

Securing Your Debt in the Sunshine State: A Beginner's Guide to Caveats in Queensland

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Summary

When caveating real property in Queensland to secure a debt, it is important to remember that unlike the other States and Territories (excluding NT), caveats securing a charge lapse after three months.

To avoid lapsing, the Queensland system places the onus on the Caveator to bring proceedings claiming their interest within that three month period. Below we'll give you a timely reminder about the issues those in trade credit and debt collection should be conscious of when operating in Queensland.

The Three Month Lapsing Rule

A caveat is a statutory instrument enabling persons claiming unregistered or equitable interests in land to record their interest on title and preventing the registration of subsequent interests on the title¹.

In order to register a caveat, a person must have a caveatable interest in the land.

For the majority of creditors, a caveatable interest will be in the form of a charge arising out of a charging clause in a contract and/or guarantee. The charging clause typically charges all of the debtor's right, title and interest in all present and acquired property in the debtor's name to secure the payment of any and all debts that may become due and payable under the contract and/or guarantee.

It is important to note that unlike a registered mortgage, a caveat does not secure the land on which it is registered.

The only effect of a caveat is to prevent the registration of subsequent dealings. A caveat does not in itself give any other substantive rights, e.g a power of sale or foreclosure. It is sometimes said that a caveat is a "shield" and not a "sword".

In Queensland, caveats recording the interest of an unregistered mortgagee or charge automatically lapse after three months².

Lapsing can be avoided by the Caveator commencing proceedings in a "court of competent jurisdiction" (see below) to establish the interest claimed in the caveat and notifying the Department of Natural Resources and Mines ('DNRM') within three months of the caveat being lodged. This time limit is strictly enforced in Queensland and it is not merely enough to start proceedings, unless the DNRM is informed in time, your caveat will lapse. It is therefore crucial to remain conscious of your three month window and commence proceedings well before the end of the three months.

Second Chances can be Expensive

If a caveat ('the original caveat') is lodged in relation to an interest, a further caveat by the same caveator can never be lodged on the same, or substantially the same, grounds as the grounds stated in the original caveat unless the leave of a court of competent jurisdiction to lodge the further caveat has been granted.³

In exercising its discretion on whether or not to grant leave,⁴ the considerations on which the Court may take into account include whether:

- a) there is a serious question to be tried;⁵
- b) the owner of the land would be unduly prejudiced;⁶

- c) there is satisfactory explanation for the lapse;⁷
- d) there is a satisfactory explanation for any delay in making the application for leave;⁸ and
- e) the balance of convenience favours the lodgement of the second caveat.⁹

The Court gives the most weight to considerations (a) and (b).¹⁰ As you can see, leave of the Court is no certainty. If proceedings become contested the failure to adhere to your three month deadline can be an expensive and irreversible mistake.

What about the Caveatee's Consent?

Ordinarily, the consent of the registered owner renders a caveat non-lapsing. However, consent cannot be given retrospectively; and it must be lodged at the same time as the caveat.¹¹ Remember that consent itself does not create a caveatable interest.¹²

That being said, a caveat may only be lodged by an equitable mortgagee on the basis that the lapsing provisions apply.¹³

Caveating a Guarantor Director when the Company Debtor is in Administration

Section 440J of the *Corporations Act 2001* requires that when a company is in Administration that the leave of the Court be sought to begin proceedings against a director in relation to a guarantee given in favour of the company. The Court has previously held that proceedings seeking to extend a caveat do fall under the remit of section 440J.¹⁴ While it may be possible to obtain leave retrospectively,¹⁵ the prudent approach is to extend your caveat prior to Administration. If you are aware of an impending Administration act quickly to protect your interests.

When a Caveatee is Bankrupt

Section 58 of the *Bankruptcy Act 1966* (Cth) states that after a debtor has become bankrupt the leave of the Federal Circuit Court or the Federal Court is required to commence any legal proceeding in respect of a

provable debt. It has previously been held by the Court that proceedings seeking to extend a caveat falls within the remit of this section.¹⁶ To save the time and expense of seeking leave, act quickly to extend your caveat if bankruptcy is foreshadowed.

Caveatee Notice

A caveatee may serve on a caveator a notice requiring the caveator to start a proceeding in a court of competent jurisdiction to establish the interest claimed under the caveat.¹⁷ Once served, the caveator has only fourteen days to bring proceedings and once again this time limit is strictly enforced. If you are served with a notice make sure to seek legal advice as a matter of urgency to protect your security caveat.

What is a Court of Competent Jurisdiction?

To satisfy Queensland's requirements, a caveator will have to start proceedings in any one of the superior courts or, depending on the circumstances, the value of the property and the nature of the interest claimed, the District Court.¹⁸

1 Sections 122 and 124 of the Land Title Act 1994

2 Sections 122(2) and 126 of the Land Title Act 1994

3 Section 129 of the Land Title Act 1994 and s 389J of the Land Act 1994

4 s129 Land Title Act 1994 (QLD)

5 Re McKean's Caveat [1988] 1 QdR 524, cited in Landlush Pty Ltd v Rutherford [2002] QSC 219 at [18]

6 Landlush Pty Ltd v Rutherford [2002] QSC 219 at [18]

7 Ibid.

8 Ibid.

9 Re McKean's Caveat [1988] 1 QdR 524, cited in Landlush Pty Ltd v Rutherford [2002] QSC 219 at [18]

10 His Honour Chesterman J in Oversea-Chinese Banking Corporation Ltd v Becker & Ors [2003] QSC 301 at [19] – [21]

11 s126(1)(b) of the Land Title Act 1994 (QLD)

12 Queensland Estates Pty Ltd v Collas [1971] Qd R 75

13 s122(2) of the Land Title Act 1994 (QLD)

14 Waco Kwikform Ltd v Jabbour [2010] NSWSC 1379

15 Coates Hire Operations Pty Ltd v McNaughton (2006) 24 ACLC 765; [2006] NSWSC 841 at [5]

16 Mango Media Pty Ltd v Velingos (2008) 216 FLR 176; [2008] NSWSC 202

17 s 126(2) of the Land Title Act 1994 (QLD)

18 Section 66 of the District Court Act 1967 (Qld) allows proceedings in that court if the land is less than \$750,000 in value.

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