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 to specifically preclude 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 paragraphs reproduced above provide two of a number of exemptions in section 74H (5) of the Act enabling specified dealing types to be registered notwithstanding the existence of a caveat on the Register.

Having regard to these exemptions, Land and Property Information’s (LPI) practice in relation to transfers under power of sale of land affected by a caveat is as follows.

Later caveat by an unregistered mortgagee
Provided that the caveat does not expressly prohibit the exercise of the mortgagee’s rights under the mortgage, a transfer under 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 s.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
Where the interest claimed in the caveat relates to a statutory first charge, (e.g. for unpaid stamp duty or land tax), the transfer may be registered. However, the caveat will remain on title and continue to be effective against any other dealing coming within its prohibition, including any dealings accompanying the transfer under power of sale (for example a mortgage).

If registration of any accompanying dealing is prohibited by the caveat, the transfer, as well as the accompanying dealing, will not be registered until the caveat is disposed of or the consent of the caveator is furnished. This is on the basis that the rights of the person acquiring an interest under the accompanying instrument may be prejudiced if the instrument is under requisition and subsequently rejected, and the transfer alone 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.

Again, should the caveat prevent the registration of a dealing lodged with the transfer, neither instrument will be registered until the caveat is disposed of or the consent of the caveator is furnished.

In any case where a purchaser does not choose to rely on section 74H (5) (g) and (i) of the Act, the mortgagee may wish to utilise section 74J to dispose of the caveat by application on the approved form (08LX).

In this regard, it is relevant 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.

Requests for confirmation that specific caveats will be removed upon registration of a Transfer under Power of Sale
It will continue to be LPI’s practice to remove caveats in specific circumstances covered by s.74H (5) (g) and (i), that is where the caveat protects an unregistered mortgage or charge and has not been altered to specifically prohibit a transfer under power of sale.

Where the caveats in question are not caveats that come within s.74H (5) (g) and (i) or are caveats that specifically prohibit a transfer under power of sale, they will not be removed.

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 deal with any issues as early in the process as practicable in order to avoid delay and additional costs.

Where there is legitimate doubt as to whether a caveat is one which comes within s.74H (5) (g) and (i), mortgagees or their advisers may contact LPI’s Legal Services telephone enquiry service between the hours 10.30am to 12 noon and 2.30pm to 4pm daily on T: 02 9228 6726. Any such requests for advice must be made well in advance of a scheduled settlement as LPI cannot guarantee a response within an urgent timeframe.