



THINKING OF LODGING A CAVEAT? A REMINDER REGARDING IMPROPER LODGEMENT OF CAVEATS

A recent NSW Supreme Court case provides a timely reminder regarding the importance of ensuring that anyone lodging a caveat must have an estate or interest in the subject land before lodging a caveat.

Summary of Facts

A husband and wife were involved in a matrimonial dispute. The wife sought to gain a tactical advantage during negotiations by trying to lodge a caveat over the husband's land. In NSW (as is generally now the case in WA) caveats must be lodged electronically and the wife was not registered electronically to lodge a caveat, she engaged the services of a settlement agent.

The wife told the settlement agent that the husband owed her company money pursuant to a loan agreement. When obtaining instructions from the wife, the settlement agent did not:

- ask to see a copy of the loan agreement;
- give any advice about caveats; or
- advise the wife that a caveator must have an estate or interest in the land over which the caveat is lodged.

The settlement agent simply proceeded to lodge the caveat over the husband's land in accordance with the wife's instructions.

When the settlement agent was lodging the caveat, the settlement agent was required to expressly confirm that the caveator, to the best of the settlement agent's knowledge, had a good and valid claim. The settlement agent was also required to provide two certifications that it had:

1. undertaken reasonable steps to ensure that the caveat was correct; and
2. complied with relevant legislation and that it had retained evidence supporting the caveat.



The wife did not have any estate or interest in the husband's land, in fact, there was no written loan agreement between the husband and the wife's company or anything which gave the wife's company any interest in the husband's land.

Decision

The Court held that the wife's company did not have an estate or interest in the land and ordered that the caveat be removed from the title.

In this case, the settlement agent was required to attend Court and provide an explanation for lodging the caveat.

Takeaway

In the new electronic system where lawyers and settlement agents certify compliance, lawyers and settlement agents are essentially gatekeepers of the system and must ensure that their clients have an estate or interest in land before lodging caveats.

A failure to ensure that clients have an estate or interest in the subject land before lodging a caveat may result in the lawyer or settlement agent having to pay the legal costs of the innocent party for the removal of the caveat and compensation for any loss occasioned by the caveat. Worse still, this could potentially result in the lawyer or settlement agent facing professional disciplinary proceedings.

This case clearly illustrates that with the move to electronic conveyancing and the shift of responsibility from the Land Titles Office to lawyers and settlement agents, it is not sufficient/satisfactory for lawyers or settlement agents to blindly lodge caveats on their client's instructions.

Guirgis v JEA Developments Pty Ltd [2019] NSWC 164

If you have any questions or require any advice in relation to property issues, please contact Peter Broun (Director) of Murfett Legal's property & real estate team.

The above is a summary for general information purposes only. It is not intended to be comprehensive or constitute legal advice. You should seek formal legal or other professional advice in relation to your particular circumstances before relying on the content of this article.

For further information or assistance contact Murfett Legal on +61 8 9388 3100.

Author: [Peter Broun](#) (Director: Property & Real Estate)

Email: peter.broun@murfett.com.au

Murfett Legal is a leading law firm in WA, providing services in litigation, corporate and commercial, employment and workplace relations, insolvency, debt collection, business restructuring, Wills & estates, property, leasing, settlements, liquor licensing and intellectual property.