Equitable Priorities and the Failure to Caveat

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Introduction

The question of the effect of a failure to caveat upon the determination of priority between competing equitable interests has fuelled judicial and academic interest for over a century. It encompasses three broad areas of law: interests in land, priorities and caveats.

Priority questions, of course, are not solely confined to Torrens System jurisdictions. Over the centuries the courts have developed rules to determine priority questions concerning non-Torrens System land. In relative terms the determination of priority between equitable interests in Torrens System land is still in its infancy. It is suggested that the development of this area of law has been impeded by an unwarranted concern on the part of some courts to rely on the general law exceptions to the "qui prior est" maxim.

Caveats are also a recent invention. Upon lodgment (in New Zealand at least) they serve as notice to all the world of the existence of an equitable interest. They are at once a statutory injunction and a warning – preventing the registration of a dealing inconsistent with the existing equitable interest, and warning prospective dealers of that interest's existence. The legal debate, which this paper will discuss, has centred around what the effect of a prior equitable interest holder's failure to use that statutory instrument should be on his or her prima facie priority.

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Interests in Land

It is generally thought that there are at least four major distinctions between equitable and legal interests:[1]

(i) A legal estate is a right in rem while an equitable estate is a right in personam.[2]

(ii) A legal estate must be created in the manner prescribed either by common law or by statute. An equitable estate on the other hand may be created informally. That is not to say that equitable estates cannot be created in a formal manner: "[t]he element of form is not necessary to its validity."[3]

(iii) Unlike an equitable estate which can be transferred in an informal manner, legal estates must be transferred in the manner required by the common law or by Statute.

(iv) An equitable interest holder is open to postponement in favour of a purchaser of the legal estate. Hence the equitable interest lacks "the greater safety of the legal estate".[4]

Legal estates and interests within the Torrens System can generally only be transferred or created by registered instruments. The nature of the system caused early doubts as to the continued applicability of equitable principles to estates in land.[5] Hogg argued in 1905 that the estate in land conferred by registration is neither the common law estate, seisin, the statutory seisin given by the Statute of Uses, nor the equitable estate of English equity jurisprudence, but a new statutory estate which could be described as the "registered estate".[6] The courts however (beginning in *Barry v Heider*[7]) have interpreted the Torrens System Acts so as not completely to remove equity's influence over Torrens System land.

Under the Torrens System the term "equitable estate or interest" defines those in personam rights which a Court of Equity may enforce against a

1 Curzon, *Equity* (2nd ed) 32-33; Hinde McMorland & Sim, *Land Law* (1978) Vol 1, para 1.056.

2 Cheshire & Burns, *Modern Law of Real Property* (13th ed) 57. Woodman, however, is less certain. He suggests that the 'in personam' – 'in rem' distinction is blurred. In some circumstances such as the following of trust funds, an equitable interest may be tantamount to a right 'in rem'; whereas legal interests, usually said to be rights 'in rem', will not give rise to a claim 'in rem' against a person who has acquired a title under the Limitation Act 1950. See *Law of Real Property in New South Wales* (1980) Vol 1, 94-95.

3 Hinde, McMorland & Sim, supra at note 1.

4 Curzon, supra at note 1, at 33.

5 See for example, Baalman "Approach to the Torrens System" (1956-58) 2 Syd Law Rev 87, 89; Hogg, *Australian Torrens System* (1905) 778-783.

6 Ibid.

7 (1914) 19 CLR 197. The High Court of Australia decided unanimously that equitable claims and interests in land are recognised by the Real Property Act in particular and the Torrens System in general.

registered proprietor (or someone entitled to be such) when to do so is not prohibited by statute. Equitable interests may be either interests under unregistered but registrable instruments, or interests under unregistrable transactions which in the general law would confer an equitable title. However, this definition is not in itself sufficiently broad. For example, an executed unconditional agreement for sale and purchase, while undoubtedly conveying an equitable interest to the purchaser, falls outside the definition. Perhaps an all-encompassing definition of an equitable interest can be constructed by reference to the Courts of Equity's prerequisites for an enforceable interest in land. Such an interest arises when there is:

(i) a contract which the Courts would enforce using one of the equitable remedies;[8]
(ii) sufficient writing to comply with the Contracts Enforcement Act 1956, or alternatively some act of part performance; and
(iii) the subject matter of the contract is an interest in land.

Equitable interests may also arise occasionally under the doctrine of proprietary estoppel.[9]

Priorities

> Where at two different times transactions purport to create interests in relation to the same parcel of land, and the interests are such that neither can be completely satisfied if the other is completely satisfied, the parties have conflicting or inconsistent interests and it is necessary to determine which is to prevail.[10]

Many different questions of priority can arise concerning any interest in property. If one takes the case of mortgages, for example, four different priority questions may arise. There may be competition between two legal mortgages, between a prior equitable and subsequent legal mortgage (and vice versa), and between two equitable mortgages. The concern of this paper is with questions of priority which involve a balancing of the respective interests of two people who have taken from the same disponer in the course of successive transactions. The problem is simply that at the time of creating the second interest, the disponer had already committed him or herself to another disposition. The effect of determining priority is to give full enjoyment of the interest to Party A, leaving Party B with either no interest or a reduced interest and thus forced to resort to other remedies against the person who created the interest.[11]

8 See the discussion in Blanchard, *A Handbook on Agreements for Sale and Purchase of Land* (4th ed) para 526.
9 See the discussion in Hinde, McMorland and Sim, supra at note 1, at paras 7.007-7.008.
10 Woodman, supra at note 2, at 95. See also Sykes, *Law of Securities* (3rd ed) 316-318; Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies* (1st ed) para 801.
11 See also Sykes, ibid, 317.

The resolution of a priorities question does not result in the "losing" interest being declared invalid: it is simply a recognition that that interest is inconsistent with the successful interest.

Competition Between Interests

TWO COMPETING LEGAL INTERESTS

Before the introduction of the Torrens System, priority as between legal estates or interests was decided according to the date of execution. Where the two interests were inconsistent the second disposition was a nullity. If they could stand together the second stood subject to the first. So, for example, where Party A by executed deed conveyed the legal estate in his land to B and then two days later purported to sell the same legal estate to C, C's interest was a nullity. Where however A executed a legal lease to B and a conveyance to C, C's interest was still valid but was taken subject to B's interest. Woodman summed up the common law attitude to the question of competing legal interests: "non dat quod non habet" (one cannot convey what one does not own).

PRIOR LEGAL; LATER EQUITABLE

The general rule is that "where the equities are equal the law prevails."[12] Hence the only way by which the holder of a later equitable interest can gain priority is by establishing that circumstances render the equities unequal and in his or her favour. Not surprisingly the onus of proof lies on the holder of the equitable interest.

The exceptions to the general rule may be divided into three broad categories:

(i) Where the owner of the legal estate has created the later equity by an assurance, declaration of trust or agreement, the later equity will take priority.

(ii) The prior legal interest holder will be postponed where he or she is involved in blameworthy conduct which induces a third party to acquire the later equitable interest.[13] Blameworthy conduct is comprised of two types: fraudulent conduct and gross negligence.[14]

(iii) The prior legal interest holder may be estopped from asserting his or her legal interest. Most estoppel cases in this area have involved an

12 Woodman, supra at note 2, at 103-104.

13 *Peter v Russell* (1716) 1 Eq Cas Abr 321; 21 ER 1075.

14 See discussion infra. *Walker v Linom* [1907] 2 Ch 104 is the leading case. Party A sold land to trustees of an estate. The trustees left some of the title deeds with A. A then used them to obtain a loan. A legal mortgage was taken over the land by the lender. The trustees' interest was postponed because they had negligently failed to get in the title deeds, and had thus created a situation whereby A was able to hold himself out to a third party as the legal owner – or at least as someone entitled to deal with the property.

> express or implied representation by the legal owner, the truth of which the legal owner is later estopped from denying, and a subsequent inducement of another party to act to his or her prejudice.[15]

PRIOR EQUITABLE; LATER LEGAL

Here again the general rule is that where the equities are equal, the law prevails. This situation requires an application of the doctrine of the bona fide purchaser for value without notice:[16] the equities will only be regarded as being equal where the legal interest has been acquired for value,[17] and without notice of the prior equitable interest.[18] In such circumstances, the underlying rationale for applying the general rule is "that force this Court necessarily and rightly allows to the common law and to legal titles."[19]

The doctrine of "tabula in naufragio" provides an exception. This phrase, evoking "a vision of drowning equitable owners struggling for the lifebelt of the legal estate,"[20] describes the situation where Party A originally intends to take an equitable interest and does so, but later tries to get in the legal estate in order to protect himself or herself against a prior equitable interest of which he or she became aware, subsequent to acquisition of the original entity. It would appear that A can escape the consequences of the "qui prior est" rule by acquiring the legal estate and then relying on his or her status as a bona fide purchaser for value of the legal estate to gain priority, except where the transaction resulting in the acquisition of the legal estate amounts to a breach of trust by the legal estate title-holder.[21] It is immaterial that the purchaser of the legal estate had notice when he or she acquired the legal estate – indeed, this is usually the reason for his or her acquisition of it.[22]

15 See discussion infra. *Perry-Herrick v Attwood* (1857) 2 De G & J 21; 44 ER 895 and *Brocklesby v Temperance Building Society* [1895] AC 173 are examples of situations where the legal owner has given Party X authority to deal with the property, and X has exceeded that authority. In *Perry-Herrick*, Party A mortgaged his property to B and B allowed A to keep the deeds so that he could raise a further limited sum. A raised the sum then later raised a much larger amount. It was held that B's legal mortgage would be postponed to the last lender for the full amount of the loan. In *Brocklesby* a father gave his son authority to collect his father's title deeds and to raise £2250 on them. The authority however did not expressly set out the limit. The son then went out and raised £3500. The father was held to be bound by the mortgage to the full amount.

16 See Meagher, Gummow and Lehane, supra at note 10, at para 845.

17 Although the legal interest must not have been acquired by a volunteer, any consideration in money, money's worth, or marriage will bring the defence into effect: *Wormand v Maitland* (1866) 35 LJ Ch 69; *Salih v Atchi* [1961] AC 778. The consideration need not be adequate – merely valuable: *Bassett v Nosworthy* (1673) Rep T Finch 102; 23 ER 55.

18 A purchaser who has notice of an equitable interest must not rely on the vendor's assurance that it has been got in, but must ascertain this for himself: *Jared v Clements* [1903] 1 Ch 423 (CA). The defence is also available to one who has acquired the legal interest with notice provided he or she has acquired it through a bona fide purchaser for value without notice.

19 *Wortley v Birkhead* (1754) 2 Ves Sen 571, 574; 28 ER 565, 567 per Hardwicke LC.

20 Sykes, supra at note 10, at 325.

21 See *Bailey v Barnes* [1894] 1 Ch 25.

22 *Blackwood v London Chartered Bank of Australia* (1874) LR 5 App Cas 92, 111.

TWO COMPETING EQUITABLE INTERESTS

This problem may arise in a number of instances; for example where the owner of a legal interest has transferred equitable interests in that land to two different people, or where a trustee has purported to create an equitable interest in a trust property in favour of Party X who is not a cestui que trust.

The general rule for resolving this question is set out in the Latin phrase *Qui prior est tempore potior est iure* (first in time is strongest in law).[23] This rule governs unless there are circumstances making it inequitable for the first equitable estate holder to insist on priority. The onus of proof of such circumstances lies on the second equitable estate holder trying to upset the rule.[24] Mere lack of notice of the earlier interest is not a sufficient circumstance to improve the second interest holder's position.

There are two opposing views as to how priority should be determined between competing equitable claimants. The first view is that espoused by Kindersley V-C in *Rice v Rice*.[25] Reliance on the "qui prior est" maxim should be as a matter of last resort only. The primary consideration, it is argued, should be the conduct of each claimant in relation to the other. It is only, therefore, when a court can find no other grounds of preference that order of creation is the determining factor.

The second view, which according to Ashburner is "supported by the great mass of authority,"[26] is that order of creation prima facie determines priority. The Privy Council itself supported this view in *Abigail v Lapin* where Lord Wright (giving the advice of the Judicial Committee) said:[27]

> The opinion of the Vice-Chancellor no doubt has not been approved in so far as he says that priority in time is only taken as the test where the equities are otherwise equal: it is now clearly established that prima facie priority in time will decide the matter unless, as laid down by Lord Cairns LC in *Shropshire Union Rys and Canal Co. v The Queen* [(1985) LR 7 App Cas 496], that which is relied on to take away the pre-existing equitable title can be shown to be something tangible and distinct having grave and strong effect to accomplish the purpose.[28]

On either view, postponement requires finding that there is some difference in the equities of the claimants which may be a ground for giving preference to one over the other. This may be established in several ways.

23 *Penn v Browne* (1697) Freem Ch 214; 22 ER 1168; *Willoughby v Willoughby* (1787) 1 TR 763, 773; 99 ER 1366, 1371; *Brace v Marlborough* (1728) 2 P Wms 491, 496; 24 ER 829, 831; *Phillips v Phillips* (1862) 4 De GF & J 208, 215; 45 ER 1164, 1166.

24 *General Finance Agency v Perpetual Executors* (1902) 27 VLR 739.

25 (1853) 2 Drew 73; 61 ER 646.

26 Ashburner, *Principles of Equity* (2nd ed) 56.

27 [1934] AC 491, 504.

28 Cf Wallace & Gorbich, "A judge's guide to legal change in property – mere equities critically examined" (1979) 3 UNSWLJ 175. The authors appear to be fighting against the tide of authority in alleging that Kindersley VC was right and that subsequent courts have taken the dictum out of context.

Generally

If the prior interest holder's conduct has led Party X to assume that no prior interest exists and thence leads Party X to acquire an equitable interest, the prior interest holder's interest will be postponed. In *Lloyd's Bank v Bullock*,[29] for example, an equitable estate had been vested in a trustee for sale. The trustee gave a receipt for a conveyance to Party X but failed to get in the purchase money. X then sold the equitable estate to Y. It was held that Y's equitable interest would prevail against the trustee and the cestui que trust.

In *Rice*[30] a vendor had sold certain leaseholds to X. Although he had not received all of the purchase money the vendor gave a receipt for the full sum, and handed over the title deeds. X subsequently gave an equitable mortgage over the land in favour of Y, and handed over the title deeds as security. It was held that the vendor's lien for the unpaid purchase money would be postponed in favour of Y. Y was entitled to assume that there was no outstanding lien. The Court held that the 'Qui prior' maxim will not apply where the equities of the parties are other than equal.

Fraud

A prior interest holder who is guilty of fraudulent conduct leading to the creation of a later equitable interest will have his or her interest postponed. The relevant principles are the same as those which relate to a competition between a prior legal interest holder and a subsequent equitable interest holder, and were discussed by Fry LJ in *Northern Counties of England Fire Insurance Co v Whipp*.[31] The courts will postpone the prior equitable estate to a subsequent equitable estate where the owner of the prior equitable estate has assisted or connived in the fraud, and has led to the creation of a subsequent equitable estate acquired without notice of the prior estate, or where the owner of the prior equitable estate has constituted the mortgagor his agent with authority to raise money and the estate thus created has by the fraud or misconduct of the agent been represented as being the first estate. Fry LJ considered further that the courts will not postpone the prior equitable estate to the subsequent equitable estate on the ground of any mere carelessness or want of prudence on the part of the legal owner.

This restrictive interpretation of fraud has been recently extended by Lord Denning. He stated that:[32]

> Fraud in this context covers any dishonest dealing done so as to deprive unwary innocents of their rightful dues. The marks of it are transactions done stealthily and speedily in secret for no sufficient consideration.

29 [1896] 2 Ch 192.
30 Supra at note 25.
31 26 Ch D 482.
32 *Midland Bank Trust Co Ltd v Green* [1980] Ch 590, 625 and 629-631. Although this case was taken on appeal, arguments based on fraud were abandoned in the House of Lords: [1981] AC 513, 527.

Negligence

There is at present uncertainty as to the degree of negligence required before a prior equitable interest will be postponed. In *Taylor v Russell*[33] counsel for the defendants argued that gross negligence must be proved in order to postpone a legal mortgagee but that a lesser degree of negligence (mere carelessness or want of prudence) would be sufficient to postpone the first of two equitable mortgagees. Kay J at first instance decided – on the basis of what His Honour called "positive and very high authority" – that gross negligence was the common requirement. His Honour defined the negligence required as being[34]

> so gross as to render [the prior equitable interest holder] responsible for the fraud committed upon the second mortgagee.

In the House of Lords Lord MacNaghten (with whom Lord Watson concurred) expressed himself to be unconvinced that Kay J was correct but went no further.[35]

Halsbury states that it is still "possible" that a lesser degree of negligence is sufficient to postpone an equitable, as opposed to a legal, encumbrancer.[36] The learned editor cites *Taylor v London and County Banking Company*[37] and 2 Beven's Negligence[38] in support. In *Taylor v London County Banking Company* Stirling LJ states:[39]

> I am not aware that the precise point considered by that learned judge [Kay J in *Taylor v Russell*] has since arisen for decision; and if it were necessary to decide it in the present case, I should think it my duty to examine with the utmost care his judgment in *Taylor v Russell* and the authorities relied on by him.

Meagher, Gummow and Lehane[40] see the introduction of a gross negligence requirement as unhelpful for two reasons: first because the distinction between gross negligence and negligence remains elusive, and second, because the distinction is not supported by authority. The authors point to *Butler v Fairclough*[41] – a case where the prior equitable interest was postponed – as one example of a case where the conduct of the prior interest holder could not be termed "gross negligence".[42] Reconciliation of the cases

33 [1891] 1 Ch D 8, 15 and 17.
34 Ibid, 17.
35 [1892] AC 244, 262.
36 Halsbury's *Laws of England* (4th ed) Vol 16, para 1315.
37 [1901] 2 Ch 231 (CA).
38 (4th ed) 1554 et seq.
39 Supra at note 37, at 260.
40 Supra at note 10, at para 810.
41 (1917) 23 CLR 78.
42 Ashburner, supra at note 26, at 454 agreed with Kay J in *Taylor v Russell*. A Court of Equity should, he said, accord to an equitable interest competing against another equitable interest the same protection as that reserved for a legal estate: "On principle, therefore, if the substance of the matter is looked at, an equitable mortgagee ought not to be prevented from setting up his prior title, unless his negligence has been such as would estop a prior legal title." Ashburner conceded, however, that the cases did not support this proposition.

on negligence is difficult. It is probably more useful for the purposes of this paper simply to highlight situations where the courts have identified negligence as the reason for postponement.

One example is the failure by a mortgagee to get in the title deeds. Similarly, the prior interest holder will be postponed where a prior equitable mortgagee parts with the title deeds[43] or allows them unduly to remain out of his possession, thus allowing the creation of a later equitable mortgage.[44] However, where the interest is such as not to require possession of the title deeds to support it (for example in a trustee-beneficiary situation, where the trustee usually holds the deeds) the equitable owner cannot be found negligent and will not be postponed on that account if the trustee uses those deeds to commit a fraud.[45]

Estoppel

Where a document has been handed to a party X and can be construed as containing a representation to the effect that the prior interest holder holds no such interest, and where X then acts to his or her detriment, the prior interest holder will be postponed.[46] Although it has been suggested that estoppel may be the sole basis for all postponements of prior equitable interests, Meagher, Gummow and Lehane argue to the contrary for the following reasons:[47]

(i) Estoppel does not explain those cases of fraudulent conduct on the part of the prior equitable owner: here conduct and not reliance is the main criterion;
(ii) Parker J rejected the estoppel theory in *Cappell v Winter*;[48]
(iii) The cestui que trust cases make it clear that cestuis que trustent are usually entitled to rely on their trustee and claim immunity from the consequences of his or her unauthorised dealings;[49]
(iv) Conversely, to hold the legal estate as trustee does not amount to a representation that one holds an unencumbered beneficial estate in that property.

Competition Between Interests Under the Torrens System

Prior to the introduction of the Torrens System the major division with respect to interests in land was between legal and equitable interests. That

43 See *Farrand v Yorkshire Banking Co* (1888) 40 Ch D 182 and *Honeybone v National Bank of New Zealand* (1891) 9 NZLR 102, 106.
44 *Waldron v Sloper* (1852) 1 Drew 193; 61 ER 425.
45 *Cory v Eyre* (1863) 1 De GJ & Sm 149, 169; 46 ER 58, 66 per Turner LJ.
46 *Barry v Heider* supra at note 7; *Rice v Rice* supra at note 25.
47 Meagher, Gummow and Lehane, supra at note 10, at para 810.
48 [1907] 2 Ch 376, 382.
49 Meagher, Gummow and Lehane, supra at note 10, at para 810.

division is now between registered and unregistered interests and is not necessarily commensurate with the earlier dichotomy. A fee simple can be obtained by registration of a void instrument. Some equitable interests can be registered.[50] Further, there are interests legal in nature which cannot be registered under the Torrens System, for example certain types of implied easements.

PRIORITIES BETWEEN REGISTERED INSTRUMENTS

The priority of registered instruments inter se is established by statute.[51] Section 37 of the Land Transfer Act 1952 sets out two rules for resolving any problems:

(i) Instruments shall be registered in order of time of presentation;
(ii) Where priority questions arise, instruments take priority according to the date of registration and not the date of creation of the interest. Where simultaneous presentation occurs, s 41(2) provides that it is the person who presents the duplicate original certificate of title who is entitled to have his or her instrument registered first.

Sykes suggests that this rule is not so much a reversal of the general law position (wherein priority between two legal interests depended upon the date of creation) as an affirmation that under the Torrens System no legal estate vests until registration.[52] It should be noted that s 37(2) of the Land Transfer Act 1952 deals only with legal priorities. The Registrar has no jurisdiction to determine cases of conflicting equitable priorities.[53]

PRIORITIES BETWEEN UNREGISTERED INSTRUMENTS

It is a fundamental precept of the Torrens System that the register is definitive. Accordingly, s 182 of the Land Transfer Act 1952 states:

> Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any registered estate or interest shall be required or in any manner concerned to inquire into or ascertain . . . or shall be affected by notice, direct or constructive of any trust *or unregistered interest* any rule of law or equity to the contrary notwithstanding and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud. [emphasis added.]

As noted above, however, a court will recognise unregistered interests in Torrens System land to the extent that they are not precluded from doing so by statute. In *Butler v Fairclough* Griffiths CJ said:[54]

> In dealing with such equitable rights the Courts in general act upon the principles which are

50 See Woodman, supra at note 2, at 212.
51 See Helmore, *Law of Real Property in NSW* (2nd ed) 377.
52 Sykes, supra at note 10, at 381.
53 See Kerr, *The Principles of the Australian Land Titles (Torrens) System* (1927) para 287; also *Kissling v Mitchelson* (1885) 3 NZLR 261 (CA).
54 Supra at note 41, at 91.

> applicable to equitable interests in land which is not subject to [Torrens] Acts.

The Privy Council accepted this statement of the law in *Abigail v Lapin*.[55] New Zealand courts have echoed the words of Griffiths CJ. In 1920 the Court of Appeal in *Wellington City Corporation v Public Trustee* found that:[56]

> [The Land Transfer Act] undoubtedly recognises that there will be persons who, although not registered as proprietors, yet ... are entitled to or are beneficially interested in some land, estate, or interest under the Act by virtue of an unregistered agreement or other instrument or transmission, or of some trust expressed or implied, or otherwise howsoever.[57]

Such recognition does, however, have its limits. Francis emphasises that unregistered estates and interests are not exceptions to the principle of indefeasibility.[58] "Recognition" in this sense may be lost, since these estates or interests will be extinguished upon the registration of a different proprietor. A succinct summary of the position is given by Francis:[59]

> It therefore clearly emerges that the effect of an unregistered instrument or dealing with land which is registered under the Torrens System is no greater than in the words of Isaacs J [*Barry v Heider* (1914) 19 CLR 197, 216] the rights which are behind it", and is no less than those rights, except so far "as the Torrens enactments expressly or impliedly otherwise provide.

There remains an issue as to how such interests are to be characterised. Hogg[60] and Kerr[61] have both asserted that under the Torrens System there is only one estate in land: the statutory estate conferred by registration. Hence an unregistered instrument cannot be said to confer an equitable estate or interest. Although their view, strictly speaking, may be correct, the point is considered by others to be largely semantic. Francis uses the expression "equitable estates and interests" with respect to Torrens System interests to refer to:[62]

> those rights which may be enforced by a Court of equity acting in personam, against a registered proprietor or a person entitled to become a registered proprietor, when such a course is not prohibited by the statutes.

Hogg has also distinguished between equitable interests under the Torrens System and those at general law.[63] In the case of registered land, equitable interests can be more effectively protected through the use of a caveat. The corollary of this, however, is that failure to make use of the caveat procedure renders an equitable interest more likely to be defeated than an equitable

55 Supra at note 27, at 501-502.
56 [1921] NZLR 1086, 1092 per Hosking J giving the judgment of the Court.
57 See also *Premier Group Ltd v Lidgard* [1970] NZLR 280, 283 where Henry J quotes extensively from *Barry v Heider* (supra at note 7) regarding recognition of equitable interests under the Torrens System.
58 Francis, *Torrens Title in Australasia* (1973) Vol 2, 221.
59 Ibid, 232.
60 Hogg, supra at note 5, at 766.
61 Kerr, supra at note 53, at para 134.
62 Ibid, para 222.
63 Hogg, *Registration of Title to Land throughout the Empire* (1920) 153-155.

interest under the general law.

Despite these distinctions, in practice unregistered interests are treated under the Torrens System in the same way as equitable interests are treated under the general law. As Woodman states:[64]

> Registration of title has not changed the fundamental principles of the common law and equity with respect to rights of property but merely the methods of evidencing and enforcing those rights.

The general rule governing priority between holders of equitable interests – "qui prior est tempore potior est iure" – thus applies to a conflict between unregistered interests under the Torrens System[65] with three modifications:[66]

(i) enactments concerning the priority inter se of competing statutory instruments presented for registration;
(ii) the caveat procedure, which may be used as an instrument to protect equitable interests; and
(iii) general provisions contained within the Land Transfer Act, for example ss 137 and 182.[67]

The Effect of Caveats on Equitable Priorities

The system of caveats is founded upon the basic principle that existing equitable rights should be protected[68] and that some basis should be provided for the proof of alleged claims to interests.[69] The balance of this paper presents an analysis of some of the leading cases in which the courts have applied the "qui prior est" maxim in relation to equitable interests in land under the Torrens system, specifically where the acquirer of the first equitable interest in time has failed to lodge a caveat.

64 Ibid, 153; Woodman, supra at note 2, at 213-214.

65 *J & H Just (Holdings) Pty Ltd v Bank NSW* (1971) 125 CLR 546; *Templeton v Leviathan Pty Ltd* (1921) 30 CLR 34, 85. Sykes, supra at note 10, at 387 calls it the "foundational principle".

66 Hogg, supra at note 63, at 169-172; Adams, *Land Transfer Act* (2nd ed) para 59.

67 *Barnes v James* (1902) 27 VLR 749 is an illustration of a case where the principles of priority as set out in the general law are modified by the Torrens System.

68 Thom, *Canadian Torrens System* (2nd ed) 601: "the scheme of the [Torrens System] Acts is to recognise only registered interests in land, but just as it was impossible under the old system to confine all estates in land to the legal estate so under the Torrens system it is equally impractical to confine all interests in land to registered interests." The caveat was seen as the compromise solution between the two extremes of nullifying for all practical purposes unregistered and unregistrable instruments, or allowing them to be registered.

69 Hogg, supra at note 63, at 184.

Barnes v James[70]

Barnes was the registered proprietor of a mining lease. He transferred it to James who agreed to hold a half share on trust for the transferor. James registered himself as proprietor, while Barnes failed to lodge a caveat or even take custody of the title. James then sold the lease to a company who had searched the register beforehand and found no notice of Barnes' interest. In an action brought by Barnes to establish the priority of his interest over that of the company, the judge ruled in favour of the defendant, because "no step was omitted by it by which it could have ascertained the existence of a prior interest in any other person."[71] While his Honour would not label Barnes' conduct as negligent, he considered that "he might have done more than he did to protect his title by entering a caveat when he ascertained that a lease was issued. There were difficulties in the way but he could have done more."

On the question of Barnes' failure to protect his interest by lodging a caveat, one must agree with Sackville's comments[72] that postponement was based not so much on failure to caveat as on the wider ground of omitting to take precautions to protect one's own interests.[73] The other party had on the other hand done all it could to protect itself. In the final analysis the approach taken by the judge was to ask himself: Who has done better job of protecting his interest?

Butler v Fairclough[74]

The chronology of events in this case was as follows:

30 June 1915	Good, the registered proprietor of a Crown lease executes an equitable mortgage in favour of Butler.
1 July	Good agrees to transfer the land to Fairclough.
2 July	Fairclough has the Office of Titles searched but no caveats are found. Good executes the transfer.
7 July	Butler lodges a caveat.
12 July	The transfer is lodged for registration. When notified of the lodgement Butler threatens to bring proceedings.
7 October	Transfer is withdrawn from Office of Titles by agreement.
6 March	Transfer is relodged by Fairclough and registered without notice to Butler.

70 (1902) 27 VLR 749. See also *General Finance Co. of Australia Ltd v Perpetual Executors* (1902) 27 VLR 739 and *Connelly v Noone and Cairns Timber Ltd* [1912] St R Qld 70 in which the same approach was used.

71 Ibid, 752. While the defendant company had not got the legal estate it was well on its way to obtaining from James all that was necessary to give it that legal estate: it had paid its money, got its lease, and obtained a transfer of the lease. It could have obtained registration immediately but for the absence of its attorney who was to have signed on its behalf.

72 Sackville, "Competing Equitable Interests in Land under the Torrens System" (1971) 45 ALJ 396, 400.

73 But cf Hogg, supra at note 63, at 171.

74 Supra at note 41.

On these facts, priority was determined in favour of Fairclough. The key question which has arisen from this case is whether it is authority for the proposition that failure to lodge a caveat to protect one's equitable interest will cause postponement of that interest to a subsequent equitable interest holder.

WHAT DID GRIFFITHS CJ DECIDE?

It is submitted that there were two central and alternative grounds for the decision of Griffiths CJ in favour of Fairclough: a finding that there had been no fraud,[75] and a finding of mutual mistake. Butler's failure to lodge a caveat resulted in priority being accorded to Fairclough, contrary to the belief of both parties.[76] It was in the course of examining the cause of action based on mistake that Griffiths CJ made the following remarks about the failure to lodge a caveat (which the writer submits are therefore ratio):[77]

> In the case of a contest between two equitable claimants the first in time, all other things being equal, is entitled to priority. But all other things must be equal, and 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.

Butler could have caveated on June 30. His Honour asked himself:[78]

> Had the plaintiff when the defendant acquired his equitable right taken or failed to take all reasonable steps to prevent Good from dealing with the land without notice of the plaintiff's title?

Butler did not act promptly, and therefore had to suffer for his delay by being postponed in favour of Fairclough's interest. It can be seen here that, although His Honour cited *Barnes v James*[79] as authority, the Chief Justice nevertheless appeared to move away from an approach of comparing the two parties' conduct, and towards one of investigating whether the prior interest holder had taken sufficient steps to protect his or her interest.

ISSACS J (BARTON J CONCURRING)

The issue of failure to lodge a caveat was dealt with very briefly by Isaacs J and his remarks were unquestionably obiter. Having found that the matter was really ended by the registration of Fairclough's interest – there being no evidence of fraud – Issacs J considered what the result would have been had the issue been one of determining priority as between two equitable interest holders. His Honour concluded that Fairclough would still have gained priority. Like Griffiths CJ, Isaacs and Barton JJ relied on Butler's failure to

75 See also Harrison, *Cases on Land Law* (1958) 737.
76 Hence, argued Fairclough, any agreement to withdraw the transfer on October 7 was vitiated.
77 Supra at note 41, at 91.
78 Ibid, 92.
79 Supra at note 70.

caveat to reach this result; unlike the Chief Justice, their Honours introduced a second prerequisite to Fairclough's taking of priority – that Fairclough had searched the title and been misled by the lack of caveats:[80]

> In my opinion, in the absence of some clear explanation justifying or excusing this failure [to caveat] it is one which, at all events in so simple a case as an equitable mortgage, postpones the mortgagee to the person bona fide misled by the result of a search.

Does Butler Stand for the Proposition that Failure to Caveat per se Results in Loss of Priority?

It is submitted that *Butler* does not stand for the above proposition. That proposition featured as a ground for the decision in only one judgment. The remarks of Isaacs and Barton JJ were obiter while the other judges (Rich and Gavan Duffy JJ) did not consider the question.

Abigail v Lapin[81]

The registered proprietors, Mr and Mrs Lapin executed two memoranda of transfer to a Mrs Heavener. The arrangement was purportedly carried out in order (inter alia) to secure costs owed by the Lapins to their solicitor Mr Heavener. Mrs Heavener registered the transfer, thereupon becoming the registered proprietor. The properties were later mortgaged to a bank. These mortgages were discharged out of moneys advanced by Abigail, who in turn took a mortgage over the land. Abigail took possession of the certificates of title and lodged the mortgage for registration but it was rejected. Before it could be relodged, the Lapins lodged a caveat. It was not proved that the Lapins' initial failure to lodge a caveat had influenced Abigail to advance the money.

In the Privy Council, in an opinion delivered by Lord Wright, their Lordships regarded the crucial issue to be whether the Lapins' equitable interest was to be postponed in favour of Abigail's. The Privy Council approved Griffiths CJ's classic statement in *Butler*,[82] and stated that that case had been rightly decided. Griffiths CJ had stated, again, 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."[83] It would appear that the Privy Council accepted that *Butler* stands for the proposition that where a prior equitable interest holder fails to lodge a caveat and a subsequent equitable interest holder, after searching the register and without notice of the interest then (for example) lends money or purchases the land, the prior holder will be postponed. The Privy Council

80 Supra at note 41, at 97.
81 Supra at note 27.
82 Supra at note 41, at 91.
83 Ibid. Emphasis added.

consequently asked itself whether – given that the register was clear – failure to search makes any difference. The Committee pointed out that a search would merely have shown that the transfer was for full consideration (thereby rebutting, ex facie, any suggestion that it was to act as security). As Sackville succinctly put it, Abigail's failure to search did not alter the fact that he had been misled.

The Committee opined that the instant case closely parallelled *Honeybone*,[84] in which case the judge had emphasised the mortgagor's conduct – not whether the plaintiff had searched or made inquiries. The Committee considered that:[85]

> Apart from priority in time 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.

Whereas the Lapins had enabled Mrs Heavener to represent herself as legal owner, Abigail had done everything (except register his interest) that he could to secure the money he had lent.

Failure to Caveat and its Part in the Lapins' Downfall

The role which the Lapins' failure to caveat played in their downfall has been the subject of debate. Robinson, after citing a passage from the advice of the Committee,[86] concluded that:[87]

> The Privy Council thus equated the failure to protect as constituting grounds for postponement to a later interest entered into in ignorance of the prior interest.

With respect, it is difficult to see how the passage cited by Robinson could support such a conclusion, since it is concerned with the Lapins' act of transferring title absolutely to Mrs Heavener and with Abigail's unexceptionable conduct. Robinson appears to suggest that the Privy Council thought that a mere failure to caveat will lead to postponement. It is submitted that this view is untenable, not only not on the basis of the passage cited, but also from the advice as a whole. Failure to caveat is simply a factor weighing in favour of postponement. Compare Robinson's comments with those of Sackville,[88] who argued that the failure to caveat was relevant because a caveat would have taken away from Mrs Heavener the ability to represent herself as the absolute owner.

It is submitted that the real basis of the decision was that the Lapins, by their conduct (which conduct included, inter alia, a failure to caveat), armed Mrs Heavener with the indicia of title and thus the power to go out into the

84 Supra at note 43.
85 *Abigail*, supra at note 27, at 504.
86 Ibid.
87 Robinson, "Priorities of Interests in Registered Land" (1971) 35 Conv (NS) 100, 107.
88 Supra at note 72, at 407.

world and to parade as the unencumbered owner of the fee simple estate.[89]

J & H Just Holdings Pty Ltd v Bank of NSW[90]

The registered proprietor of land mortgaged it to the Bank of New South Wales. The Bank held certificate of title as security. It neither caveated the title nor registered its mortgage. The registered proprietor later purported to mortgage the land to the plaintiff. Although the certificate of title was not produced, it was said to be with the Bank for safe custody. The plaintiff had the title searched and subsequently lodged a caveat. Some time thereafter, the Bank attempted to lodge its own mortgage for registration. Proceedings were commenced when the registered proprietor died bankrupt leaving insufficient money in his estate to repay both mortgages.

In the High Court counsel for the appellants argued (citing *Butler*) that the absence of a caveat indicates to a searcher the absence of equitable interests, and that therefore the Bank had failed to take all reasonable steps to protect its interest and to prevent the registered proprietor from continuing to deal with land in a manner prejudicial to its interest. Counsel also used policy arguments: the Torrens System has deliberately provided the caveat procedure in order to protect equitable interests. Failing to take advantage of the procedure is failing to take all reasonable steps.

In the course of his decision Barwick CJ (with whom McTiernan and Owen JJ concurred) considered *Abigail* at some length, and suggested that it was the arming of Mrs Heavener with power to go out into the world with false colours, rather than any failure by the Lapins to lodge a caveat, which was "decisive" in that case. With respect, it is submitted that this overstates the correct position. It was the arming of Mrs Heavener, *combined with* a failure to caveat, that led to postponement: a caveat was the means by which Mrs Heavener could have been disarmed. Had the Lapins caveated, it appears unlikely they would have been postponed.[91]

Barwick CJ continued:[92]

> Ultimately the case then becomes one of an agent exceeding the limits of his authority but acting within its apparent indicia.

If his Honour is suggesting that the above is the ratio of *Abigail*, then clearly he is wrong. That particular passage is derived from a section of the advice

89 Woodman, supra at note 2, at 223.

90 Supra at note 65; affirming the NSW CA at (1970) 92 WN (NSW) 803. A review of the case law up to the NSW CA decision can be found in Palmer, "Caveats and their effect on Equitable Priorities" in Hinde (ed), *The New Zealand Torrens System Centennial Essays* (1971). See also *Breskvar v Wall* (1971) 126 CLR 376 decided four weeks after *Just* by a Full Court of the High Court. The Court adopted the same approach it used in *Just*.

91 For support of this view, see Sackville, "Competing Equitable Interests in Land under the Torrens System – A Postscript" (1972) ALJ 344, 345. Sackville described the High Court's handling of Abigail as "puzzling" (at 344).

92 Supra at note 65, at 554 quoting Lord Wright in *Abigail v Lapin*, supra at note 27, at 508.

characterised by the Privy Council itself as "further or supplementary reasoning" and – at most – is only an alternative ground for the decision to postpone the Lapins' interest.[93] Barwick CJ concluded his judgment with the following statement:[94]

> [O]nce it is recognised that the respondent's conduct in handing the memoranda of transfer and the duplicate certificates of title provided the ratio decidendi, much of what Lord Wright says about the consequences of a failure by a claimant to an equitable interest to lodge a caveat and particularly his comments on *Butler v Fairclough* become, in my opinion, obiter.

This writer disagrees. It is submitted that, for the reasons given earlier, Lord Wright's remarks about failure to caveat were necessary to the decision in *Abigail*.

Nevertheless, the writer does agree that failure to caveat need not necessarily lead to postponement. His Honour's further statement that failure to caveat can combine with other conduct and lead to postponement is also unexceptional. Although Sackville regards this as an "apparent retreat ... from the extreme position taken earlier [in Barwick CJ's judgment]",[95] this writer accepts that such a conclusion is logically open to the Chief Justice despite his finding that failure to caveat *per se* does not lead inexorably to postponement. It is submitted, however, that Barwick CJ went rather too far to justify that conclusion, since precisely the same analysis was possible from the Privy Council decision itself.[96]

Barwick CJ's second reason for refusing to recognise failure to caveat as decisive of priority was that in taking possession of the certificate of title the Bank had already protected itself sufficiently. The Chief Justice relied for that conclusion on the Registrar-General's practice of refusing to accept an instrument of transfer on mortgage for registration without production of the duplicate certificate of title.

93 Sykes, supra at note 10, at 390-391 states: "[the High Court decision] in fact appears to place something of a wrong interpretation on the grounds for the Privy Council decision in *Abigail v Lapin*". See also Sackville, supra at note 91, at 345: Barwick CJ "ignores the greater part of the reasoning of the Privy Council and seizes upon a subsidiary argument as the true ratio decidendi."

94 *Just*, supra at note 65, at 554.

95 Sackville, supra at note 91, at 345.

96 Chamings would appear to agree; see Case Notes (1975-1976) 10 MULR 145, 148. He suggested that much of what Barwick CJ said was not necessary to that decision and was therefore obiter. His Honour could just have easily come to the same conclusion by (i) relying on the peculiar facts of the case, and (ii) relying on the principle that failure to caveat per se will not lead to postponement unless such failure has induced someone subsequently to acquire an interest. "There was no need to limit *Abigail v Lapin* (and thus *Butler v Fairclough*) as these decisions did not attempt to hold that the only purpose of a caveat was to give notice or that a failure to give notice would necessarily result in postponement of the prior equitable interest."

Breskvar v Wall[97]

The Breskvars (registered proprietors of the relevant land) executed a memorandum of transfer, giving it together with the duplicate certificate of title to Petrie as security for a $1200 loan. Petrie's name, however, was not inserted in the transfer; by virtue of s 53(5) of the Stamp Act 1894 the instrument was therefore void and inoperative. Six months after the loan was made, Petrie had his grandson's name (Wall) inserted in the transfer, and presented it for registration. Wall later purported to sell the land to Albany Pty Ltd ("Alban Ltd"), a bona fide purchaser for value, but the Breskvars found out and caveated before Alban Ltd could lodge its transfer for registration. The Breskvars sought relief against Alban Ltd.

The case resolved itself into a conflict between the competing equities of the Breskvars and Alban Ltd; the Breskvars' interest being prima facie entitled to priority because it was created when Petrie became the registered proprietor and was thus first in time. Barwick CJ (with whom Owen and Windeyer JJ agreed) stated that the equitable principles upon which such a competition is to be resolved are "well settled".[98] His Honour relied on the alternative ground for the decision in *Abigail* – that of an agent exceeding its authority while acting within the apparent indicia thereof – and held that the prior equitable interest holder should be postponed. Barwick CJ again rejected the argument that the Breskvars' failure to lodge a caveat per se should lead to their postponement.

Basing his conclusions upon the principles set out on *Butler v Fairclough* and *Abigail v Lapin*, Walsh J decided that the Breskvars' interest should be postponed to that of Alban Ltd because (i) the Breskvars had placed in Wall's hands a memorandum of transfer which could be completed in such a way as to make it appear that it was a valid, absolute, transfer of the Breskvars' estate; (ii) the Breskvars allowed Petrie to hold the certificate of title, thus enabling him to procure the registration of Wall as owner of an estate in fee simple; and (iii) the Breskvars' failure to caveat as one of the circumstances which led to the postponement should be seen, as Sackville argues, as:[99]

> a more accurate and complete analysis of the problem posed by *Abigail v Lapin* and *Breskvar v Wall* then appears from the judgment of Barwick CJ (or indeed the other members of the Court) in either case [*Just* or *Breskvar*].

Meagher, Gummow and Lehane concluded of *Just* and *Breskvar*:[100]

> In *Just* the High Court put an end to speculation and laid it down authoritively[101] that mere failure to lodge a caveat could never, of itself, be a ground for deferring a prior equity., It has now repeated this doctrine in *Breskvar v Wall*. The facts of these cases are, for all

97 Supra at note 90.
98 Ibid, 388.
99 Sackville, supra at note 91, at 347.
100 Supra at note 10, at para 818.
101 See also Francis, *Torrens Title in Australasia* (1973) Vol 2, 238.

relevant purposes, identical with those in *Abigail*. The same result was reached as in that case, but without the attachment of any significance to the failure by the original registered proprietor to lodge a caveat.

Osmanoski v Rose[102]

On 9 May 1973, the registered proprietors of land executed a sale note in favour of the Osmanoskis who thus acquired an equitable interest in the land. The Osmanoskis failed to lodge a caveat. On 16 May the vendor executed a sale note in favour of Ina Rose.[103] Rose searched the title on 29 May and found no caveats or prior equitable interests. She then exchanged an executed contract of sale on 22 June. On 18 July the Osmanoskis lodged a caveat. Ten days later Rose's transfer was lodged for registration.

Gowans J defined the issue as being:[104]

> [W]hether the equitable interest of the applicants is to be postponed to that of the respondents, having regard to the former's failure to lodge a caveat before the making of the respondent's search, and the effect of that upon the latter.

The central factor, according to Gowans J, was the test contained in *Butler* and in *Abigail*: can it be proved that there was some act or omission by the applicants which had or might have had the effect of inducing the respondents to act to their prejudice? His Honour quoted extensively from Barwick CJ's decision in *Just* about the effect of failing to caveat. The Chief Justice's conclusion, that failure to caveat does not necessarily lead to postponement, was effectively distinguished:[105]

> This conclusion, in my view, was not separable from the circumstances that, in that case, the certificate of title continued to be held by the party which had refrained from lodging a caveat.

The second ground for distinguishing *Just* derives from ss 89(2) and 89A(1) of the Transfer of Land Act 1958 (Vic). Whereas under the Real Property Act 1900 (NSW) the Registrar-General is not required to enter a notation of the caveat on the certificate of title, in Victoria a memorandum of the caveat must be entered. According to Gowans J:[106]

> In my view the presence of these provisions distinguishes the situation dealt with in the New South Wales cases that have been cited. In my opinion, where these and other provisions are taken into account it cannot be said that the purpose of the caveat system under the Victorian Act is solely to provide protection for the person lodging the caveat by providing for an injunction against the Registrar until notice is given. That may be one of its purposes but it is not the sole purpose. And it is not the effect of the system. The lodging of a caveat under the Victorian Act operates, whether a 'cloud' or a 'blot' or by whatever name it is

102 [1974] VR 523. See also *Morris v Merbank Corporation Ltd* [1984] 1 NZLR 552 in which Barker J was influenced by *Osmanoski*.

103 Carmen Pless later became a joint purchaser.

104 Supra at note 102, at 525.

105 Ibid, 527.

106 Ibid, 528.

> called as an obstacle to a registered proprietor making title to a purchaser and to a purchaser obtaining title from the registered proprietor.

In deciding that the Osmanoski's interest should be postponed Gowans J took into account four relevant circumstances. First the Osmanoskis had failed to lodge a caveat despite the fact that the registered proprietor had retained the certificate of title. Second, if they had lodged a caveat a memorandum would have been entered on the certificate of title, and people dealing with the vendors would have been prevented from having such a dealing registered. Third, Rose had searched the title before acquiring the interest. Finally, the absence of a caveat induced Rose to acquire the interest and to pay the balance of the purchase money.

Reliance Finance Corporation Pty Ltd v Heid[107]

On 27 May 1977 the registered proprietor Heid, agreed to sell his land to Connell Investments Pty Ltd ("Connell"). The terms of payment were $15,000 cash on completion, $100,000 to be deposited by the purchaser in the vendor's name with a finance company, together with $50,000 to be secured by mortgage back. Heid adopted the purchaser's suggestion that he employ Gibby as his solicitor (even though, unbeknown to Heid, Gibby was unqualified). Heid gave Gibby authority to uplift the certificate of title. No caveat was lodged to protect Heid's interest under the $50,000 vendor mortgage, and the memorandum of transfer contained an acknowledgement of receipt of the full purchase price.

On 10 June, before the transfer was registered, Connell gave two further mortgages in favour of (inter alia) Reliance Finance Corporation Pty Ltd ("Reliance"). The transfer was registered and Reliance lodged a caveat. On 4 July Connell then gave two further mortgages. Heid found out before any of the mortgages could be registered. He caveated, and began proceedings.

In the High Court Gibbs CJ (Wilson J concurring) opined that the question for the Court was:[108]

> whether [Heid's] conduct in handing to Gibby a completed memorandum of transfer, containing an acknowledgement of payment and accompanied by the certificate of title, thus enabling Connell Investments Ltd to represent itself to Reliance Finance as having a title free from outstanding equitable interests, has the consequence that Reliance Finance has the better equity, and that the appellant's interest should be postponed to that of Reliance Finance.

Gibbs CJ also quoted extensively from *Abigail*. Significantly, the quotations are from the first part of the advice (that is, from what may be called the "arming with false colours" section), and not from the "agency" section which was such a happy hunting ground for Barwick CJ. Moreover Gibbs CJ, after

107 [1982] 1 NSWLR 466 (NSW CA); (1983) 57 ALJR 683 (HCA).
108 Ibid, 685.

setting out those quotations, stated:[109]

> The decisions in such cases as *Rimmer v Webster* [1902] 2 Ch 163 and *Abigail v Lapin*, supra, may be based, *alternatively*, on the principle that a person who hands over title deeds to an agent with authority to deal with the property in a restricted manner cannot rely on the restrictions as against the third party who had not notice of them, and on the doctrine of estoppel. [emphasis added]

It is submitted that this passage is at last recognition by the High Court (or at least by the Chief Justice) that *Abigail* is not ultimately a case of agency, as Barwick CJ had stated. Barwick CJ's decision is now inconsistent with Gibbs CJ's statement that "arming with false colours" is an alternative ground for the decision.

In order to resolve the priority question, Gibbs CJ looked first to see whether estoppel by representation would provide grounds for postponement.[110] His Honour held that the appellant effectively armed Connell with power to go out into the world under false colours. Reliance assumed no adverse equitable interest existed, and acted to its detriment. The appellant's conduct was thus a contributing factor. The appellant was therefore estopped from setting up his equitable interest.

As for the failure to lodge a caveat, Gibbs CJ, while asserting that this "was not itself fatal to his case",[111] nevertheless stated that the effect of lodgment would have been to disarm Connell by giving notice to Reliance and other prospective mortgagees of the interest. Significantly, the remarks of Barwick CJ and Windeyer J from *Just* are cited to be compared with this statement.[112] The importance of failing to caveat to the finding of postponement in such cases as *Abigail* is implicitly recognised. This comment is significant because Gibbs CJ cites the remarks of Barwick CJ and Windeyer J in *Just* as ones to be compared to his statement.

In their decision Mason and Deane JJ stated that it is not reasonably foreseeable that failure to caveat will lead to the creation of a later equitable interest, nor to the holder of that later interest assuming the non-existence of the earlier interest. In this they agreed with *Just*. Failure to caveat is simply another of those circumstances to be taken into account when deciding who has the better equity.[113]

Clark v Raymore (Brisbane) Pty Ltd (No 2)[114]

Sanders and his wife owned land as joint tenants. On 27 February 1980

109 Ibid, 686.

110 It should be noted that Gibbs CJ agreed with the Privy Council in *Abigail* that a direct representation is not necessary.

111 Ibid.

112 Ibid, 687.

113 This is of course a return to the approach adopted in the early Australian priority cases such as *Barnes*, supra at note 70.

114 [1982] Qd R 790.

Sanders executed a guarantee in favour of Raymor (Brisbane) Pty Ltd ("Raymor"), including in that guarantee a charge over all of his property. On 27 March Sanders and his wife contracted to sell their land to the respondents (the Clarks). On 2 April the respondents had the title searched. Only one encumbrance was revealed, being a registered mortgage in favour of AGC Ltd. Settlement of the sale occurred on 2 May, and all relevant documents were lodged for registration. Before registration was completed, however, Raymor lodged a caveat.

Thomas J (with whom Campbell CJ concurred) employed the reasoning in *Barnes v James* and *Osmanoski v Rose* to reach the conclusion that Raymor's interest should be postponed. As was A'Beckett J in *Barnes*, his Honour was impressed by the fact that the purchaser had not omitted any step by which it could have ascertained the existence of the prior interest; whereas Raymor might have done more to protect its interest. Further, while the purchaser did not have the legal estate it had gone as far as it could to obtain it.

In *Osmanoski*, Gowans J had relied on four factors in his decision to postpone: failure to caveat, the effect if a caveat had been lodged, the fact that a search had been made before acquisition of the interest, and inducement by absence of caveat. In the instant case, Thomas J noted that only the third factor was absent. His Honour did not regard this as critical and concluded that Raymor's interest should be postponed.

Andrews SPJ (with whom Campbell CJ also concurred) agreed in large part with the judgment of Thomas J. However, his Honour went on to state that where a prior equitable interest holder leaves matters in such a state that a search of the title would not reveal the interest, he is[115]

> bound in his own defence against postponement of his interest to lodge a caveat with the Registrar of Titles.

If by the above Andrews SPJ meant that in these circumstances a prior interest holder is legally obliged to caveat, then his opinion contradicts most of the cases, is inconsistent with his support of Thomas J's judgment,[116] and makes Campbell CJ's position unclear.

Conclusion

An analysis of the leading cases suggests that any questions as to the effect of a failure to caveat upon the determination of priority between competing equitable interests should have been settled, in 1934, with the Privy Council decision of *Abigail v Lapin*. No decision before that date had ever regarded

115 Ibid, 791. His Honour suggested that this becomes unnecessary where the prior interest holder has taken other and sufficient precautions to protect his interest; for example, by taking possession of the relevant title deeds.

116 Thomas J said, ibid, 798: "... it is clear that there is no such thing as a legal duty upon a party to lodge a caveat."

failure to caveat as anything other than a contributing factor in the determination of which competing equitable interest holder had the better equity.

Prior to the decision in *Butler v Fairclough* the courts tended to assess the better equity by a comparison of the manner in which the competing interest holders sought to protect their respective interests. These cases manifest a lack of concern for detailed analysis of the theoretical basis of postponement. Instead the courts recognised – with a lucidity perhaps missing from later judgments – that with the advent of the new Land Transfer System the rules determining priorities developed under the old general law might no longer be appropriate nor necessary. Thus in *Barnes v James* A'Beckett J decided to postpone Barnes' interest without finding it necessary to categorise Barnes' conduct as negligent.

Seen in this context, a failure on the part of a prior equitable interest holder to lodge a caveat before the creation of a subsequent legal interest could not be decisive of priority. It was merely a factor – albeit one of some importance – which the courts could take into account when determining which of the parties had the better equity.

The High Court of Australia, however, refused to let the matter rest. That the decisions in *J & H Just Holdings Pty Ltd v Bank of NSW* and in *Breskvar v Wall* are correct is not questioned. Nevertheless, the reasoning of those decisions is based upon an unwarranted view of *Butler v Fairclough* and *Abigail v Lapin*.

Following the departure of Barwick CJ from the Bench, the High Court of Australia has retreated from the position adopted in *Just* and *Breskvar*. More recently the caveat has been recognised for its potential to disarm an intending clever dealer, and for its role as one of the major contributing factors in the Privy Council's decision to postpone the equitable interest of the Lapins in *Abigail*. The High Court decision in *Reliance Finance Corporation Pty Ltd v Heid* is notable for its perception that *Abigail* is not, ultimately, an agency case and that failure to caveat is significant as representing the loss of an opportunity to disarm a clever dealer. Meanwhile, *Clark v Raymore (Brisbane) Pty Ltd (No 2)* evidences a return by the superior courts to the approach of the pre-*Butler* cases and gives overdue recognition to *Osmanoski v Rose*.

The effect of failure to caveat upon a prior equitable interest holder's prima facie priority can now be summarised. If the holder of a prior equitable interest in Torrens System land fails to lodge a caveat before the creation of a subsequent equitable interest, that failure will not automatically lead to postponement of the prior interest. However, it may combine with other factors to lead the court to decide that the subsequent equitable interest holder has the better equity, and that the prima facie priority accorded to the prior equitable interest holder should be displaced.

The Privy Council in *Abigail v Lapin*, and more recently the full Court of Queensland in the *Clark* case, has shown that in order to take priority it is not necessary for the subsequent equitable interest holder to prove that he or she searched the Register. Proof of a search is merely another relevant consideration which the courts may take into account when determining the better equity.