

CAVEATS TO PROTECT INTERESTS IN LAND

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It is a common perception that registering a caveat on a property gives the caveator an interest in the property.

A caveat against dealings does not enlarge or add to the rights the caveator would otherwise have to the interest claimed. The primary purpose of a caveat is to protect the caveator's interest from being defeated by a registered dealing without the caveator first having the chance to approach the Supreme Court for an order protecting its interest. A caveat merely freezes the register, preserving the status quo. It operates as a statutory injunction, requiring the Register-General to withhold registration of the dealing until the caveator has been given the opportunity to pursue remedies against the person who lodges the dealing for registration. This requires the court to consider the priority between the caveator's claimed interest and the (unregistered) interest of the person who lodges the dealing for registration, in accordance with principles which are discussed below.

A caveat can prohibit the recording of a dealing only to the extent that the recording would affect the interest claimed in the caveat.

While a caveat remains in force, the Register-General cannot record in the Register any dealing prohibited by the caveat, except with the caveator's consent. To this general prohibition there are two categories of exception. The first permits certain specified dealings and entries to be recorded in the face of the caveat, unless the caveat otherwise specifies. These dealings and entries include such matters as applications by executors or surviving joint tenants following the death of a registered proprietor, writs and vesting orders. They also include dealings by mortgagees and lessees exercising rights under mortgages or leases recorded or lodged in registrable form before the caveat was lodged.

The second exception provides that a caveat does not prevent the recording of a dealing lodged in registrable form before the caveat was lodged. Such a caveat is too late to prevent registration. The caveator could still seek an injunction to restrain the Register-General from recording the lodged dealing, but whether the injunction will be granted depends on whether the claimant can demonstrate that his or her interest in the land is entitled to priority over the interest of the person claiming under the dealing. That in turn will depend on the principles governing priorities between competing unregistered interests in Torrens title land, to be discussed below.

WHAT SHOULD CAVEATORS BE AWARE OF?

1. A caveat may only be lodged to support a registrable interest in land.
2. If a caveat secures a charge over the property, the caveat must be stamped by the Office of State Revenue with mortgage duty.
3. An application for the caveat to lapse may be made by the registered proprietor or any other person claiming an interest in the land.
4. An application may be made to extend the life of the caveat by the caveator.

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5. If a lapsing order is sought, the validity of the caveat may be tested before a court where the caveator may be required to give an undertaking to pay the complainant the damages he or she suffers as a result of the caveat.
6. A caveat does not give an unregistered mortgage holder the rights of a mortgage holder such as the right of possession on default.
7. An interest that is registered on the title prior to the caveat will nearly always have priority over the caveator's interest.
8. An unregistered mortgage will not give the mortgagee an automatic right to possession upon default and the mortgagee will usually need to seek a court order for possession.
9. A caveat may not have the effect of providing notice to other parties.
10. If a caveat is defective as to form and/or substance, it may be invalid.
11. If a caveat is invalid then it may be removed and the caveator may be liable to pay any affected party damages.
12. A caveator is not obliged to withdraw their caveat to allow discharge and registration of a first mortgage (*Miro v Fu Pty Limited* [2003] NSW SC 1009).

WHAT SHOULD CAVEATORS DO TO PROTECT THEMSELVES?

1. Search the title prior to lodging a caveat to note which interests take priority in terms of registration.
2. Seek legal advice to ensure the caveator has a caveatable interest in the property.
3. If possible obtain the signed consent of the registered proprietor of the property upon the caveat prior to lodging it.
4. Only seek to prohibit dealings which may affect the interest claimed.
5. Make enquiries to ascertain whether the caveator's interest can be registered and unless there is a good reason not to do so, register it.
6. Provide notice to all other interested parties of the caveator's interest.
7. Enter into a deed of priority with any unregistered interests subsequent on title to the caveator's to protect the caveator's priority and rights.

CAVEATS AND PRIORITIES

An unregistered dealing is known as an 'equitable interest'. This is distinct from a registered dealing which is known as a 'legal interest'. As between two equitable interests in Real Property Act land, the earlier in time is entitled to priority unless the circumstances are such to make it inequitable as between the holders of the interests that the earlier should have priority. The interest will be defeated by the registration of a subsequent inconsistent dealing and cannot then be asserted against a party who takes under the dealing.

The failure by the holder of an equitable interest to lodge a caveat does not necessarily result in the postponement of the earlier to the subsequent interest. However, where the later person proposing to deal

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3.

with the registered proprietor dealt with him or her after making searches and (because of the failure to caveat by the holder of the earlier interest) failed to get notice of the earlier interest, it may be that the conduct of the holder of the earlier interest in not lodging a caveat may postpone such interest. Accordingly it is always wise to lodge a caveat in relation to an equitable interest in the land.

A purchaser acquiring from a person who is purchasing under contract and who has not become the registered proprietor, can protect themselves by lodging a caveat. It should be remembered that this caveat may not restrict the rights of the registered proprietor to cancel the first contract for sale on the original purchaser's default.

Where a sale is on terms over a number of years, the purchaser, in order to give notice of his or her interest, should lodge a caveat immediately after signing the contract. If the title is subject to a registered mortgage, lodgment of a caveat will not prevent the mortgagee from selling the land in exercise of his or her power of sale if the caveat purports only to prohibit dealings by the registered proprietor. Where the caveat is drawn in wide terms and prohibits all dealings with the land, a mortgagee may be temporarily prevented from exercising power of sale.

This information has been provided by way of service to you to assist you in understanding our work relationship. Clearly there are other issues which might be relevant to your individual circumstances. Should you require any further information, please do not hesitate to contact any member of The Property Team on (02) 8263 6600.