

Does a caveat prevent registration of a Transfer by a mortgagee exercising Power of Sale?



Info Sheet

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Section 74H(5) of the Real Property Act 1900 (the Act) sets out a number of types of dealings with land that may be registered despite the presence of a caveat on title, provided that the caveat has not been amended specifically to block the dealing. Specifically relevant to the sale by a mortgagee are paragraphs (g) and (i) of section 74H(5):

“74H(5) Except in so far as it otherwise specifies, a caveat lodged under section 74F to protect a particular legal or equitable estate or interest in land, or a particular right arising out of a restrictive covenant, does not prohibit the Registrar General from recording in the Register with respect to the same land:

(g) in relation to a mortgage, charge or covenant charge recorded or lodged in registrable form before the lodgment of the caveat - a dealing effected by the mortgagee, chargee or covenant chargee in the exercise of a power of sale or other power or a right conferred by the mortgage, charge or covenant charge or by or under law,

(i) in relation to a mortgage, charge, covenant charge or lease to the recording of which the caveator has consented or in respect of the recording of which the caveat has lapsed - a dealing effected by the mortgagee, chargee, covenant chargee or lessee, including a dealing effected in the exercise of a power of sale or other power or right conferred by the mortgage, charge,

covenant charge or lease or by or under law, ...”.

The paragraph excerpts above are two of a number of exemptions in section 74H(5) of the Act enabling specified dealing types to be registered despite the existence of a caveat on the Torrens Title Register.

With regard to these exemptions, NSW Land Registry Services' (NSW LRS) current (at time of publication) practice in relation to transfers by a mortgagee exercising power of sale of land affected by a caveat is outlined below.

Later caveat by an unregistered mortgagee

Provided that the caveat has not been modified to expressly prevent the exercise of the mortgagee's rights under the mortgage; a transfer by a mortgagee exercising power of sale will be registered and the caveat removed from the title without application or the payment of a fee. This is on the basis that the registration of the transfer vests the estate of the mortgagor in the transferee freed and discharged from the particular mortgage and any subsequent mortgage (see section 59 of the Act).

Prior caveat by an unregistered mortgagee

Where a prior caveat by an unregistered mortgagee has been partially lapsed (to allow the registration of the mortgage under which the power of sale is exercised) or the caveator consented to such mortgage, the transfer

under power of sale will be registered pursuant to section 74H(5)(i) of the Act. The caveat will also be removed from the title without fee on the basis that the caveator's claim has ceased to exist.

Caveat pursuant to a statutory first charge

The transfer may be registered where the interest claimed in the caveat relates to a statutory first charge (e.g. for unpaid stamp duty or land tax). However, the caveat will remain on title and continue to be effective against any other dealing coming within its prohibition.

If registration of any accompanying dealing (e.g. a mortgage) is prohibited by the caveat, the transfer and accompanying dealing will not be registered until either:

- the caveat is disposed of
- the consent of the caveator is provided
- the accompanying dealing is withdrawn

This is on the basis that the rights of the person acquiring an interest under the accompanying dealing may be prejudiced if the dealing is under requisition and subsequently rejected and only the transfer is registered.

Other caveats

The Registrar General will not cancel the recording of any other caveat unless satisfied that the interest claimed by the caveator has ceased to exist after the registration of a transfer by the mortgagee exercising power of sale.

If the caveat prevents the registration of a dealing lodged with the transfer, neither dealing will be registered until either:

1. the caveat is disposed of
2. the consent of the caveator is provided
3. or the accompanying dealing is withdrawn.

Where a purchaser does not choose to rely on section 74H(5)(g) and (i) of the Act, the

mortgagee may wish to utilise the lapsing provisions of section 74J to dispose of the caveat by application on the approved form. It is relevant here to note the observation of Young J in *National Australia Bank Limited v Bridge Wholesale Acceptance Corporation (Australia) Limited* in (1990) NSW Conv. R. 55-555 at 59098 that the terms of section 74H(5)(g) do not affect the duty of a vendor to remove all caveats from the title regardless of whether the caveats are good or bad.

Recommendations

It is recommended that where a mortgagee is selling land that is affected by a caveat, solicitors and others acting in the matter carefully read the caveats and resolve any issues as early as possible in the process to avoid delay and additional costs.

A withdrawal of caveat should be obtained where there is doubt as to whether a caveat is one which comes within section 74H(5)(g) of the Act. NSW LRS does not provide confirmation of whether caveats will be lapsed pursuant to section 59 of the Act.

The above does not apply to a mortgagee exercising Power of Sale over a Water Access Licence the provisions of the Water Management Act 2000 apply.

Further Information

Further information can be obtained by visiting our website: www.nswlrs.com.au.

Or contact the NSW LRS Customer Service Centre on **T: (02) 8776 3575** or email GeneralEnquiry@nswlrs.com.au.

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