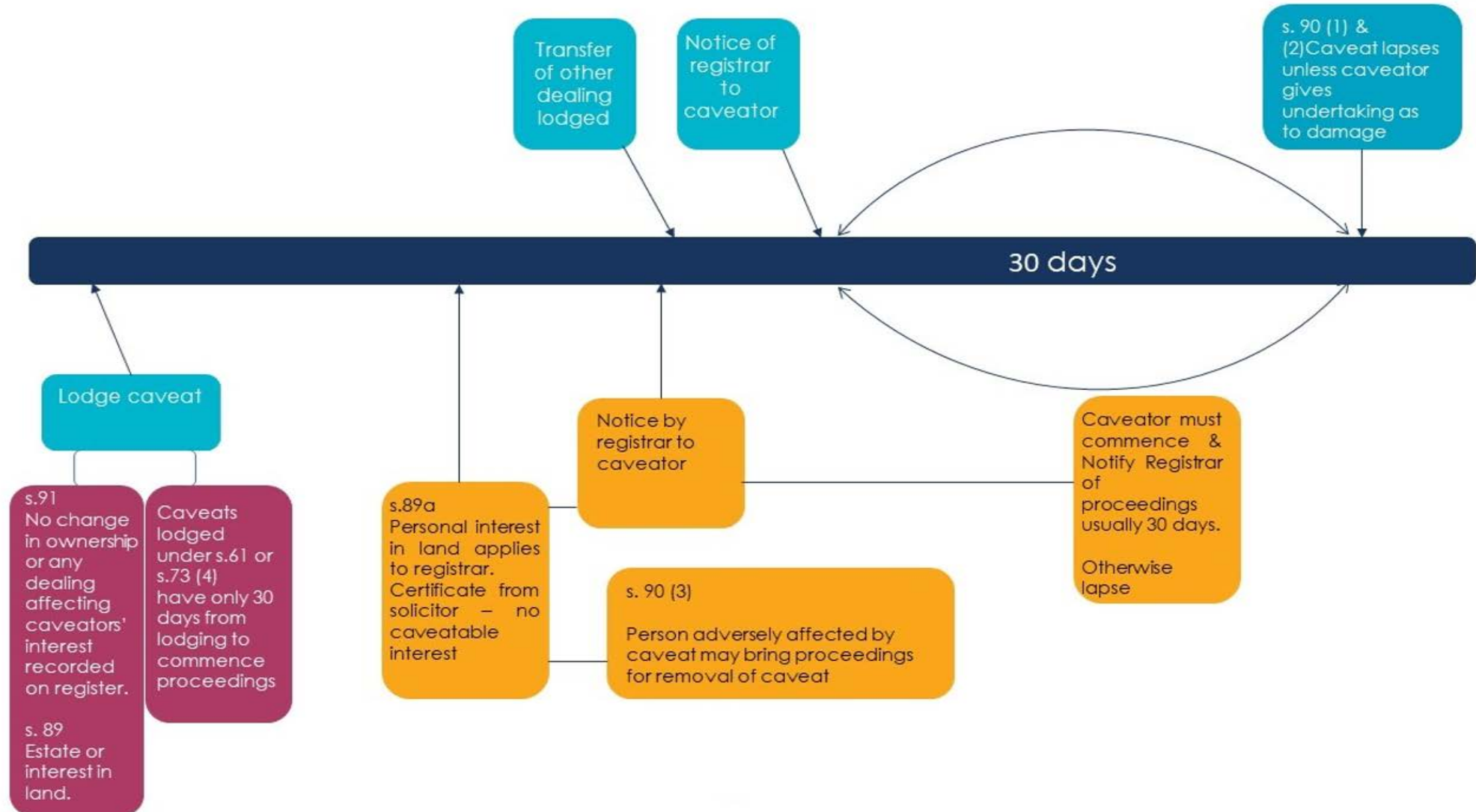
6. Checklist

# Overview

- *Transfer of Land Act 1958* (Vic)
- Essential elements
- When a caveat is ineffective



# Overview - timeline





# Did you know?

Since 11 October 2021 in NSW, a member of the public cannot lodge a caveat because of the transition in NSW away from paper-based processes.

Only a subscriber in NSW can now place a caveat on a title.



# Other relevant Acts and caveats

- ❑ Sale of Land Act 1962
- ❑ Subdivision Act 1988
- ❑ Duties Act 2000
- ❑ Domestic Buildings Contracts Act 1995
- ❑ Confiscation Act 1997



**Victorian Current Acts**

# Some caveat cases

- Caveats and registrable instruments
- Caveat as a dealing tool
- No grounds to lodge caveat



# Some caveat cases

- Power of court to amend a caveat
- Balance of convenience
- Caveat and adverse possession claim
- Compensation for lodging unlawful caveat



# Exercise – caveats and joint ventures

## Background

A new client instructs you to lodge a caveat.

They are in dispute with a joint venture partner about the proposed sale of the joint venture development site.

They tell you that the joint venture agreement gives them a right to lodge a caveat over the development site.





# Exercise – caveats and joint ventures

## Zoom poll

Which approach do you prefer?

- a) Immediately lodge the caveat and tell the client that they need to provide you with a copy of the joint venture agreement.
- b) Await receipt of the joint venture agreement and then lodge a caveat.
- c) Await receipt of the joint venture agreement and once satisfied the client has a caveatable interest then lodge the caveat.



# Exercise – amending caveats once on title

## Background

You lodge a caveat on instructions from a tenant in relation to the leased premises.

In the caveat the estate claimed is a freehold estate.

The practitioner for the landlord requests that the caveat be withdrawn as the correct estate is a leasehold estate.

Your client insists on the caveat remaining and you are instructed to amend the caveat.

# Exercise – amending caveats once on title

## Zoom poll

Can the caveat be amended?

- a) Yes
- b) No
- c) Don't know



# Claims

Failing to manage legal issues is the most common cause of caveat claims.

## Examples of claims

- No grounds to lodge
- Failure to do a check search
- Failure to lodge



# Claims

## Zoom poll

Where registration of a mortgage is delayed is it best to:

- a) Wait for a while and then check to see if the problem is solved.
- b) Immediately lodge a caveat.
- c) Immediately lodge a priority notice.





# Conveyancing, easements and caveats

Failure to lodge a caveat for an unregistered easement.

## Zoom poll

Can a servient tenement of a drainage easement lodge a caveat?

- a) Yes
- b) No
- c) Don't know



# Conveyancing, check searches and caveats

## Claims

Failure to do a check search and where a caveat was lodged just prior to settlement.



# Conveyancing, family law and caveats

Failure to lodge a caveat may mean a property is sold without notice to the caveator.

## Zoom poll

Which of the following do you select when lodging a caveat on behalf of a family law client who is not a registered proprietor?

- a) Implied, resulting or constructive trust.
- b) Estoppel.
- c) Court order under the *Family Law Act 1975*.



# Exercise - address for service and caveats

## Background

Recently a family law practitioner referred a client to you to undertake the sale of the former matrimonial home. The practitioner tells you that they have ceased acting for the wife following an allegation by the husband that the firm had a conflict as the firm had previously acted for both husband and wife in relation to a retail lease dispute.

The wife tells you that the former matrimonial home is solely in her name but it has been agreed with the husband that the funds from the sale will be held in trust pending agreement with her husband or court orders.

The wife also tells you the husband has lodged a caveat over the former matrimonial home and that her former lawyer lodged two caveats over two investment properties. The husband is the sole registered proprietor of the two investment properties.



# Exercise - address for service and caveats

## Zoom Q&A

What advice would you give the wife about the caveats?





# Conveyancing, leases and caveats

When a purchaser buys subject to a lease, does your retainer include advice about the lease and the tenant's right to caveat?



# Exercise - leases and caveats

## Background

A practitioner acted for a purchaser of three parcels of land. Part of the land was leased. A copy of the lease was attached to the contract of sale. The lease granted the tenant a right of first refusal.

The vendor's practitioner informed the purchaser's practitioner that the tenant was offered the property but no agreement could be reached about the price.

About 14 days prior to settlement the purchaser's practitioner was informed by the practitioner acting for the client's mortgagee that their recent title searches disclose that the tenant has lodged a caveat and it needs to be removed prior to settlement.

It turned out that the tenant was seeking to enforce the right of first refusal.



# Exercise - leases and caveats

## Zoom Q&A

What advice would you have given to the purchaser about the caveat issues?



# Caveats and priorities

## Claims example

- Practitioner acted for purchaser.
- Purchaser's caveat lodged.
- Creditor lodges caveat prior to settlement but not picked up.

Matters settles.

## Question

Who has priority?



# Certifications and caveats

When lodging or withdrawing a caveat certifications are given to the Land Registry that the subscriber has taken reasonable steps to verify both the identity and authority of the client.

## Relevant case

*Trani & Anor v Trani & Ors (No 2) [2019]*  
VSC 723





# Sale by mortgagee and caveats

Only some caveats lapse on the transfer by a mortgagee.

See section 91(2B) of the *Transfer of Land Act*



## **Risk management tip**

Ensure that you obtain a withdrawal of any other caveat for settlement purposes.

Examples include a Queens caveat, caveat claiming an implied trust, or a resulting trust.

# Caveats – do the right thing

There are a number of ethical issues that may arise in relation to caveats.

- Unsatisfactory professional conduct
- Acting without instructions
- Clients need to make informed choices

## Help

If you have an ethical issue about a caveat contact LIV ethics:

Phone: 03 9607 9336

Email: [ethics@liv.asn.au](mailto:ethics@liv.asn.au)



# Caveat checklist



- Raise with client any caveat issues (V, P, C, OP).
- Advise client of the benefits and/or consequences of registering a caveat (P).
- Obtain instructions about any caveat issues. For example, to lodge / withdraw / remove caveat (V, P, C, OP).
- Receive evidence of caveatable interest (C).
- Determine whether the caveator has a caveatable interest. (V, P, C, OP).
- Lodge a caveat promptly (P, C)
- Track title during settlement period (V, P).
- Check for any caveats on title just prior to settlement (V, P, C).
- Ensure any caveats on title removed at or prior to settlement (V, P, C, OP).
- Obtain instructions prior to withdrawing a caveat, preferably in writing (C).
- Issue any necessary proceedings within time to substantiate a claim as caveator pursuant to s.89 of the TLA (C).
- Consider using the property transaction alert service.



# More information about caveats

- Go to the **LPLC website** and word search 'caveat'.
- ***An essential guide to caveats*** by Doug Solomon Law Society of WA Journal February 2015.
- Information published by the **State of Victoria Department of Environment, Land, Water and Planning**.
- **Removing hostile caveats** – William Rimmer Barrister Leo Cussen presentation on 10 April 2019
- **Lodging a caveat** – Russell Cocks LIJ Sept 2017
- **The Use and Abuse of caveats** – Robert Hay SC and Brett Harding Barrister Monash University Law Chambers 22 March 2017.



# Reflection

What have you learned from this session and materials that might help you and your colleagues in your work?



**F E E D B A C K**



# CONVEYANCING SERIES 2021

Mastering the essentials

## Conveyancing and Caveats

Presented by | Phil Nolan, Risk Manager, LPLC

