

CONVEYANCING SERIES 2021

Mastering the essentials

Conveyancing and caveats

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Thought

Do you have enough knowledge about caveats?

Quote

Beware false knowledge; it is more dangerous than ignorance.

George Bernard Shaw

CPD information

1 CPD substantive law

0.5 CPD practice management

For all queries relating to CPD rules please refer to the *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015*. Information can also be found [here](#). LPLC does not keep records of practitioner CPD.

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Key points

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

Introduction

'Caveat' is from the Latin word 'beware' and it is common for practitioners when advising a purchaser in a conveyancing matter to mention *caveat emptor* – buyer beware.

More recently the principle of *caveat emptor* was re-enforced by the October 2014 amendments to the *Sale of Land Act 1962* (Vic) with the introduction of a statutory due diligence checklist for purchasers. See sections 33, 33A, 33B and 33C.

Caveats can also be used to prevent action such as preventing the court from granting probate or administration pursuant to section 58 of the *Administration and Probate Act 1958* (Vic).

But for our present purposes we are considering a caveat which may be placed on a title to land giving notice of an unregistered interest. The right to place a caveat on a title is found in the *Transfer of Land Act 1958* (Vic) and much has been written about caveats and there are many relevant cases.

Every year LPLC receives claims involving caveats and failing to manage legal issues is the most common cause of caveat claims. Whether a client has reasonable grounds to lodge a caveat is probably the most important issue for practitioners to get right to avoid a claim and possibly a professional misconduct finding.

Did you know?

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?

By a registered proprietor who has lost their title

By a person entitled to an option to purchase under a will

By a legal practitioner claiming a general lien

Overview of caveats on titles

Main legislation

Transfer of Land Act 1958 (Vic) (TLA). See sections 26R, 61, 73(4), 89, 89A, 90, 91, 100 and 118.

Comments on lodging and removing caveats

A caveat is placed on a certificate of title notifying the world of an interest that a party may have in the land described in the caveat.

A caveat can be in paper when lodged by a member of the public and electronic when lodged by a subscriber.

Some essential elements for a valid caveat are:

- specify an estate or interest in the land
- there must be grounds for lodging the caveat
- land affected must be adequately described, usually by the volume and folio
- specify the name of the caveator and an address for service
- specify the extent of the prohibition.

Generally a caveat becomes ineffective when one of the following occurs:

- withdrawn
- cancelled
- lapses after 30 days' notice
- removed by order of the court.

Your comments

Timeline information

See attached timeline about sections 61, 73(4), 89, 89A, 90 and 91 of the TLA.

Your comments

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.

Some other relevant Acts referring to caveats

Sale of Land Act 1962 (Vic)

Section 27(3)(c) - remember to include details of any caveat on title in the section 27 statement.

Subdivision Act 1988 (Vic)

S.22 – caveator’s consent required to register a plan.

S.32AL and s.32A – upon registration of a plan of consolidation or re-subdivision the land is freed from any caveats.

Duties Act 2000 (Vic)

S.173 provides that duty is payable on any caveat lodged on the grounds of an unregistered mortgage which would have been payable on the mortgage. This is no longer relevant as mortgage duty was abolished from 1 July 2004. Refer s.148A of the Duties Act.

Domestic Building Contracts Act 1995 (Vic).

S.18 provides that a domestic building contract does not give any interest in land to the builder. In one claim a practitioner lodged a caveat for a builder in breach of this section.

Confiscation Act 1997 (Vic).

See s.28, s.36Y, s.40Y and s.72.

A restraining order is grounds to lodge a caveat.

Your comments

Some caveat cases

Caveats and registrable instruments

Classic Heights Pty Ltd v Black Hole Enterprises Pty Ltd (1994) V Conv 54-506

In this case Batt J held that the basis on which a caveatable interest arises is from a registrable instrument or where the caveator has a right to compel the registered proprietor to deliver an instrument which can be registered. This case has been questioned in subsequent cases and is not consistently followed.

Crampton v French (1995) V Conv 54-529

A broader view of the basis to lodge a caveat and preferred to *Classic Heights*.

Caveat as a dealing tool

Maxwell v Moorabool Developments Pty Ltd [2004] VSC 392

Caveats used as a dealing tool following a dispute about a property development and where the caveator did not have an honest belief based on reasonable grounds for lodging the caveats.

Goldstraw v Goldstraw [2010] VSC 491

Lodgement of a caveat for a collateral purpose, as a bargaining chip in relation to an unrelated claim. Caveat lodged by former spouse.

No grounds to lodge caveat

Piroshenko v Grojsman & Ors [2010] VSC 240

A caveat was lodged by former spouse claiming an unregistered equitable interest in a property. The property was sold to a third party and the caveat was removed by a court order as there was no equitable interest in the property.

Sargana v Gordon Conveyancing Darebin Pty Ltd [2021] VCAT 1039

The tribunal was not satisfied that the caveator's legal representative implemented best practice when lodging the caveat under the circumstances. The tribunal commented that:

'.....Caveats can only be lodged if a person has an interest in land. If this cannot be established a caveat should not be lodged. A person who lodges a caveat without reasonable cause is guilty of serious misconduct and may be liable for loss and damages.....'

Power of court to amend a caveat

Ren v Shi [2012] VSC 271

Power of the Court to amend a caveat where caveat was not limited to the interest of one of two registered proprietors.

Balance of convenience

Carbon Black Lab Pty Ltd v Launer [2015] VSCA 126

Consideration of balance of convenience to remove caveat lodged by purchaser where vendor rescinds contract and re-sells the property.

Sokolovska v Galea [2021] VSC 435

Order for removal of a caveat as there was no caveatable interest and the balance of convenience was in favour of the registered proprietor as the property had been sold and settlement was due.

Caveat and adverse possession claim

Nicholas Olandezos v Bhatha & Ors [2017] VSC 234

Caveat lodged by a person claiming an interest by adverse possession. Caveator ordered to commence proceeding to establish their entitlement to the freehold estate in the disputed land by adverse possession within one month or the caveat should be removed.

Compensation for lodging unlawful caveat

Lanciana v Alderuccio [2020] VSCA 152

The statutory cause of action found in s118 of the *Transfer of Land Act* does not lie against a solicitor who lodges a caveat as a duly authorised agent of their client.

Your comments

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

Zoom poll

Which approach do you prefer?

Immediately lodge the caveat and tell the client that they need to provide you with a copy of the joint venture agreement.

Await receipt of the joint venture agreement and then lodge a caveat.

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.

Zoom poll

Can the caveat be amended?

Yes

No

Don't know

Relevant case

Ren v Shi [2012] VSC 271

Tip

Be mindful of s.91(4) of the Transfer of Land Act:

A caveat that has lapsed or been removed by an order of a [court](#) shall not be renewed by or on behalf of the same person in respect of the same interest.

Claims

Every year LPLC receives claims involving:

- lodging caveats without good cause
- not lodging caveats, in time or at all, to protect legitimate interests
- removing caveats without instructions or
- not having caveats removed.

Some caveat claims arise because the practitioner does not understand what constitutes a caveatable interest. In other cases the existence of the caveat is overlooked or there are administrative errors in not lodging documents including the caveat, a withdrawal of caveat or a change of address.

Claims involving caveats most commonly occur in conveyancing but also in loan and mortgage arrangements and family law.

Claims involving loan transactions previously arose where a practitioner failed to lodge a caveat when there was a delay in the registration of a mortgage. This resulted in the mortgagee losing priority. This is less likely to occur now with electronic lodgment. We also see practitioners not advising private lenders of the risks of lending on security of unregistered second mortgages and a caveat or just the security of a caveat.

Zoom poll

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

Wait for a while and then check to see if the problem is solved.

Immediately lodge a caveat.

Immediately lodge a priority notice.

Your comments

Conveyancing, easements and caveats

Caveat mistakes are not just limited to the areas referred to above but arise in many property matters.

In one claim the practitioner was negotiating to formalise a drainage easement on behalf of the client with the client's neighbour. The registration was delayed and in the meantime the neighbour sold their property and the purchaser had no notice of the easement.

A caveat on title by the dominant tenement client would have put the purchaser on notice.

Zoom poll

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

Yes

No

Don't know

Conveyancing, check searches and caveats

Caveat claims also arise because the practitioner did not obtain an up to date register search statement or otherwise check the title just prior to settlement. In many instances there were third party caveats lodged just prior to settlement which related to charges granted over the land pursuant to lease agreements or guarantees in financing arrangements to do with the vendors' businesses.

Conveyancing, family law and caveats

In family law property matters the failure to lodge a caveat may mean a property is sold without notice to the caveator. In this sort of matter, you would expect that the settlement funds would also be disbursed to the registered proprietor.

However, if a caveat had been lodged there would usually be the opportunity to reach agreement that any settlement funds be held in trust until final agreement is reached in the family law property matters or in accordance with court orders.

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?

Implied, resulting or constructive trust.

Estoppel.

Court order under the *Family Law Act 1975*.

Exercise – caveats and address for service

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.

Zoom Q & A

What advice would you give the wife about the caveats?

One issue that arises in relation to this scenario is the need to update any address for service.

A firm address on a caveat is taken to be the address for service of any notices by the Land Registry including for proceedings made under s90 of the Transfer of Land Act.

It follows that where a practitioner ceases to act, they should consider the need to change the address for service.

The *Transfer of Land Act* makes provision for the address to be changed.

According to Land registry:

You need to lodge an *Application for amendment of address for service of Notice in caveat* form in accordance with s113(6) of the Transfer of Land Act.

You can access the form along with the Guide to Residual Documents at [Fees, guides and forms \(land.vic.gov.au\)](https://www.land.vic.gov.au)

This application will need to be lodged via PEXA.

LPLC has received a couple of claims where practitioners have been served and have lost contact with the client, do not know how to contact them, do not pass on any documents and then are blamed for the adverse consequence.

Tip

As part of bringing your retainer to an end get the address for service changed for any caveats.

This is like filing a notice of ceasing to act if proceedings were ongoing at the conclusion of your retainer.

Relevant case

[Sokolovska v Galea \[2021\] VSC 435 \(23 July 2021\) \(austlii.edu.au\)](#)

Conveyancing, leases and caveats

When land is sold subject to a lease practitioners need to carefully consider the limits of their retainer and ensure the client understands those limits.

For example, would providing advice about any lease issues and the right of the tenant to lodge a caveat form part of your retainer?

Exercise – right of first refusal

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.

Zoom Q & A

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

Beware

In the claims examples above, the incoming mortgagee may insist that the caveat be removed before settlement.

Your comments

Caveats and priorities

In one claim the practitioner acted for a purchaser of real estate who was the sister of the vendor client. No deposit was paid by the sister.

The sister's practitioner lodged a purchaser's caveat on the title.

A week later a further caveat was lodged by the vendor's creditor pursuant to rights to do so under a guarantee dated some two years earlier. The guarantee was in relation to debts owed by the vendor's business which had failed four months earlier.

While the purchaser's practitioner was cautious enough to lodge a caveat, they failed to undertake a check search before settlement. Settlement occurred and the transfer and mortgage were lodged for registration, but the second caveator obtained an injunction preventing the Registrar from registering the transfer.

While the purchaser's caveat was first in time in terms of lodging, the creditor had an equitable caveatable interest that was created first in time.

Lodging a caveat serves to notify the world of a caveator's interest. But the act of lodging the caveat does not of itself usually give the caveator priority.

Where you have two unregistered interests, here represented by two caveats, the priority of those competing equitable interests is usually resolved by looking at the date the interest was created, not at the date the caveat was lodged. But there are many factors to consider including the type of interest and the circumstances and conduct of the caveators including whether there has been fraud, gross negligence or an agent exceeding authority.

The failure to lodge a caveat by the creditor here was unlikely to justify the creditor losing its priority as a first-in-time equitable interest; particularly where the sister/purchaser did not pay a deposit and therefore had not acted to her detriment up until the point the second caveat was lodged.

The sister had also failed to protect her interest by doing a check search before settlement which would have shown the caveat.

Had a check search been done before settlement, the second caveat would have been found and the purchaser would have had the option of not settling until they had obtained a withdrawal of caveat.

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.

Rule 7.10.1 of the [ARNECC Model Participation Rules](#) (MPRs) requires the subscriber, to provide certain certifications as set out in the Certification Rules, including that the subscriber has taken reasonable steps to verify the identity of the client. The Certification Rules are contained in schedule 3 of the MPRs and require

certification be given at the time of digitally signing an electronic registry instrument.

These certifications need to be taken seriously and only given if they are true. In the case of [Trani & Anor v Trani & Ors \(No 2\) \[2019\] VSC 723](#) the Court found a conveyancer was liable for providing false certifications as to identity and authority to the Registrar of Titles.

The property in this case was located at Safety Beach and was owned by three siblings, two brothers and a sister, who were registered on title as tenants in common in equal shares.

The two brothers alleged their sister, without their knowledge, consent or authority, fraudulently entered into a contract to sell the property for \$1,350,000 and received the funds from the sale.

The two brothers also alleged that the conveyancer acting for the sister failed to verify their identity.

In the Trani case this meant that the conveyancer needed to verify the identity of all three registered proprietors before the certification was given. The court described the certification requirements as going to:

‘the heart of the checks and balances required for the protection of interests in land associated with registration and had a real facilitative role in the fraud’.

The certifications given by the conveyancer that they had taken reasonable steps to verify identity were found to be false and misleading and deceptive under section 18 of the Australian Consumer Law. The fact that the conveyancer had made some assumptions about authority and identity based on representations made by the sister, did not change the fact that the certifications were misleading and deceptive. The conveyancer should have taken reasonable care to confirm those assumptions and only given the certification if they had verified identity and authority.

The conveyancer was found to be a concurrent wrongdoer with the sister and her associated company. The fact that the sister had been fraudulent did not absolve the conveyancer, whose proportionate liability was assessed at 15 percent.

Your comments

Sale by mortgagee and caveats

LPLC has received a number of enquiries from practitioners seeking clarification of whether a caveat will lapse on the transfer by a mortgagee.

Pursuant to the TLA, caveats lodged after a registered mortgage which secure an amount owing pursuant to an unregistered mortgage or charge, will lapse on registration of a transfer by the mortgagee.

See [section 91\(2B\) of the *Transfer of Land Act*](#).

Upon the registration of an [instrument](#) of transfer by the [registered proprietor](#) of a mortgage or charge in exercise of the power of sale conferred on him by this Act, any caveat that—

- (a) was lodged after the mortgage or charge was lodged; and
- (b) claims an estate or interest in the land transferred by virtue of an unregistered mortgage or charge or other unregistered document intended to create a security for the payment of moneys—

shall lapse to the extent that it claims an estate or interest in the land transferred.

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.

Your comments

Caveats – do the right thing

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

Lodging a caveat without reasonable grounds may be the basis for an allegation of unsatisfactory professional conduct and / or professional misconduct and result in a complaint to the Legal Services Commissioner.

This sort of complaint may be determined by the Victorian Civil and Administrative Tribunal and the Victorian Legal Services Board and Commissioner maintains a register which lists disciplinary action taken against practitioners.

A client may also look to make a complaint to the Legal Services Commissioner about a practitioner who withdraws a caveat without instructions. Acting without instructions may constitute misconduct at common law and be caught by the definition of professional misconduct in s.297 of the Legal Profession Uniform Law.

One rule which would usually apply when advising a client about caveat issues is [Rule 7](#) of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*. Rule 7 provides that a practitioner must ensure clients make informed choices and alerting a client to any relevant caveat issues is sometimes necessary to help the client make informed choices.

A breach of rule 7 may also result in a complaint to the Legal Services Commissioner.

More information

The LIV ethics committee has published a number of rulings about caveats. For example see [ruling Number R3779](#).

Background

A firm acted for the wife in a family law matter and lodged a caveat over the former marital home. Subsequent to lodging the caveat, legal firm X ceased to act for the client. The current address of their former client was unknown. Legal firm Y, who acted for the husband, asked legal firm X to withdraw the caveat so that it could exercise judgment for outstanding legal costs over the former marital home. Legal firm X sought a ruling from the Ethics Committee as to whether it could rely on the caveat lodged to collect its portion of legal fees once the property was sold, and whether it could withdraw the caveat.

Decision

Legal firm X cannot rely on the caveat lodged to collect its fees when and if the property is sold. Legal firm X cannot withdraw the caveat without the permission of the former client.

Help

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

Phone: 03 9607 9336

Email: ethics@liv.asn.au

Conveyancing and caveats checklist

This checklist will help practitioners avoid the most common claims in relation to conveyancing matters and caveats and is not intended to be exhaustive of all issues that need to be considered.

Different items will apply depending on who you act for.

Legend

V – vendor

P – purchaser

C – caveator

OP – other party objecting to caveat

Items

- 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. This service allows anyone, for a small fee, to register to receive email alerts when anything happens on a particular title. This includes notice of lodgement of caveats, plans of subdivision, transfers and mortgages. While a very useful service, particularly if you would like early notice of any caveats lodged on title, it is not a substitute for a caveat (V, P, C, OP).

More information

- Go to the LPLC website and word search 'caveat'.
- *An essential guide to caveats* by Doug Solomon Law Society of WA Journal February 2015.
- Guide to caveat by the State of Victoria Department of Environment, Land, Water and Planning 2016.
- Guide to grounds of claim for caveats by the State of Victoria Department of Environment, Land, Water and Planning 2016.
- 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.

Did you know?

One way to find cases which have considered a section of an Act is to use 'noteup references' on Austlii. Go to: www.austlii.edu.au and find the relevant Act and then open the relevant section in the Act and then go to 'noteup references'.

If you do noteup references on s.89 of the TLA you will find 89 documents, most of which are cases. Other documents include articles about s.89 and other legislation which reference s.89.

Reflection

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

Your answer

Caveat timeline

