

settlements made before the adoption order.⁴¹ Thus the Victorian legislation, by giving the adoption order retroactivity, gives greater effect to the adoption order in Victoria than the same adoption order had in England. This result should be of particular interest to the large number of English immigrants to Australia (the Victorian legislation being part of a national scheme, all States having similar legislation) as local legislation may have unforeseen consequences for the interpretation of wills and settlements, or differing results depending on where the will or settlement was executed.

T. F. YUNKEN

J. & H. JUST (HOLDINGS) PTY LTD v. BANK OF
NEW SOUTH WALES¹
LENSWORTH FINANCE PTY LTD v. WHITTENBURY²

Torrens System—Competing unregistered equitable interests—Priority—Effect of a failure to caveat.

Where there are competing unregistered equitable interests under the Torrens System priority is determined by the General Law principle *qui prior est tempore potior est iure*. Therefore, the equitable interest first in time prevails unless the holder, by some act or omission, has made it inequitable that he should be allowed to insist upon his priority. The general principle, as stated by Knox C.J. in *Lapin v. Abigail*³ and approved by Kitto J. in *I.A.C. (Finance) Pty Ltd v. Courtenay*,⁴ is that 'the possessor of the prior equity is not to be postponed to the possessor of a subsequent equity unless the act or omission proved against him has conduced or contributed to a belief on the part of the holder of the subsequent equity, at the time when he acquired it, that the prior equity was not in existence'. Whether the failure to lodge a caveat was alone sufficient to upset the priority of the prior equitable interest was the subject of somewhat different approaches by the courts in *Just (Holdings) Pty Ltd v. Bank of N.S.W.*⁵ and *Lensworth Finance Pty Ltd v. Whittenbury*.⁶

In *Just (Holdings) Pty Ltd v. Bank of N.S.W.*,⁷ the registered proprietor had mortgaged certain lands to the defendant bank, which took a memorandum of mortgage and the certificate of title. However, the bank failed to lodge a caveat or register the mortgage, and therefore a search at the Office of Titles by the plaintiff failed to reveal the existence of the prior mortgage. The registered proprietor represented to the plaintiff that the certificate of title was at his bank for safe keeping and for credible reasons the plaintiff agreed that it should remain there.

Helsham J. decided that a mere omission to caveat was insufficient to postpone the prior equity, for *Butler v. Fairclough*⁸ was not 'authority for the proposition that failure to caveat will postpone a prior equity in

⁴¹ S. 16 which deals with the effects of adoptions on wills and settlements, speaks only of children adopted before the execution of a will or settlement and does not apply to subsequent adoptions such as Elizabeth's.

¹ (1970) 90 W.N. (N.S.W.) (Pt. 1) 571. In Equity, Helsham J.

² 1970 Supreme Court of Victoria, unreported, Lush J.

³ (1930) 44 C.L.R. 166, 183-4.

⁴ (1963) 110 C.L.R. 550, 575-6.

⁵ (1970) 90 W.N. (N.S.W.) (Pt. 1) 571.

⁶ 1970, unreported.

⁷ (1970) 90 W.N. (N.S.W.) (Pt. 1) 571.

⁸ (1917) 23 C.L.R. 78.

favour of a later one taken on the faith of the register'.⁹ To support this interpretation His Honour cited Dixon J. in *Lapin v. Abigail*¹⁰ who noted that if a prior equity can be postponed for a failure to caveat, the anomaly arises that while the caveat system is intended to protect equitable interests from the registration of inconsistent dealings, the 'failure to use that means affords a reason for defeating the equity or postponing it to the very interest, although unregistered, which upon the terms of the statute, requires registration in order to prevail'.¹¹ In *Abigail v. Lapin*¹² the Privy Council decided that unless there was a direct representation by the holder of a prior equity to the holder of a subsequent equity, the basis of any postponement was not estoppel but a consideration of the conduct of the holder of the prior equity in enabling a third person to transact with a subsequent holder 'on the faith of his possessing the larger estate'. Helsham J. held that failure to caveat was not by itself conduct requiring the postponement of the prior estate because the subsequent holder was not entitled to assume that there was no outstanding equitable interest merely from the absence of a caveat, unless it was universal practice to lodge a caveat. Therefore, His Honour held the defendant bank had not lost the priority which time conferred upon its interest.

A caveat, lodged before the creation of a subsequent equity, will not only prevent the registration of that inconsistent dealing, but will also, on general equitable principles, maintain the priority of the prior equity because it operates as notice to all the world that the prior equity is in existence. In *I.A.C. (Finance) Pty Ltd v. Courtenay*,¹³ although no caveat was lodged, priority in time was not upset because the holder of the subsequent equity had notice, through other means, of the existence of a prior equity and was, therefore, himself responsible for the creation of a subsequent equity.

In the two leading cases in this area, there have been additional considerations, other than the mere failure to caveat, for upsetting the priority established by time. In *Abigail v. Lapin*¹⁴ the prior equity was an equity of redemption, but its holder had made out a transfer which on its face was absolute and thereby allowed a third party to represent herself as the unencumbered owner. In *Butler v. Fairclough*¹⁵ the holder of the subsequent interest had actually registered his interest. As Helsham J. noted '[t]he holder of the later interest obtained his priority by becoming registered in the absence of fraud and by the priority that such registration gave him'.¹⁶ However Griffith C.J., with whom Isaacs J. appeared to agree,¹⁷ also held that even if fraud or some other factor prevented an interest obtaining the indefeasibility that registration normally provides, the holder of a subsequent estate would still succeed on general equitable principles, because the holder of the prior equitable estate had failed to lodge a caveat or protect his interest by any other means. In *Abigail v. Lapin*¹⁸ the Privy

⁹ (1970) 90 W.N. (N.S.W.) (Pt. 1) 571.

¹⁰ (1930) 44 C.L.R. 166.

¹¹ *Ibid.* 205.

¹² [1934] A.C. 491.

¹³ (1963) 110 C.L.R. 550.

¹⁴ [1934] A.C. 491.

¹⁵ (1917) 23 C.L.R. 78.

¹⁶ (1970) 90 W.N. (N.S.W.) (Pt. 1) 571, 577.

¹⁷ (1917) 23 C.L.R. 78, 97.

¹⁸ [1934] A.C. 491.

Council did not canvass the criticism of this view made by Dixon J. but expressly approved the judgment of Griffith C.J. in *Butler v. Fairclough*,¹⁹ including his statement that:

the claimant who is first in time may lose his 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 . . . A person who has an equitable charge on the land may protect it by lodging a caveat, which in my opinion operates as notice to all the world that the registered proprietor's title is subject to the equitable interest alleged in the caveat. In the present case the plaintiff might, if he had been sufficiently diligent, have registered his charge of June 30th on that day. The defendant, having before parting with the purchase money to Good, found on searching the register that Good had a clear title and relying on the absence of any notice of defect in Good's title, paid the agreed price.²⁰

Thus the Privy Council has agreed that the conduct of the prior holder in allowing a subsequent holder to act upon reliance of a clear title is conduct sufficient to postpone the prior equitable interest. The courts have therefore placed a burden on the holder of an equitable interest to protect that interest by lodging a caveat or by similar measures such as obtaining registration or lodging a transfer for registration so that a third party is prevented from dealing with the holder of a subsequent equity on the basis that the prior equity does not exist.²¹

Of the text book writers, Harrison²² and Voumard²³ agree that the effect of *Butler v. Fairclough*²⁴ is that priority will be lost by a failure to caveat. Sykes²⁵ agrees with Dixon J. that such conduct could not be described as 'gross negligence' unless the existence of a universal practice of caveating altered the original operation of the caveat system. The effect of the caveat system is to protect equitable interests against destruction through the registration of an inconsistent instrument, and of itself a caveat does not create or endanger any proprietary rights. However, the courts will recognise the creation and destruction of equitable interests upon general equitable principles except where they are precluded from so doing by the statute.²⁶ Where a claimant prior in time has failed to avail himself of the statutory protection of the caveat system, he has failed to take a reasonable step to prevent another from dealing with the land without notice of his prior equitable interest, and on general equitable principles this omission may require the postponement of his interest. Therefore, the objection that the caveat system is only intended to protect equitable interests is ill-founded when the failure to take that measure has the effect of 'arming' a third person with 'false colours'. Furthermore, Griffith C.J. justifies his approach to the operation of the caveat system by noting 'the alternative view [that of Dixon J. and Sykes] would in effect give as great validity to an unregistrable equitable assignment unprotected by caveat as to a registered instrument lodged for registration.'²⁷

¹⁹ (1917) 23 C.L.R. 78.

²⁰ *Ibid.* 91.

²¹ This view is supported by *Connolly v. Noone and Cairns Timber Ltd* [1912] St.R.Qd 70, while *Lynch v. O'Keefe* [1930] St.R.Qd 74 may be distinguished on the ground that the holder of the subsequent equity was himself responsible for the creation of his interest.

²² Harrison, *Cases on Land Law* (2nd ed. 1965) 654.

²³ Voumard, *The Sale of Land* (2nd ed. 1965) 476.

²⁴ (1917) 23 C.L.R. 78.

²⁵ Sykes, *Law of Securities* (1962) 310.

²⁶ *Butler v. Fairclough* (1917) 23 C.L.R. 78.

²⁷ *Ibid.* 92.

A consideration of policy adds weight to the view of Griffith C.J. 'The object is to save persons dealing with the registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity.'²⁸ The potential holder of an equity should therefore be able to rely on more concrete evidence than vague 'common practice' to investigate the possibility of the existence of a prior equitable interest. Therefore, holders of prior equitable interests must themselves take the burden of protecting their interests by registration, by lodging their interests for registration or by lodging a caveat. When the holder of the prior equitable interest has failed to take sufficient precaution and thereby 'arms' a third party 'with the power of going into the world under "false colours"',²⁹ then the legal priority invested in the equity prior in time should be lost.

Although the reasoning of *Just (Holdings) Pty Ltd v. Bank of N.S.W.*³⁰ is not altogether satisfactory either on the basis of policy or of authority, the decision not to upset the priority invested by time may be justified on another ground. Although the prior mortgagee had failed to lodge a caveat, his retention of the duplicate certificate of title protected his interest in that without the duplicate certificate of title no conflicting interest could be registered as the Register-General could not dispense with the requirement of production of the certificate of title upon registration when it was held by another as security for the repayment of money. In *Connolly v. Noone and Cairns Timber Ltd*³¹ the holder of the prior equity had failed to lodge a caveat or protect his interest by any other means. The Queensland Supreme Court held that priority in time should be upset because the prior holders 'by neglecting to take those precautions to record and safeguard their rights required by the policy and scheme of the Act, have misled the plaintiff into an erroneous belief as to the nature of Margaret Noone's interest'.³² In *Lynch v. O'Keefe*³³ the same court stated that in the above case priority may not have been lost had 'the prior equitable claimant needed to take no further precaution to safeguard his interests, being already adequately protected by possession of the title deed'.³⁴ An alternative formulation is that since the holder of the subsequent equity accepted without verification a statement as to the whereabouts of the title deed, he himself was at fault and could not take priority over a claimant, prior in time, who held the title deed. This view was specifically rejected in *Just (Holdings) Pty Ltd v. Bank of N.S.W.*³⁵ where His Honour held that only where the holder of the prior equity has been shown to be at fault can the conduct of the subsequent holder be considered. However, the conduct of both parties must be considered concurrently to determine whether the conduct of the prior holder has enabled any representation to be made to the subsequent holder and therefore the latter formulation appears to be viable. Since the subsequent holder is not being forced to go behind the register to conduct a lengthy and costly investigation of title but is merely being required to ensure that the certificate of title is not held by another as security, the policy basis

²⁸ *Gibbs v. Messer* [1891] A.C. 248, 254.

²⁹ *Dixon v. Muchliston* (1872) L.R. 8 Cr. App. 155, 160.

³⁰ (1970) 90 W.N. (N.S.W.) (Pt. 1) 571.

³¹ [1912] St.R.Qd 70.

³² *Ibid.* 81.

³³ [1930] St.R.Qd 74.

³⁴ *Ibid.* 108.

³⁵ (1970) 90 W.N. (N.S.W.) (Pt. 1) 571.

of the Torrens System would not be upset if the courts held that retention of the title deed was sufficient protection of the prior equity.

In *Lensworth Finance Pty Ltd v. Whittenbury*³⁶ the registered proprietor mortgaged certain land to the defendant under an instrument of mortgage. Some months later he entered into a loan contract with the X Company, one of the terms of which was the execution of a mortgage over this land. A search at the Office of Titles by the X Company revealed no conflicting dealings with the land since the defendant had lodged neither the mortgage nor a caveat. The X Company immediately made an effective assignment of the benefit of the contract to the plaintiff. In a brief judgment Lush J. held

[The X Company] entered into the loan contract and took the charge upon the faith of the state of the register book at about 28th May, and that meant they entered into the agreement and took the charge as a result of the failure by the first defendant to take steps to protect his interest by caveat. In this situation it appears to me to be established upon the authority of *Butler v. Fairclough*³⁷ and *Abigail v. Lapin*³⁸ that the priority which time would otherwise have given to the first defendant has been lost because his failure to take a precaution which is regarded as a reasonable precaution has led to the coming into existence of the later equity.

Although the prior holder in *Just (Holdings) Pty Ltd v. Bank of N.S.W.*³⁹ had also failed to caveat, his priority in time should not have been upset because he had protected his interest by retaining the duplicate certificate of title. Since the defendant in *Lensworth Finance Pty Ltd v. Whittenbury*⁴⁰ had not attempted to protect his interest by a caveat or by any other means, the loss of his priority seems to be in full accord with the authorities discussed above.

In N.S.W. the effect of section 43A of the Real Property Act 1900 as amended must also be considered. In general, a legal estate can only arise upon registration (section 42) at which time the protection of section 43 is also available. Upon the settlement of a transaction, the agreement, being specifically enforceable, gives the transferee an equitable interest (see Isaacs J. in *Barry v. Heider*⁴¹). However, in the gap between settlement and registration, proceedings to enforce a prior equitable interest, assuming priority in time is not lost, will force the holder of the subsequent equity to take his estate subject to that prior interest. Therefore section 43A was enacted to bridge this gap by giving a person who receives a registrable transfer without notice of the prior equitable estate the same protection against that estate, at settlement, as a *bona fide* purchaser of the legal estate for value without notice at general law.⁴² In *Just (Holdings) Pty Ltd v. Bank of N.S.W.*⁴³ His Honour held that the holder of the subsequent equitable estate was not entitled to this protection because without the certificate of title or the means to enforce its production, the transfer was not registrable.

³⁶ 1970, unreported.

³⁷ (1917) 23 C.L.R. 78.

³⁸ [1934] A.C. 491.

³⁹ (1970) 90 W.N. (N.S.W.) (Pt. 1) 571.

⁴⁰ 1970, unreported.

⁴¹ (1914) 19 C.L.R. 197.

⁴² Taylor J. *cf.* Kitto J. in *I.A.C. (Finance) Pty Ltd v. Courtenay* (1963) 110 C.L.R. 550, *United-Star Bowkett Co-Operative Building Society Ltd v. Clyne* (1967) 68 S.R. (N.S.W.) 331.

⁴³ (1970) 90 W.N. (N.S.W.) (Pt. 1) 571.

However, there seems to be little scope for section 43A in this area since the law places a burden on the holder of the prior estate to protect his estate. If the holder of the prior estate lodges a transfer for registration or caveats, or retains a certificate of title, then his priority will not be upset. Nor can the holder of a subsequent equity succeed under section 43A, for in the first two situations he has notice of the prior estate while in the last his transfer is not registrable (in *Just (Holdings) Pty Ltd v. Bank of N.S.W.*⁴⁴ the court held that the subsequent holder's negligence in overlooking the certificate of title did not amount to constructive notice). On the other hand, if the holder of the prior estate does not adequately protect his interest the holder of the subsequent estate may recover on general equitable principles without the assistance of section 43A.

PETER HOLLAND

⁴⁴ *Ibid.*