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The 'Common Grantor' or 'Inconsistent Grant' Cases

Butler v Fairclough (1917) 23 CLR 78: Good was the RP of a Crown lease, subject to a registered mortgage. On 30 June, Good granted a charge over his lease to Butler, which was unregistered. On 2 July, Good sold the lease, subject only to the registered mortgage, to Fairclough, who searched the register prior to settlement. On 7 July (after settlement, but before Fairclough lodged his transfer for registration), Butler lodged a caveat. Fairclough lodged his transfer for registration on 12 July. Fairclough was held to take free of the unregistered charge.

- Griffith CJ at 91-92: 'It must now be taken to be well settled that under the Australian system of registration of titles to land, the Courts will recognize equitable estates and rights except so far as they are precluded from doing so by the statute...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.**'
- 'A person who has an **equitable charge** upon the land may protect it by **lodging a caveat**, which in my opinion operates as **notice to all the world that 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 30 June 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 the defect in Good's title, paid the agreed price.'

J & H Just (Holdings) Pty Ltd v Bank of NSW (1971) 125 CLR 546: Josephson, the RP of land, granted the Bank a mortgage in registrable form accompanied by the CT. The bank did not register the mortgage. Subsequently, Josephson gave an unregistered mortgage to J&H, telling them that the land was unencumbered and that the CT was with the Bank for safekeeping. J&H's solicitor searched the Register, but **did not enquire of the Bank as to the terms on which it held the CT**. J&H's solicitor lodged a caveat after the grant of the mortgage that later prevented the registration of the Bank's mortgage when the bank attempted to do so.

- HCA held: The Bank retained priority, even though it failed to caveat and the Appellant searched. By receiving the title documents, the Bank had taken adequate precautions to protect themselves.

- **The failure of the holder of an equitable estate or interest in land to lodge a caveat does not necessarily involve the loss of priority which the time of the creation of the equitable interest would otherwise give.**
- Barwick CJ at 552: '[The purpose of caveats] is to act as an **injunction to the R-G to prevent registration of dealings with the land until notice has been given to the caveator**...The purpose of the caveat is **not to give notice to the world or to persons who may consider dealing with the RP of the caveator's estate or interest though if noted on the certificate of title, it may operate to give such notice.**'
- At 553-4 – on *Abigail v Lapin*: 'But it was the [Lapins'] conduct in arming the mortgagee's with the capacity to become the RP and able to deal with others as such and not by any failure by them to lodge a caveat that was decisive in *Abigail v Lapin*.
- '...the [Lapins'] conduct in handing over the memorandum of transfer and the duplicate certificate of title provided the ratio...much of what Lord Wright says about the consequences of failing to caveat and particularly his comments on *Butler v Fairclough* became, in my opinion, obiter.'
- At 554: 'To hold that a failure by a person...to lodge a caveat against dealings with the land must necessarily involve the loss of priority which the time of the creation of the equitable interest would otherwise give, is not merely in my opinion unwarranted by general principles or by any statutory provision but would in my opinion be subversive of the well recognized ability of parties to create or to maintain equitable interests in such lands.'
- At 555, quoting Dixon J in *Abigail v Lapin* (1930) 44 CLR 166 at 204: 'In general an earlier equity is not to be postponed to a later one unless because of some act or neglect of the prior equitable owner. In order to take away any pre-existing admitted title, that which is relied upon for such a purpose must be shown and proved by those upon whom the burden to show and prove it lies, and...it must amount to something tangible and distinct, something which can have the grave and strong effect to accomplish the purpose for which it is said to have been produced.' Then Barwick CJ concluded: 'In my opinion, the failure to lodge a protective caveat cannot properly be said necessarily to be such an act or default. It could not properly be said to be so in the present case.'
- At 556: 'As I have said, **the purpose of the caveat is protective: it is not to give notice.** The holder of the subsequent equity in my opinion could not properly rely upon the absence of any notification in the register book of the lodgement of a caveat as a representation or as the basis for a conclusion that no equitable interest in the land existed in any person.'

- ‘As I have pointed out, 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 in my opinion, to consider the conduct of the appellant.’
- Windeyer J at 559: ‘**The Bank did not by not lodging a caveat warning the R-G represent to the appellant that it had no claim. It relied upon its possession of a registrable instrument and a clean duplicate certificate of title.** It is not to suffer because the RP made a statement to the appellant that was very far from frank in explanation of the Bank’s having his duplicate certificate of title.’

Jacobs v Platt Nominees Pty Ltd [1990] VR 146: The Platts were directors of a company, Platt Nominees, which owned a motel. The Platts entered into a contract with their daughter, Mrs Jacobs, in which she had an **option to purchase the motel**. This gave J an equitable, caveatable interest. J did not lodge a caveat because she thought that the creation of any subsequent interests would have to be approved by her mother, who would not allow it – and, J did not want to antagonise her father. Platt Nominees entered into a contract of sale with Perpetual Trustees to sell the land. The father did this by using his son, who had a signed authority from his mother to authorise transactions. It happened without the knowledge either of J or Mrs Platt. J found out about the contract after exchange, but before settlement – she lodged a caveat.

- The Full Court (Crockett, King and Gobbo JJ) held: **The mere failure to lodge a caveat will not result automatically in postponement, although it could do in the circumstances.**
- At [34]-[35]: ‘We are therefore of the view that there was no detriment demonstrated sufficient to sustain any estoppel nor was there any detriment shown to have been suffered by Perpetual such as to command an meaningful role in the chose between competing equities. All of this was a relevant circumstance working not, as the learned trial judge appears to have found, in Perpetual’s favour but, if at all, in the appellant’s favour.’
- [37]: ‘It is difficult to see how much significance can be placed on failure to lodge caveat if there is not shown to be a general expectation that caveats will be lodged in all cases, and that searches are invariably made for the purpose of discovering any claims to interests in the land and not merely to discover options to purchase.’
- [39]-[40]: ‘The **primary purpose of a caveat** is, as was said in **Just’s case**, to provide **protection for the caveator** not to give notice to the world. The practice of lodging caveats is at best that and not a duty to the world at large. In any event, there was **no settled**

practice proved that covered all options to purchase nor was it proved that there was a settled practice for unregistered transactions that conveyed that the prospective purchasers invariably searched the title with the relevant expectation before entering into any purchase.'

- [40]: **'The doctrine of estoppel is more appropriate to the cases where parties armed the third party 'with the power of going into the world under false colours'...by arming him with title deds and evidence of payment.'**

→ At [41]-[42]: **'...the appellant had secured the option from her parents in such a way that it was inconceivable that her mother and father would join together to sell the motel in breach of the option. It was, in short, not reasonably foreseeable that her failure to lodge a caveat exposed herself or others to a risk of a later sale. In this setting, her explanation that she did not want to upset her father by lodging caveat was entirely consistent.'**

Importance of Caveating

Black v Garnock (2007) 230 CLR 438: RP contracted to sell land to Black. On the day of settlement, Black's solicitor searched the Register – the folio was clear. Two hours before the settlement, a writ of execution was recorded against the folio in favour of the judgment debtor (X). B's solicitors advised of X's claim. The purchase was settled, but registration of B's transfer was blocked by writ: *RPA* s 105A(2). There was, thus, a question of construction as to whether s 105A(2) applied to prevent B from protecting its equitable interest under the contract of sale entered into prior to the recording of the writ. B had the ability to protect his unregistered interest under the contract by lodging a caveat prior to the recording of the writ, which would have prevented any purchaser from the Sheriff registering transfer: *Gummow and Hayne JJ* at [43]-[44], [48]-[49].

- Per Callinan J (obiter) at [52]: **'It used to be the practice of careful conveyancers...to 'caveat as soon as the agreement for the relevant dealing was made'**
- At [84]: **'The fact that the purchasers might have protected themselves by lodging a caveat here may not be decisive of this case, but that the ct enabled them to do so...are factors relevant to the proper construction and reconciliation of the two enactments governing the respective rights and interest of the parties.'**