

## Article Information

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## Protecting Interests: When Can Lenders Lodge Caveats?

**Lenders will often lodge caveats to protect their interest in the land until settlement occurs. However, lenders need to ensure that they have a caveatable interest prior to lodging a caveat. If a caveat is lodged where the lender does not have a caveatable interest, lenders open themselves to significant liability. It is also important to outline the common circumstances in which caveats can be circumvented.**

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### What is a caveat

A caveat is a statutory injunction which prevents the Registrar General from registering certain dealings and/or plans on a title until the caveat is removed or consent to the dealing/plan is provided.

In New South Wales, caveats are governed by the *Real Property Act 1900* (NSW) (“**the Act**”) and the general law. Section 74F(5) of the Act sets out what must be included in a caveat including: the name and address of the caveator, the prescribed particulars of the legal or equitable estate claimed and the title reference, among other things.<sup>[1]</sup> This article focuses on a lender’s caveat which is often lodged to ‘secure’ the lender’s fees, costs and expenses in respect of a term sheet or in respect of a loan facility.

### When do lenders have a caveatable interest?

Section 74F of the Act sets out when a person may lodge a caveat on title. The most common category that lenders will rely on is that they are entitled to a legal or equitable estate or interest in the land.<sup>[2]</sup> To ensure that lenders have a caveatable interest, lenders will need evidence that they are entitled to an interest in the land rather than mere contractual remedies against the proposed borrower.

The question then becomes at what point is a lender considered to be entitled to an interest in the land? Of course if the borrower and/or guarantors have already executed the relevant national mortgage form/s, this would entitle the lender to an interest in the land. However, where it is less clear is when the finance documents are yet to be executed. This is where lenders will rely on properly drafted term sheets/binding heads of agreement. Among other things, a good term sheet, from the lender’s perspective, will contain a charging clause which states that the borrower and the guarantor/s charge all of their interest in all of their real property and charge and grant a security interest in favour of the lender to secure all monies payable by the borrower or the guarantor to the lender pursuant to the term sheet. This provides the lender with a caveatable interest in the borrower’s real property on execution of the term sheet.

### What are the consequences for lodging a caveat without reasonable cause?

Serious consequences await those parties who have lodged a caveat without reasonable cause.<sup>[3]</sup> Caveators must have a reasonable cause for lodging the caveats and this has been held to be “an honest belief, based upon reasonable grounds, that the caveator has a caveatable interest”.<sup>[4]</sup>

Section 74P of the Act provides that a caveator is liable to pay compensation to any person who sustains monetary loss that is attributable to the lodging of the caveat (subject to the ordinary contractual principles of mitigation of loss). For example it has been held that where a caveat that has been lodged without reasonable cause and prevents the transfer of a property to a prospective purchaser, the caveator will be liable to the registered proprietor for the additional interest payable on their loan which would not have been payable if the transfer had proceeded.<sup>[5]</sup> It is irrelevant as to whether the caveator is aware of the loss that is likely to occur as a result of the lodging of the caveat.<sup>[6]</sup>

It is also important to note that a solicitor who prepares a caveat for a client where the client does not have a caveatable interest, may be guilty of professional misconduct.<sup>[7]</sup>

### **When can caveats be circumvented?**

Lenders often consider that if they have a caveat on title that they are unconditionally protecting their right to collect their fees for the proposed loan facility. However, there are various dealings that the Registrar General will continue to register notwithstanding the existence of a caveat on title.<sup>[8]</sup> The most common example of this is in relation to a current registered mortgagee exercising their power of sale conferred by the mortgage or under law.<sup>[9]</sup> In this circumstance, once the transfer to the new purchaser has been made, the title passes to the purchaser free of all mortgages, charges and covenant charges.<sup>[10]</sup>

Thus, where a prior registered mortgagee exercises their power of sale and there is not sufficient funds to pay out the registered mortgagee as well as the caveator, the caveat will be removed from title and the caveator will not have any claim to the property.

### **Qualifications**

The position outlined above is the general position in New South Wales as at the time of this article being published. As caveats are governed by state legislation, please ensure that you carefully consider the law in your relevant state or territory.

### **Summary**

- Caveats are statutory injunctions that prevent the Registrar General from registering dealings and plans on title and are in place until the caveat is removed or caveators consent is received.
- Lenders need to ensure that they are entitled to an interest in the land before lodging a caveat, otherwise they may be liable for compensation and their lawyer could be found guilty of professional misconduct in certain cases.
- Lenders should also be aware that caveats are not full-proof and that prior registered mortgagees can exercise their power of sale 'through' the caveats on title.

*For further information relating to caveats, please contact Banking and Finance Partner, [Greg Conomos](#).*

<sup>[1]</sup>Real Property Act 1900 (NSW) ('Real Property Act') s 74F(5).

<sup>[2]</sup>Ibid s 74F(1).

<sup>[3]</sup>Ibid s 74P.

<sup>[4]</sup>*Natuna Pty Ltd v Cook* [2007] NSWSC 121 [195].

<sup>[5]</sup>*Lee v Ross (No 2)* [2003] NSWSC 507.

<sup>[6]</sup>Ibid [42].

<sup>[7]</sup>*Law Society of NSW v Young* [2010] NSWADT 264.

<sup>[8]</sup>Real Property Act (n 1) s 74H(5)

<sup>[9]</sup>Ibid s 74H(5)(g).

<sup>[10]</sup>Ibid s 59.