Lodged a Caveat, what's next?

By Christopher Yam*

It is common these days for there to be a charging clause in a credit or finance agreement/guarantee.

A credit provider or financier will rely on the charging clause to lodge a caveat over land owned by the debtor/guarantor when a debtor is in default.

Once a caveat is lodged, what's next?

A credit provider or financier who has a charging clause in a credit or finance agreement/guarantee:

1. is a secured creditor of the debtor/guarantor;
2. has security over land owned by the debtor/guarantor in the form of an equitable charge.

A credit provider or financier can enforce an equitable charge over land owned by the debtor/guarantor by applying to a court for the land to be sold by:

1. the creditor provider;
2. a receiver or receivers.

This is an effective way of recovering moneys owing to the credit provider.

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Scenario 1

Charging clause in a guarantee.

- Financier lodged a caveat against land owned by the guarantor.
- Guarantor became bankrupt.
- Financier enforced equitable charge over land owned by the guarantor by applying to a court for the land to be sold by the financier.
- Financier sold the land by auction. The land was sold at the auction for $860,000.00, $60,000.00 above the market value of the land.
- Financier was paid in full (debt + interest + costs on a full indemnity basis) at the settlement of the contract of sale of the land.
- The sale of the land generated surplus net proceeds in the sum of $128,018.30 (Surplus). Financier paid the Surplus to the bankruptcy trustee of the guarantor for the benefit of unsecured creditors of the guarantor.

Scenario 2

Charging clause in finance agreement.

- Financier lodged caveats against 3 parcels of land, one owned by the debtor solely and the other two owned by the debtor jointly with the debtor's spouse (Properties).
- Financier enforced equitable charge over the Properties by applying to a court for the Properties to be sold by the financier and receivers.
- Court made orders that the Properties be sold by the financier and receivers.
- The debtor entered into a payment arrangement with the financier to pay the amount owing to the financier together with interest and costs on a full indemnity basis to avoid the Properties being sold by the financier and receivers. ◇

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