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## How effective is your caveat really?

June 26, 2017

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In one of JHK Legal's recent articles entitled "Can I lodge a caveat on real property if someone owes me money?", Alicia Auden, Associate Director covers the following topics:

- (a) the legal requirements necessary to establish a caveatable interest;
- (b) what happens once a caveat is lodged and registered on title; and
- (c) issuing proceedings and obtaining judgment.



You can read this article by clicking here <http://www.jhklegal.com.au/can-i-lodge-a-caveat-on-real-property-if-someone-owes-me-money/>

### ***What if you want to enforce the judgment and sell the property?***

Two important points must first be considered:

1. The priority your caveat ranks on the title over the other registered encumbrances; and
2. The equity in the property.

A registered mortgage will, in most circumstances, hold priority over any caveats that are registered on title. This means that even if you enforce the judgment and sell the property by way of seizure and sale; if the equity in the property is not enough to satisfy the mortgage, you may not receive any funds from the sale.

In circumstances where there *is* enough equity in the property to pay out a caveators, it will be necessary to determine the priority in which the funds from the sale of the property are distributed to the caveators (in circumstances where there is more than one).

In *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)*(1965) 113 CLR 265, Kitto J stated that:

“If the merits are equal, priority in time of creation is considered to give the better equity”.

Kitto J established the precedent that priority is dependent on the date of charge, being the date the contractual agreement is created which gives rise to the caveatable interest. For example, a contractual agreement signed on 1 November 2015 will have priority over a contractual agreement signed on 1 December 2015 (assuming both contractual agreements have binding charging clauses, valid caveats and commenced proceedings in the proper jurisdiction).

If all caveators subject to a sale of a property can agree to the priority (and the amount each party is to be paid), the proceeds of sale are typically dealt with by way of a consent order or a deed. If not, it may be the case that the caveators will need to file an application in the proper jurisdiction seeking judicial guidance.

### ***What if a mortgagee sells a property on which you have a caveat?***

S 88 of the Property Law Act 1974 (Qld) states that:

*“(1) Subject to this section, the money arising from sale, and which is in fact received by the mortgagee, shall be held by the mortgagee in trust to be applied by the mortgagee—*

*(a) firstly, in payment of all costs, charges and expenses properly incurred by the mortgagee as incident to the sale, or any attempted sale, or otherwise; and*

*(b) secondly, in discharge of the mortgage money, interest and costs, and other money (if any) due under the mortgage; and*

*(c) thirdly, in payment of any subsequent mortgages or encumbrances;*

*and the residue (if any) of the money so received shall be paid to the person entitled to receive or entitled to give receipts for the proceeds of sale of the mortgaged property.*

*(2) The money that is in fact received by a mortgagee arising from sale in the exercise of the power conferred under the Mineral Resources Act must, subject to subsection (1)(a) and (b), be dealt with as provided under that Act.*

*(3) The proceeds of sale arising from a sale by a mortgagee in the exercise of the power conferred by the Land Act shall be disposed of as provided in that Act.”*

The Property Law Act 1974 (Qld) enables a mortgagee to satisfy the amount owed under its mortgage before any other secured parties are able to assert a claim to the sale funds. This includes all costs, charges and expenses that were properly incurred by the mortgagee from the sale of the property.

It also provides a mortgagee with the power to sell through any caveats that might be on the title; no release is required from a caveator(s) at settlement. The surplus funds (if any) are then usually paid into court for any other secured creditor to assert their claim and priority over.

In the event where there is more than one mortgage on the title, it is common for the other mortgagee(s) to be paid out by the first ranking mortgagee prior to the surplus funds being paid into court.

### ***Something to keep in mind***

Bankruptcy does not usually interfere with the rights of a secured creditor. As such, if the registered owner of a property against which you have registered a caveat becomes a bankrupt, it may be the case that as a secured creditor, your interest in the property remains separated from the bankruptcy and you may still realise your interest.

Be mindful that just because someone has a caveat on title does not mean that they have a valid and legal caveatable interest in that property.

If you wish to know more about your rights under to a caveat that you have already lodged or have a charging clause in a contract that you wish to know more about; JHK Legal are happy to advise you on your legal rights and assist you with any steps you may wish to take.