



DAVIS LAWYERS

Legal Insights

CAVEATS IN LOAN TRANSACTIONS

1. Introduction

Caveats over real property are often utilised to secure loans, which may or may not be effective for the lender. They can be an efficient and cost-effective tool which, may prevent the registration of other competing interests in the land or allow time for the parties to resolve a dispute, either between themselves or through the Court system. Once lodged, caveats included on the title as a registered dealing and appear on title searches thereafter. Each Australian State has a different treatment of the rules around the lapsing of caveats and processes for their removal.

2. What is the effect of lodging a caveat?

There are two parties to a caveat, namely, the Caveator and the Caveatee. The name Caveator refers to the party noted on a caveat claiming an interest, whilst the name Caveatee refers to the party whose interest the Caveator has lodged the caveat over.

Once a caveat is registered, the Caveatee will be notified by the Registrar of Titles that a caveat has been lodged over their interest. Depending on whether or not the Caveatee has a need to deal with their interest, the Caveatee may not take issue with the caveat. This is because caveats, depending on who lodges them and on what grounds, may lapse.

Caveats have the effect of preserving the status quo and ensure that other registrable interests are not registered. In some States (such as Tasmania and South Australia) a registered caveat will need to be withdrawn before the mortgage can be registered. A registered caveat will not prevent the registration of a subsequent caveat on the same title.

3. How long will a caveat remain registered?

There are different State based rules about when and if a caveat lapses.

- (a) Qld – An equitable mortgagee's caveat will lapse after 3 months unless before that 3 months expires, the caveator takes action in the Supreme Court to substantiate the interest claimed and then gives a "Notice of Action" to the Registrar. Other types of caveats may be lodged with the consent of the registered owner and in that case, the caveat is non-lapsing.
- (b) Other States – caveats do not lapse by effluxion of time, but another interested party can cause a "lapsing notice" to be served on a caveator (this also applies in Queensland) and in that case, the caveator must start a Supreme Court action to establish the interest claimed. If a lapsing notice is served and the caveator does not start proceedings and notify the Registrar of Titles accordingly within the time permitted under the relevant State based legislation, after receipt of the lapsing notice (generally between 21-30 days), then the caveat will lapse.

4. What should I do before lodging a caveat?

You should always seek legal advice before lodging a caveat. It is not always clear whether or not an interest claimed is in fact a caveatable interest. Lodging an improper caveat can result in the Caveator having to compensate the Caveatee for loss or damage.

Whilst caveats can act as a useful tool in protecting an interest in land, they can also open the gates for litigation.

5. Implications of “Caveat” only loan

In some circumstances, a Lender may require their loan to be secured by way of caveat, rather than a registered mortgage. The essence of a formal mortgage is that a property owner signs a document which allows the credit provider to register the mortgage interest on the State based Land Register, maintained by the Registrar of Titles. Under a registered mortgage, the credit provider / mortgagee has statutory rights against the property which may be realised in order to discharge the liability of the debt.

Until registration of a mortgage, the credit provider only has the interest of an "equitable mortgagee". Similarly, if the property owner merely "charges" their interest in the land, without signing a registerable mortgage, an equitable mortgage is created and cannot be converted to a registered mortgage. Unlike a registered mortgage, there is no specific form required to create an equitable mortgage.

An equitable mortgagee has limited rights to enforce their security as they have no statutory right to sell the property as mortgagee exercising power of sale or to enter possession. In that case, it is therefore necessary to seek a Court Order from the Supreme Court for a Judicial order for Sale or for possession. This adds considerable time and cost to enforcement rights.

Other implications result from non-registration of a mortgage, some of these include:

Delay	<p>A delay in seeking consent from the first mortgagee could result in difficulties later. For example, the prior registered mortgagee has a right to not consent (eg., in NSW), then the mortgagee may not agree to registration at a later time.</p> <p>Further, if there is a delay in registration of the mortgage, and a later caveat is lodged by some other party, this later caveat will prevent registration of the prior equitable mortgage.</p>
Breach of prior mortgages	<p>The first registered mortgage will most likely contain a provision that the granting of further liabilities on the properties was a breach of those mortgages. A breach of the prior mortgages could result in those mortgages being called upon. However, negative pledges may not be enforceable (especially in Queensland).</p>
Quantum of prior mortgages	<p>Enquiries should be sought prior to the advance to obtain confirmation as to the amount of the prior mortgages. This is for the obvious reason that the value of the security is dependant, inter alia, on the amount owing under the first mortgage, or other prior mortgages.</p>
Notice to Registered Mortgagee / Tacking	<p>Consideration should be given to giving specific notice to the first mortgagee about the interest of the second mortgagee. If the first mortgagee is on notice as to a subsequent mortgagee's interest, then such further advances by a 1st mortgagee may well not have priority over advanced by the 2nd mortgagees. Until the 1st mortgagee is actually aware of the 2nd mortgagee's interest, the chances are that the 1st mortgagee will have priority for all advances it makes.</p> <p>A first mortgage, once it becomes aware that a second mortgage has also been granted, is limited in its ability to make further advances to the mortgagor and claim the repayment of those advances in priority to the moneys due under the second mortgage. The ability to claim first priority for such further advances is known as “tacking”.</p> <p>In Victoria, Queensland and Tasmania, the law pertaining to tacking is set by statute. In those states, tacking of further advances after notice of a second mortgage and without the consent of that second mortgagee is only permitted if the terms of the first mortgage require such advances</p>

LEGAL INSIGHTS - CAVEATS IN LOAN TRANSACTIONS

	to be made or if the further advance money is used to improve the value of the property. In the other Australian jurisdictions, the ability to tack is determined by case law. It is similar to the statutory regime of the other States, but the requirement in the first mortgage to make further advances will be insufficient to permit tacking unless the further advances are for the purpose of improving the security property (as would occur, for example, in the case of a construction loan).
Insurance	If there is a payout by an insurance company, an equitable mortgagee may struggle to have its interest recognised.

6. State legislation governing Caveats

State/Territory	Legislation
Australian Capital Territory	<i>Land Titles Act 1925 (ACT)</i>
New South Wales	<i>Real Property Act 1900 (NSW)</i>
Queensland	<i>Land Title Act 1994 (QLD)</i>
Victoria	<i>Transfer of Land Act 1958 (VIC)</i>
South Australia	<i>Real Property Act 1886 (SA)</i>
Northern Territory	<i>Land Title Act 2000 (NT)</i>
Western Australia	<i>Transfer of Land Act 1893 (WA)</i>
Tasmania	<i>Land Titles Act 1980 (TAS)</i>

DISCLAIMER

This document does not constitute legal advice and should not be relied upon as such. It is intended only to provide a summary and general overview on matters of interest and it is not intended to be comprehensive. You should seek legal or other professional advice before acting or relying on any of the content.