

This article discusses caveats and how a caveat registered with the Land Registry Services (LRS) can protect the caveator's interest in a property.



A. WHAT IS A CAVEAT?

Caveats are used to protect unregistered interests in land. A caveat does not register the interest per se but prevents the registration of other interests which would then defeat your unregistered interest. This is why caveats are often likened to injunctions. Caveats are particularly important for people who have an interest in land but are unable to obtain the certificate of title, as you do not need the property's certificate of title to lodge a caveat upon it.

Caveats can only be lodged in relation to interests in land. This means that you cannot caveat personal debts, but you can caveat a mortgage or an easement. Caveating will not change the nature of the interest caveated but will give the 'owner of that interest' (the caveator) a chance to argue their claim.

B. WHY DO I NEED TO LODGE A CAVEAT?

It can be a very costly and complex process to enforce an unregistered mortgage. This would require you to seek orders from the NSW Supreme Court Equity Division. If X sells to Y and Y registers the transfer, it will be difficult to enforce the mortgage against Y, even if Y knew about your agreement with X beforehand. Consequently, it is much harder to enforce an unregistered mortgage than a registered mortgage if the borrower defaults on their loan. On the other hand, the lodgment process for caveats is much more straightforward and faster. This would ensure sure that your interest on the property is made known and is somewhat protected at the LRS.

C. WRONGFUL LODGMENT OF CAVEATS

You must be careful when deciding whether to lodge a caveat. If you caveat wrongly and this causes someone to suffer loss, you may be liable.¹ Wrongful caveats can cause people to suffer financial loss from:

- Reduced sale prices in a falling market;
- Additional interest payable under a mortgage over the land for the time that the caveat delayed completion of a sale; or
- Delayed sales causing the vendor to not receive purchase monies until much later.

The *Real Property Act* states that you will be liable if you lodged a caveat without reasonable cause.² You cannot caveat simply to inconvenience or pressure the proprietor,³ or to infringe someone else's rights.⁴ To have reasonable cause, you must have believed honestly and on reasonable grounds that you had the interest claimed.⁵

¹ *Lee v Ross (No. 2)* [2003] NSWSC 507.

² *Real Property Act 1900* (NSW) s 74P.

³ *Dykstra v Dykstra* (1991) 22 NSWLR 556.

⁴ *Wildshut v Borg Warner Acceptance Corporation (Aust) Ltd* (1987) ANZ Conv Rep 283

⁵ *Bedford Properties Pty Ltd v Surgo Pty Ltd* [1981] 1.

D. HOW DO I LODGE A CAVEAT?

As of 1 July 2018, caveats affecting the whole of the land must be lodged electronically (through PEXA – Property Exchange Australia).

In some circumstances, caveats are excluded from electronic lodgement or this requirement is waived by the Registrar General. For example, where the caveat is for part of the land or if multiple caveators are involved.

The Registrar General will notify the registered proprietor that the caveat has been lodged so that they can prepare a response and seek legal advice as needed.

E. HOW DO I REMOVE A CAVEAT?

If you are the registered proprietor and a caveat has been lodged against your land, there are three main ways that it can be removed:

- Withdrawal by the caveator;
- Lapsing of the caveat; or
- Obtaining a court order and submitting a request to the LRS.

The registered proprietor can apply to have the caveat lapsed, as can a third party who wishes to register a dealing but is prevented from doing so by the caveat.

You can make an Application for Preparation of a Lapsing Notice and lodge it in person at the LRS office. The caveator must obtain an order of the Supreme Court of NSW to extend the caveat and lodge it with the LRS within 21 days of receiving the Notice. If they fail to do so, the caveat will lapse.

F. CAN I STILL LODGE A DEALING IF THERE IS A CAVEAT ON MY LAND?

You can still enter and lodge some dealings if there is a caveat on your land, but you will need the caveator's consent. Depending on the circumstances, the caveator may consent to the dealings. For example, a caveator claiming an equitable mortgage might not object to you granting a lease over the property because you would still be the registered proprietor, and the lease may help you accumulate the funds to repay the mortgage.

You must attach the caveator's consent to the dealing when you register it. The LRS specifies that the consent must:

- Be written and signed by the caveator;
- State the name of the other party or parties to the dealing;
- Outline the caveator's full name and the caveat's registered number; and
- State the type of dealing, for example whether it is a mortgage, a lease etc.

Lodging a caveat helps to protect your unregistered interests in land.

Caveats can also assist you to make informed decisions when entering into land dealings, because they allow you to check if the land is encumbered by third party interests.

Comasters Law Firm can help you lodge or remove caveats and can assist you with land dealings.

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