



A brief update on...

CAVEATS



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WHAT IS A CAVEAT?

A caveat notifies others of an interest in land or property. It acts as a warning to the public that someone has a claim or legal interest over the land/property in question. The caveat itself does not grant any actual interest in the property.

Once a caveat is lodged on a land title no further transactions affecting the property can be registered without the consent of the person lodging the caveat (**the caveator**).

A caveat has the practical effect of **"freezing" the real property and preventing it from being sold**. Importantly, only those with eligible interests over the property can lodge a caveat on title.

We discuss eligible interests below. **If you do not have an eligible interest and you lodge a caveat, you may be liable to pay compensation to anyone who suffers financial loss!**

HOW CAN YOU PROTECT YOUR INTERESTS?

Caveats can be beneficial to protect your interests in many circumstances. For example:

- A person who is purchasing a property may lodge a caveat prior to having the title transferred to **protect their interest from a dishonest seller who may be attempting to sell to multiple people**.
- Banks, lenders, and liquidators may be able to lodge caveats to secure their financial interests and **ensure that property is not sold without their prior knowledge or consent**.
- An informal loan such as to family or friends may be formalised by a loan agreement which gives the lender a caveatable interest over the borrower's property in order to **avoid any loss or inability to claim compensation if the relationship breaks down**.
- If two partners financially contribute to a property in partner A's name, partner B may choose to lodge a caveat to signify their interest and ensure the property cannot be sold without their knowledge.

WHAT IS A CAVEATABLE INTEREST?

A caveat can only be registered when the caveator has a caveatable interest. A caveatable interest arises under s 74F of the *Real Property Act 1900* (NSW) (**RPA**) and relates to a party **who has an express legal or equitable interest in land**.

There has been a lot of litigation in relation to what constitutes a caveatable interest. In some circumstances it is clear and in others it is unclear.

WHEN DOES A CAVEATABLE INTEREST ARISE?

DOES ARISE

Examples of parties who may have a caveatable interest include:

1. a person with a **contractual right**;
2. a **lender** who loans money secured over real property;
3. a **purchaser** under a contract of sale;
4. a **charging clause** over real property;
5. a registered **mortgagee**;
6. a liquidator or **receiver** who has **incurred fees realising real property**; and
7. a secured **creditor**.

DOES NOT ARISE

Examples of persons who may not have a caveatable interest include:

1. a person who **owes a debt** or is pursuing a debt;
2. a person who has **improved the property** (e.g., a builder or tradesperson);
3. a **shareholder** of a company;
4. a **beneficiary** of a discretionary trust; and
5. a **liquidator** because of their appointment to the company.

HOW DO I CHALLENGE A CAVEAT?

If a caveat has been lodged but you do not believe that the caveator has an interest, there are two ways to try remove the caveat:

1. An application can be made to the Supreme Court; or
2. A notice can be served under s 74J of the RPA which gives the caveator **21 days to obtain an order from the Supreme Court** extending the operation of the caveat pursuant to s 74K of the The decision to grant an extension is discretionary but **the Court will consider** a number of factors including:
 - whether the caveator's claim has **substance**; and
 - whether the **balance of convenience favours the caveat being extended** (e.g. the caveat is not being used as a blackmailing device, or to bring unwanted pressure upon a registered proprietor).

Generally, if a court is satisfied there is a valid caveatable interest, it will readily grant an extension.

WHAT IF I LODGE A CAVEAT WITHOUT A PROPER BASIS?

Lodging a caveat without a reasonable cause will require the caveator to pay damages for any consequential loss suffered by the registered proprietor, in accordance with s 74P of the RPA. For example, in *Illpalm Pty Ltd v Wilson Hillpalm Pty Ltd v Wilson* [2009] NSWSC 362, auction and advertising costs were recoverable in circumstances where an auction was cancelled due to lodgment of a caveat without reasonable cause.

There is a test which the court applies to determine whether there was reasonable cause to lodge the caveat. The test is whether the caveator had an **honest belief, based upon reasonable grounds**, that he or she had such an interest.

KEY CONTACT



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