

Lender's Power of Attorney

**by
Paul Agnew**

State Manager – QLD

National Compliance & Risk Management Director



Lender using its Power of Attorney

A majority of modern day mortgages contain a power of attorney clause granted in favour of the mortgagee/lender (“**POA Clause**”). Such clauses are normally drafted in wide terms and intend to empower a lender to do anything which the borrower could do in order to give full effect to the security in place.

A recent NSW case of *Integrated Lending Pty Ltd v Lion International Holdings Pty Ltd* [2005] NSWSC 1268 interestingly considered the scope of a lender’s power that was exercised under a POA Clause.

The facts

The lender lent funds at a high interest rate to the borrower. Two forms of security were taken out. First, the borrower granted to the lender a mortgage over a real property owned by the borrower. The mortgage contained a POA Clause but it was not registered. Secondly, the lender lodged a caveat over the property.

The caveat was allowed to lapse. Accordingly the lender needed to lodge a second caveat in order to protect its unregistered mortgage.

However, various provisions of the Real Property Act 1900 (NSW) stated that if a caveat lapses, a second caveat cannot be lodged by the same person over the same property without a court order or the consent of the owner of the property.

The lender lodged a second caveat over the property by purporting to have the consent of the borrower to this second caveat pursuant to the POA Clause. The borrower challenged the validity of this second caveat, arguing that the lender had to have actual consent from the borrower.

The decision

The Judge noted that a POA Clause may be "read down" in certain circumstances, particularly if the wording of the POA Clause is restricted by the particular purpose of the mortgage.

Nonetheless, the Judge decided that the lender was permitted to consent to the second caveat pursuant to its powers under the POA Clause, and that the second caveat was valid. The Judge was influenced by the wide wording of the POA Clause and the presence of other provisions in the mortgage which gave the lender very wide powers to do nearly anything in order to protect and perfect the title of its mortgage.

The case is an illustration of a full and wide scope being given to a lender’s power granted by a POA Clause. However, a lender should always perfect its security by registering its mortgage and if a caveat is lodged to protect an interest in an unregistered mortgage then the caveat should be perfected in accordance with the relevant State’s legislative requirements (which may include: instituting proceedings, mortgagor’s consent, etc...)

Prevention by perfection of security is always the best cure.



Paul Agnew
Mortgage Settlements Australia

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