LX. Folder GO: Goh L.C: Failure to Lodge A Caveat Under the Torrens System.

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LL.B. (HONS)

L. C. GOH - FAILURE TO LODGE A CAREAT

This paper is a good summary of the law, and adequate research has been done.

Presentation, style and accuracy are satisfactory.

There is little that is provocative or indeed original.

It could be considered for publication but would not have a high priority.

I would mark it at 63.

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1/10/73

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TITLE : FAILURE TO LODGE A CAVEAT UNDER THE TORRENS SYSTEM.

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What is a Caveat ?

Under the Land Transfer Act 1952, trusts and other equitable interests and estates in land are kept off[1] the register. While s.41(1) appears to deny any efficacy to unregistered instruments under the system of registration of titles to land the Courts have recognised them as being capable of creating interests enforceable in equity. Griffith C.J. in Butler v. Fairclough[2] stated that "the Courts will recognise equitable estates and rights except so far as they are precluded from doing so by the Statutes. This recognition is indeed, the foundation of the scheme of caveats ..." For the purpose of protecting the holder of an interest that cannot be, or is not, registered, section 137 of the Act provides that :-

"Any person -

(a) Claiming to be entitled to or to be beneficially interested in any land, estate, or interest under this Act by virtue of any unregistered agreement or other instrument or transmission, or of any trust expressed or implied, or otherwise howsoever; or

(b) Transferring any estate or interest under this Act to any person to be held in trust -

may at any time lodge with the Registrar a caveat in Form N in the Second Schedule of this Act."

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(1) S.128 Land Transfer Act 1952; Wolfson v. Registrar - General (1934) 51 C.L.R. 300, 308.

(2) (1917) 23 C.L.R. 78,91 ; approved by the Privy Council in Abigail v. Lapin [1934] A.C. 491.

As stated by John Baalman[3] "the Torrens System replaces the equitable doctrine of notice with the statutory doctrine of notification ... In the doctrine of notification caveats play an important part. The owner of an equity who would be protected under the general law by the doctrine of notice must, under the Torrens System, protect himself by having his interest notified on the land-register", or by other acceptable means in conveyancing practice.[4]

A caveat is lodged and entered on the register but it is not deemed to be registered. As a notice[5] or warning to the registered proprietor and those who might deal with him of an equitable claim it creates no new rights but merely protects existing ones[6]. It merely suspends or freezes the process of registration. Lord Wright, in delivering the advice of their Lordships of the Privy Council in Abigail v. Lapin said at page 500: "... the effect of the caveat is that no instrument will be registered while the caveat is in force affecting the land, estate or interest until after a certain notice to the person lodging the caveat." Its primary function or purpose is "to keep the property in status quo until the court has had an opportunity of discovering what are the rights of the parties."[7]

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(3) The Singapore Torrens System 193; approved by the Federal Court of Malaysia in Nanyang Development Shd. Bhd. v. How Swee Poh [1970] M.L.J. 145, 148.

(4) J. & H. Just (Holdings) Pty.Ltd. v. Bank of New South Wales (1971) 45 A.L.J.R. 625

(5) c.f. Barwick C.J. in Just's case (Supra) at 628 where he stated: "the purpose of the caveat is protective : it is not to give notice."

(6) Canadian Pacific Railway v. District Registrar of Dauphin Land Titles Office (1956) 4 D.L.R. (2nd) 518; Ong Chat Pang v. Valliappa Chettiar [1971] M.L.J. 224,230.

(7) Re Hitchock (1900) W.N. 62,63 per Owen J.

There are two classes of caveats under the Act, viz :

(1) Caveats by the Registrar to protect persons under disability, to present fraud or improper dealing, to prohibit error[8] and to protect beneficiaries when the trustees have no power to sell.[9]

(2) Caveats by private persons against :-

(a) the bringing of land under the Act,[10]

(b) dealings in land,[11]

(c) application for prescriptive titles to land,[12] and

(d) application for title to land over access ways.[13]

A caveat is the creature of statute and may be lodged only by a person upon whom a right to lodge it has been conferred by the statute. To support a caveat the caveator must be entitled to or beneficially interested in the land itself.[14] The equitable estate or interest must be one capable or capable in due course of being converted into a legal estate or interest.[15] Thus a mere debt,[16] a contractual licence,[17] and mere proprietorship[18] have been held not to be caveatable interests, while a transfer,[19] a mortgage,[20] an option to purchase,[21] the interest of beneficiaries under a trust[22] and easements[23] over land have been considered to be caveatable interests.[24]

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(8) S.211(d) Land Transfer Act 1952

(9) S.206 Land Transfer Act 1952

(10) S.136 Land Transfer Act 1952

(11) S.137 Land Transfer Act 1952. This paper is limited to caveats under this section.

(12) Ss.8-12 Land Transfer Amendment Act 1963

(13) S.2 Land Transfer Amendment Act 1966

(14) Guardian Trust and Executors Co. of N.Z. Ltd. v. Hall [1938] N.Z.L.R. 1020, 1027; In re Savage's Caveat [1956] N.Z.L.R. 118.

(15) Staples v. Corby (1900) 19 N.Z.L.R. 517,536

(16) In re Wossidlo (1934) 52 C.L.R. 301

(17) Miller v. Minister of Mines [1963] N.Z.L.R. 560

In Canadian Pacific Railways v. District Registrar of Dauphin Land Titles Office,[25] it was held that a Registrar has a duty, not a discretion to file a caveat which was proper in form[26] since, as Tritschler J pointed out, "caveats are to be used for the protection of alleged as well as proved interests." Thus, immediately upon the lodgement of a caveat in Form N, the Registrar is required by law to serve notice[27] on the registered proprietor and thereupon no entry may be made on the register which has the effect of charging or transferring or otherwise affecting the estate or interest protected by the caveat[28] until it has been removed,[29] or withdrawn,[30] or allowed to lapse.[31] But the "existence of a caveat does not prevent the entry of such instrument as other caveats, writs or orders of Court directing sale, which do not in themselves pass an estate or interest in land."[32] Nor does it prevent registration of a lien[33] under the Wages and Contractors' Liens Act 1939.

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(18) Re An Application by Haupiri Courts Ltd (No.2) [1969] N.Z.L.R. 352. To the contrary view, see E.C. Adams Land Transfer Act (2nd Ed.) para 396. See also F.M. Brookfield, "Caveats : The Haupiri Courts Cases" (1969(3 N.Z.U.L.R. 455.

(19) In re Dillon [1939] N.Z.L.R. 550

(20) Reeves v. Steed 13 D.L.R. 422; S.2 Land Transfer Act 1952

(21) Moreland v. Hales (1910) 30 N.Z.L.R. 285; Achatz v. De Reuver (1971) S.A.S.R. 240

(22) In re Peycher's Caveat [1954] N.Z.L.R. 285

(23) Wellington City Council v. Public Trustee [1921] N.Z.L.R. 1086

(24) For a fuller account see Adams Land Transfer Act (2nd Ed.) paras 396-402; Hogg, Registration of Title to Land Throughout The Empire pp. 172-190; Francis Torrens title in Australasia (vol 1) pp. 313-360; Das, The Torrens System in Malaya pp. 350-356; Robinson "Caveatable Interests - their Nature and Priority" (1970) 44 A.L.J. 351.

(25) (1956) 4 D.L.R. (2d) 518; Chin Cheng Hong v. Hameed [1954] M.L.J. 169, 170.

(26) The particulars regarding the nature of the estate and interest claimed must be stated with sufficient certainty: S.138 Land Transfer Act 1952, and must state how it is derived from the registered proprietor : Reg.24 of the Land Transfer Regulations 1966.

(27) S.142 Land Transfer Act 1952

(28) S.141 Land Transfer Act 1952

(29) S.143 Land Transfer Act 1952

(30) S.147 Land Transfer Act 1952

(31) S.145 Land Transfer Act 1952

(32) Baalman and Well's, Land Titles Office Practice (3rd Ed) 42. But not all orders may prevail over a caveat. Thus, in Karruppiah Chettiar v. Subramaniam (1971) 2 M.L.J. 116, the Federal Court of Malaysia set aside a prohibitory order, obtained by a judgment creditor after a purchaser had lodged a caveat, as having no effect against the caveat. The Court adopted the view of Lord Wilberforce in Chung Kiaw Bank v. United Overseas Bank Ltd [1970] 1 M.L.J. 185,186 p.c. that "the judgment

creditor can only take whatever interest the debtor has" and nothing more. On the contention that a caveat was no bar to a prohibitory order, Ong C.J. stated at page 118 that "it must depend in each particular case on the caveator's interest". As the debtor had parted with his beneficial interest in the land to the purchase, there was nothing which could be put up for sale. Similarly in Firth Concrete Industries Ltd v. Duncan [1973] N.Z.L.R. 188 it was held that a charging order against land is subject to all lien and equities created over the land prior to its date of registration. It is clear that had the purchaser lodged a caveat he would equally have been protected.

(33) Pollock v. Miramar North Building, Deposit and Mortgage Co. Ltd. (1910) 29 N.Z.L.R. 1014,1018. As to the nature of liens, see articles by G. Cain : "The Liens' Act" [1962] N.Z.L.J. 248 and "Farrier - Waimak In the Privy Council" [1964] N.Z.L.J. 495.

Effect on Equitable Priorities

(I) It is trite law that lodging a caveat does not create any new rights in the caveator to support his claim as it stood before lodgment. "It is a mere preventive proceedings" declared Prendergast C.J. in Kissling v. Mitchelson.[34] As between the equitable claimant and the registered proprietor the latter has in the absence of actual fraud an indefeasible title[35] under S.62 of the Land Transfer Act 1952 and prevails over the equitable interest. The Privy Council in Farrier - Waimak v. Bank of New Zealand[36] has restored confidence in the simplicity and efficacy of the register when it stated : "Their Lordships ... do not see how any unregistered encumbrancer can take priority over ... a registered interest without doing complete violence to the Torrens System of registration."

(II) Where the contest is between two competing equitable interests prima facie the first in time, all other things being equal, prevails.[37] But there are exceptions to the rule. The prior equity must step down where the holder is fraudulent. Negligence on the part of the prior claimant may also postpone his priority. Griffith C.J. in Butler v. Fairclough[38] said : "the claimant who is first in time may lose priority by any act or omission which had or might have had the effect of inducing a claimant later in time to act to his prejudice." The act or omission may amount to negligence where, in the absence of any other precaution, the prior claimant fails to lodge a caveat promptly. However, failure to caveat does not of itself amount to negligent conduct on the part of the prior claimant, as where he has taken other reasonable precaution.

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(34) (1881) N.Z.L.R. 3C.A. 361

(35) Frazer v. Walker [1967] N.Z.L.R. 1069; Assets v. Mere Roihi [1905] A.C.176; Efstration v. Christine [1972] N.Z.L.R. 594.

See Also G.W. Hinde, "Indefeasibility of Title Since Frazer v. Walker" (1971) Centennial Essays 33.

(36) [1965] N.Z.L.R. 426

(37) Rice v. Rice (1853) 2 Drew. 73

(38) (1917) 23 C.L.R. 78, 92.

(a) Failure to caveat promptly in the absence of other precautions

Under the Torrens System registration of an instrument operates to extinguish competing equitable claims. Hence the caveat procedure is provided in order to enable the owner of an equitable interest to freeze registration and thus preserve his equity. While lodging a caveat does not create new rights in the caveator, the Courts have consistently held that failure to caveat may affect equitable priorities by postponing a prior equitable interest to a subsequent one. The moot point is under what circumstances can a person be regarded as negligent where, in the absence of other precautions being taken,[39] he fails to make use of the caveat system promptly. The protection of an unregistered interest by the employment of the caveat machinery calls for a high degree of promptitude. A delay of a few days was held sufficient in Butler v. Fairclough[40] to postpone the prior equity. Griffith C.J. felt "unable to draw any line prescribing the time within which a caveat should be lodged. The person who does not act promptly loses the advantage which he would have gained by promptitude ... "

It is clear that where the claimant of an equitable interest first in time lodges a caveat before the second interest is created he is entitled to priority. His equity is first in time and the caveat operates as a notice to the second claimant that the registered proprietor's title is subject to the equitable interest alleged therein. In General Finance Co. of Australia Ltd. v. Perpetual Executors[41] the holder of the first equitable

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(39) This qualification is now necessary in view of the decision of the High Court of Australia in J. & H. Just (Holdings) Pty Ltd. v. Bank of New South Wales (1971) 45 A.L.J.R. 625

(40) (1971) 23 C.L.R. 78

(41) (1902) 27 V.L.R. 739; Eglar v. Caskey (1912) 4 D.L.R.460,464.

interest prevailed over a later equitable interest as he had lodged a caveat before the second interest was created :"there was then no title adverse to his own, prior or subsequent." Although judgement in Reeves v. Steed[42] was given for the later claimants on a different ground, Parker M.R. found that the prior claimants had taken "the proper steps to protect their security by filing the caveat thereby giving notice of their mortgage to subsequent encumbrancers." Nevertheless, priority will be lost if the caveat is withdrawn before the creation of the second interest. In the words of Lord Upjohn in Farrier - Waimak v. Bank of New Zealand,[43] "thereafter anyone inspecting the register was entitled to assume that the interest protected by that caveat no longer affected the land." Had the caveat not been withdrawn in that case, it would have given the mortgage priority over the second lien.

Difficulties arise in situations where, in the absence of any other preventive measure, no caveat has been lodged by the holder of a prior equity until after the creation of the second interest. Here it is submitted that the first claimant is negligent and should step down,[44] for his failure to act promptly has induced a subsequent claimant to act to his prejudice. The subsequent claimant has been misled into believing that there was no prior equity at the moment he entered into the later agreement. Smith v. Sturtevant[45] offers an illustration. S obtained an unconfirmed Maori land lease in 1911. In 1913 the owners exchanged part of the land comprised in the lease and in May 1914 a partition order in it's favour was obtained. S obtained confirmation of the lease

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(42) (1913) 13 D.L.R. 422

(43) [1965] N.Z.L.R. 426, 441; see comment by G. Cain "Farrier - Waimak in the Privy Council" [1964] N.Z.L.J. 495.

(44) An exception being a cestui que trust

(45) [1923] N.Z.L.R. 481

in September 1914 and subsequently lodged a caveat. It was held that when H completed the purchase he was a bona fide purchaser without notice of the prior equity. The caveat was lodged only after the creation of the second interest. Had S lodged a caveat in 1911 H would then have taken the interest subject to that of S, for it is only upon registration before the indefeasibility provisions can apply in H's favour. Similarly, in Achatz v. De Reuver[46] R, the unregistered lessee with an option to purchase land did not lodge a caveat to protect his interest. The lessor subsequently completed a purchase agreement with A who registered the transfer. The Court held that A was a bona fide purchaser without notice of R's interest and was entitled to the land.

In Honeybone v. National Bank of New Zealand[47] H the registered proprietor borrowed money from K and gave the latter a registrable transfer and the certificate of title. K without authority registered the transfer and secured a loan from the bank on mortgage, and handed over the certificate of title to the bank. The bank presented the mortgage for registration. Decision was given in favour of the bank, holder of the later equity. The act of H in placing K in a position to obtain a title as registered proprietor and so obtain an advance from the bank, disentitled him to put his equity in competition with that of the bank. Denniston J. stated the ratio thus: "of two innocent parties to a fraud, the one who by his negligence has made it possible for the fraud to be committed should be the sufferer." It was stressed that the caveat was not lodged until after the creation of the second interest, that is, after the bank's advance to K. Forty-four years later, the advice of the Privy Council was sought to determine a similar situation in Abigail v. Lapin[48]. L delivered a

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(46) (1971) S.A.S.R. 240

(47) (1890) 9 N.Z.L.R. 102

(48) [1934] A.C. 491

registrable transfer and the certificate of title to H as security for a loan, asking H not to register the transfer. H fraudulently registered the transfer and mortgaged the land to A and handed to him the certificate of title. A had not searched the register before advancing the money. Before A could register the mortgage L lodged a caveat. Their Lordships found that L had armed H with the power to go into the world as an absolute owner of the land and thus H was able to execute a mortgage to A. L's equity though first in time was therefore postponed to that of A, irrespective of a search since it would not have revealed the prior equity in any case. It has been commented[49] that "the failure to lodge a caveat was in essence, a failure to 'disarm' [H] before he induced a third party to acquire an interest in the land." Likewise in Premier Group Ltd v. Lidgard[50] the Court held that the act of L in handing over the memorandum of transfer and certificate to C was a representation that C had acquired the interest therein described. It enabled C to obtain a loan from P which acted to its prejudice without notice of any prior equity in L. L was thus estopped from having priority over P.

(b) Failure to caveat where the prior equity holder has taken possession of the certificate of title.

A failure by a person entitled to a prior interest or estate in land to lodge a caveat will not necessarily involve

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(49) R. Sackville, "Competing Equitable Interests in Land Under The Torrens System" (1971) 45 A.L.J. 396, 399.

(50) [1970] N.Z.L.R. 280; see Burrows "Unregistered Interest and the Land Transfer Act 1952" 4 N.Z.U.L.R. 290; Hinde, "Third Party Rights on Unregistered Instrument" (1970) N.Z.L.J. 63.

the loss of priority which the time of creation of the equitable interest would otherwise give. It is clear that the caveat procedure is not the only means to protect one's prior equity. As one commentator[51] pointed out : "no one is entitled to deduce from the absence of a caveat that no ... equitable interest exists. In practice equitable mortgagees protect themselves by taking possession of the certificate of title or other document evidencing title to the interest mortgaged, and it is not necessary for them to rely on a caveat to protect their interest." The passage quoted above seems to have the blessings of the High Court of Australia in J. & H. Just (Holdings) Pty Ltd. v. Bank of New South Wales,[52] particularly the judgment of Windeyer J. where he said : "the fact that a caveat discoverable by a search of the title is 'notice to all the world' of the interest claimed does not mean that the absence of a caveat is a notice to all and sundry that no interest is claimed ... [A] caveat is not the only way in which a purchaser from the registered proprietor can be made aware of the prior equitable claims of another person. It is merely one way ... [A bank] may prefer to protect itself by obtaining and retaining possession of the duplicate certificate of title without producing which no one can register a dealing with the land ...

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(51) W.N. Harrison, "Torrens System - The Effect on Priorities of a Failure to Caveat" (1942) 16 A.L.J. 195, pp. 196-197; "Priorities Amongst Equities" 16 A.L.J. 163. But contrast McMorland, "The Effect on Equitable Priorities of the Caveat Procedure under the Land Transfer Act" (1968) Auck. U.L.R. 55, 63.

(52) (1971) 45 A.L.J.R. 625. The case as it proceeded to the High Court is discussed in two articles by R. Sackville, "Competing Equitable Interests in Land under the Torrens Syste" (1971) 45 A.L.J. 396; "Competing Equitable Interests in Land under the Torrens System - A Postscript" (1972) 46 A.L.J. 344. It is also noted by H.W. Tebbutt at (1970) 44 A.L.J. 442; (1971) 45 A.L.J. 323; (1972) 46 A.L.J. 200.

/T/ he equitable interest of the bank is not to be lost or postponed because the bank did not lodge a caveat ..."[53]

The facts of the case are simple. The bank lent money to a registered proprietor on the security of an unregistered memorandum of mortgage and held the duplicate certificate of title. It did not lodge a caveat against dealings. A subsequent mortgagee took the mortgage from the registered proprietor without seeing the duplicate certificate of title. Barwick C.J. with whom other justices generally agreed delivered the principal judgment in the High Court. His Honour rejected the proposition that a failure to lodge a caveat by a person entitled to a prior equitable interest must necessarily result in the postponement of that interest to a subsequent equitable interest. The Chief Justice laid emphasis on the conduct of the prior mortgagee saying : "unless the priority which time gives to the bank's equitable, interest in land is to be lost by reason of the bank's own conduct, there is no need ... to consider the conduct of the /later mortgagee/ ". The Chief Justice concluded : " /the bank's/ possession of the duplicate certificate of title is a reasonably sufficient protection"[54] since "it is the practice of the

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(53) In Butler v. Fairclough (1917) 33 C.L.R. 78, 97 Isaacs, J. with whom Barton J. was in agreement said : "/I/n the absence of some clear explanation justifying or excusing the failure /to lodge a caveat/ it is one which ... in so simple a case as an equitable mortgage , postpones the mortgagee to the person bona fide misled by the result of a search as in the present case." No doubt the learned Judge had in mind the long-established practice of mortgagees in retaining where possible the certificates of title to protect their interests.

(54) The Chief Justice expressly approved a statement by Dixon J. in Lapin v. Abigail 44 C.L.R. 166,205.

of the Registrar-General's office to refuse to accept an instrument of transfer or mortgage for registration without production of the duplicate certificate of title." The bank has maintained its priority by the retention of the certificate of title.[55] The ratio could be stated thus : where, instead of lodging a caveat, a prior equitable claimant obtains possession of the duplicate certificate of title that is sufficient protection of his interest.

In Just's case the retention of the certificate of title by the holder of the earlier equitable interest was reasonably sufficient to prevent the registered proprietor from creating further inconsistent interests. It was the gross negligence and recklessness of the later holder[56] in not demanding the certificate of title, as it would have been prudent to do so,[57] that resulted in the creation of the second equitable interest which he held at his own risk. The later holder could not claim that he had been misled where he ought not to have been misled. On the other hand, a prior holder is negligent where he neither retains possession of the certificate of title nor lodges a caveat to prevent a subsequent equitable interest from being created. In Lensworth Finance Pty Ltd. v. Whittenbury[58] the prior equitable mortgagee did not acquire possession of the

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(55) Butler v. Fairclough (1917) 23 C.L.R.78; Abigail v. Lapin [1934] A.C.491, distinguished.

(56) Jacobs J.A. in the Court of Appeal (1970) 92 W.N.803, 807 with whom Mason and Moffitt JJ.A. concurred, emphasised the gross negligent conduct of the second holder. In Abigail v. Lapin [1934] A.C.491, 504 Lord Wright stated : "the test for ascertaining which incumbrancer has the better equity must be whether either has been guilty of some act or default which prejudices his claim." [Emphasis mine].

(57) "Money is usually lent by banks and financial companies on certificates of title in the name of the borrower and then they are perfectly safe." General Finance v. Perpetual Executors (1902) 27 V.L.R.739,746 per Holroyd J.

certificate of title from the registered proprietor and took no other step to prevent him from creating a further equitable interest to the prejudice of the later holder, who unlike the later claimant in Just's case had demanded the certificate of title from the registered proprietor. The Court held that the prior holder has postponed his priority. In Abigail v. Lapin[59] the holder of the earlier equitable interest had clothed H as the registered proprietor of an unencumbered fee simple. The lodgment of a caveat by the earlier holder would have been thought appropriate once the duplicate certificate of title and memorandum of transfer had been given to H. This would have disarmed H and prevented the creation of subsequent inconsistent interests. As it happened the later holder after having obtained the certificate of title from the registered proprietor advanced a loan to the latter. The later equitable interest was held to prevail over that of the earlier equitable interest.

Upon this analysis[60] of a holder of the earlier equity in failing to prevent a third party from creating a subsequent equitable interest without revealing the existence of the prior interest, it is possible to reconcile what may seem to be conflicting authorities concerning equitable priorities in the Torrens System. From these cases the following propositions may be advanced :

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(58) Supreme Court of Victoria, 1st September 1970 (unreported); discussed at (1971) 45 A.L.J.396. "Thus, if an equitable mortgagee of lands allows the mortgagor to retain possession of the title deeds, a person dealing with the mortgagor on the faith of that possession is entitled to priority in the absence of special circumstances to account for it" : Butler v. Fairclough (1917) 23 C.L.R.78, 91 per Griffith C.J.

(59) For that matter, Honeybone v. National Bank of New Zealand and Premier Group Ltd v. Lidgard.

(60) See also Palmer, "Caveats and their Effect on Equitable Priorities" (1971) Centennial Essays 79.

(1) Where the earlier claimant retains either possession of the certificate of title[61] or lodges a caveat[62] before the creation of the second equitable interest, that alone is sufficient to maintain his priority over the subsequent inconsistant equitable interest.

(2) Where the holder of an earlier equity has armed a third person with the means whereby the second inconsistant interest is created, his failure to lodge a caveat itself will postpone the priority which time would have given him.[63]

It may be concluded that the caveat procedure can protect and maintain the priority of the holder of an earlier equitable interest who takes advantage of it promptly, that is, before the creation of the second interest. In itself a caveat makes a claim neither better nor worse but it does serve as a notice to those searching the register of the existence of an equitable interest. Those who take a subsequent interest take it subject to his interest : General Finance v. Perpetual Executors.[62] However by failing to lodge a caveat does not necessarily mean that no equitable interest exists, as in Just's case where Windeyer J. said that one must not "equate the noting of a caveat in the register book with the registration of a dealing : it would make competing equitable interests depend not upon priority of creation in time and other equitable consideration, but upon priority of the

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(61) J. & H. Just (Holdings) Pty. Ltd v. Bank of New South Wales (1971) 45 A.L.J.R.625.

(62) General Finance Co. of Australia Ltd v. Perpetual Executors (1902) 27 V.L.R. 739; Edgar v. Caskey (1912) 4 D.L.R. 460.

(63) Abigail v. Lapin [1934] A.C. 491; Honeybone v. National Bank of New Zealand (1890) 9 N.Z.L.R. 102; Premier Group Ltd v. Lidgard [1970] N.Z.L.R. 280.

lodgment of caveats." The caveat procedure does not give priority[64] to the equitable interest of the subsequent holder who lodges a caveat. Thus in Just's case the earlier holder prevailed despite the fact that it did not lodge a caveat while the holder of the later equitable interest did. To the later holder the caveat operates to suspend any attempt by the prior claimant to get his interest registered. Nor does it prejudice the subsequent holder's equity if he fails to lodge a caveat. In Honeybone's case it was irrelevant that the earlier holder had lodged a caveat while the later holder did not. Neither was it relevant in Smith v. Sturtevant where the earlier claimant had lodged a caveat before the later claimant. The Courts decided according to the priorities as they stood before lodgment. Equitable priorities do not exclusively depend upon the priority of the lodgment of caveats.

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(64) Templeton v. Leviatham Pty. Ltd (1921) 30 C.L.R. 34

The Caveat Procedure and Professional Negligence

The position of a solicitor in his contractual duty to advise the lodging of a caveat is stated thus by Goodall and Brookfield in Conveyancing With Precedents 3rd Edition at page 107 : "It is clear that failure to lodge a caveat may in some circumstances cause the holder of an equitable interest to lose the priority over later such interest that he would otherwise have. Plainly wherever there is a danger of that occurring, a solicitor should advise his client that a caveat should be lodged, and may be liable in negligence if he does not do so. The question is a difficult one because in the case of many equitable interests (for example, routine short-term agreements for sale and purchase) the practice of Solicitors is not to caveat; and indeed, were it otherwise, the Land Registry Offices could scarcely cope with the enormous increase of business that would ensue. In the state of authorities it is impossible to give any clear guidance. Certainly, however, all long-term agreements for sale and purchase and probably all agreement to mortgage, should be protected by caveat. How far beyond that the obligation to lodge extends is not clear."

Calder v. Holdsworth[65] is a case involving a long-term transaction for sale and purchase. Calder brought an action against his solicitor Holdsworth for professional negligence. Blair J. at page 222 had no reservation in saying that, inter alia, "a natural precaution for Mr Holdsworth to take would have been to lodge a caveat to protect the plaintiff's interest." The defendant was held liable even though he had some justification according to conveyancing practice to think that the responsibility was on another solicitor's firm. In the recent case of Mohamaad Salleh bin Shaik Ahmed v. Lau Siok Kee[66] a word of advice came from Mr Justice Lee when he said obiter : "Solicitors[67] and others[68] responsible for drafting legal instruments should take warning that neglect [to advise caveat] may... lead to charges of professional negligence."

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(65) [1935] G.L.R. 215

(66) High Court In Borneo, reported in "The Sarawak Tribune" 24/1/1973.

(67) Rees v. Sinclair [1973] N.Z.L.R. 236,244; Rondel v. Worsley [1969] 1 A.C. 191, 293-4.

As was laid down in Butler v. Fairclough[69] a failure to lodge promptly was sufficient to postpone a prior equitable interest. Would a solicitor be held liable where he fails to advise the lodging of a caveat in short-term sale and purchase agreement ? Does a delay of one day on the part of the solicitor for not lodging a caveat to protect his client's interest amount to pforessional negligence[70]? The better view, it is submitted, is that the solicitor would not be liable if he could establish a local conveyancing practice for solicitors not to advise caveat in short-term agreements. Dixon J. in Lapin v. Abigail[71] recognised the relevance of practice in the question of negligence when he said : "No doubt, if it were the settled practice for all owners of equitable interests to lodge caveats, a failure to conform to the practice would naturally lead those who searched to believe that there was no outstanding equity." A solicitor with evidence that it is the regular practice for solicitors not to advise the lodging of caveats should be entitled to rely on that established practice. As Harvey J. pointed out in Tietyens v. Cox[72] "the whole course of judicial interpretation of the Real Property Act has recognised the old law and practice of conveyancing as still applicable to equitable interest, in land under the Act." Reliance on the practice of banks in holding the duplicate certificates of title where possible instead of employing the caveat machinery was accepted in

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(68) Hedley Byrne v. Heller [1964] A.C. 465

(69) (1917) 23 C.L.R. 78

(70) The Australian conveyancer is advised to search and caveat where desirable: Harrison, "Equitable Interests under the Torrens System - Caveats and Searches" (1935) 8 A.L.J. 413.

(71) (1930) 44 C.L.R. 166, 205; expressly approved by the High Court of Australia in J. & H. Just (Holdings) Pty. Ltd v. Bank of New South Wales (1971) 45 A.L.J.R. 625, 628.

(72) (1934) 34 W.N. 10,13; see also Harrison, "Torrens System - The Effect on Priorities of a Failure to Caveat," (1942) 16 A.L.J.195, 197.

J. & H. Just (Holdings) Pty. Ltd. v. Bank of New South Wales [73] and that was held to be sufficient [74] protection of the bank's interest. It would appear to follow therefore that a solicitor who has so advised a bank or an equitable mortgagee would not be negligent by not advising the lodgment of a caveat in such circumstances. However, a solicitor should advise his client to lodge a caveat where it is not possible to obtain the certificate of title - as when his client takes as a second equitable mortgagee.

Conclusion

It is clear that, under the Torrens System, it has always been the intention of the legislature to facilitate the alienation of land at the possible expense of equitable interest. "The Register [is] not to present a picture of legal ownership trammelled by all sorts of equitable rights in others, which those who [deal] with the registered proprietor must take into account" : per Rich J. in Wolfson v. Registrar - General [75]. It does not however mean that equitable interests in land are not capable of existing under the Land Transfer System. The provisions relating to caveats is an indication that such non-registrable interests, e.g. trusts, are always recognised. Torrens law is a system of conveyancing and upon registration of an instrument the registered

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(73) (1969) 90 W.N. 571; (1970) 92 W.N.803; (1971) A.L.J.R. 625.

(74) Indeed, it was pointed out that a failure to require either production or delivery of the title by a person purporting to take a first mortgage or his solicitor amounted to gross negligence. Under S.100 of the Land Transfer Act 1952 the first mortgagee is entitled to the certificate of title.

(75) (1934) 52 C.L.R. 300,308.

proprietor acquires an indefeasible title, but not otherwise. He who succeeds in getting onto the register emerges victorious. Yet from completion of the transaction to final registration he is subjected to all sorts of fraud and adverse claims : the caveat procedure was intended to bridge these "areas of risk."[76]

In actual practice purchasers or lessees do not caveat immediately a contract of sale or agreement for a lease is concluded unless there is reason to suspect fraudulent practice. It is not the usual practice of equitable mortgagees to lodge a caveat; instead they protect themselves by taking possession of the duplicate certificates of title where possible. If they were obliged to do so now the Land Registry Offices would not be able to cope with the strain[77] thereby incurred. Nevertheless the Courts have insistently held that failure to lodge a caveat promptly may affect priorities. The consequence is that,in the absence of any other precautionary measure, it beholds the holder of an equitable interest to lodge a caveat forthwith, otherwise he risks postponement to a subsequent equitable interest. The Courts are setting a standard of conveyancing practice which is not attainable under the present[78] manpower and resources available to Land Registry Offices. In actual practice some time is certain to elapse[79] between

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(76) Jonray (Sydney) Pty. Ltd. v. Partridge Brothers Pty, Ltd.(1969) 89 W.N. 568,577 per Herron C.J.

(77) W. Taylor, "Land Transfer Reform : The Safeguarding of Documents between Searching and Registration" (1963) N.Z.L.J.568, 569.

(78) See article by D.J. Wilson, "Electronic Computer Technology and the Torrens System" (1967) 40 A.L.J. 43 where it was suggested that the use of electronic equipments would enable the lodging of entries on title to be simplified and to proceed with greater speed and accuracy.

(79) As in Re Jackson's Claim (1890) 10 N.Z.L.R. 148 where the failure to enquire from the Land Registry Staff or the Journal whether there had been instruments lodged for registration but not entered on the registar proved fatal to the searcher.

the instant of lodgment and the instant of entry of the memorial of registration. Section 137 of the Land Transfer Act 1952 notionally bridges this gap : a registrable instrument shall be registered in the order of its presentation and for the purpose of determining priority between the instrument and a subsequent caveat, the former prevails. But the difficulty would arise where the instrument presented turned out not to be in registrable form,[80] or was withdrawn without authority.[81]

Various suggestions[82] have been advanced to remedy the gap between completion of a transaction and final registration. One scheme involves "interim registration"[83] covering all transactions over $20,000. A temporary note is made on to the title at the time of searching to freeze the position while the transfer is prepared and eventually registered. "The system has the double advantage of not only protecting the party lodging the I.R. but also of warning any other intending transferees or lenders who search the title that there is a rival transaction on the way." The use of interim registration for every dealing, despite the simplicity of its procedure, would add too great a burden on Registry Staff and Solicitors. Hence transactions under $20,000 should be covered by an insurance scheme.

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(80) S.43(6) Land Transfer Act 1952; Farrier - Waimak Ltd v. Hornby Development Ltd [1962] N.Z.L.R. 635.

(81) I.A.C. (Finance) Pty Ltd. v. Courtenay (1963) 110 C.L.R. 550.

(82) Notice of Priority : D. J. Whalam "The Position of Purchasers Pending Registration" (1971) Centennial Essays 120,134; Stop Order Scheme : E.K. Phillips (1962) N.Z.L.J. 431.

(83) W. Taylor, "Land Transfer Reform : The Safeguarding of Documents between Searching and Registration" (1963) N.Z.L.J. 568; "Interim Registration" (1964) N.Z.L.J. 344.

Meanwhile this flaw in the Torrens System must be governed by the caveat procedure and conveyancing practice. Where it could be shown that it is not an unusual practice for the holder of a particular equitable interest to protect himself by obtaining the certificate of title, his failure to lodge a caveat does not amount to negligence. It would be negligent conduct where by his act he has actively armed a third party with "the power of going into the world under false colours."[84] The omission to lodge a caveat is a failure to disarm that third party before he induces a subsequent claimant to act to his prejudice.

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(84) Dixon v. Muckleston (1872) L.R. 8 ch.App. 155.

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