

### Caveats:

- Caveats are commonly used to protect equitable interests (eg purchasers interest under specifically enforceable contract of sale, beneficiary's interest under a trust, vendor's lien for unpaid purchase moneys, mortgagee's interest for unpaid mortgage, purchasers interest on an option to purchase land, equitable easement)
- A caveat doesn't make the claim stronger or create any presumption in favour of priority of the interest claimed
- Caveats provides notice of the interest to the Registrar (Barwick CJ in *Just Holdings*, Gleeson J in *Black v Garnock*), not to the world; lodge one when equitable interest may be usurped (eg robbed certificate of title, mortgagee about to sell property)
- Can have a permissive or conditional caveat; other claims can go through but they are subject to the caveat

### **Crampton v French**

Harper J: 'any equitable interest will support a caveat' – meaning any interest which will give specific relief in the land  
Need not be a registrable interest or an interest that gives the holder a right to compel the RP to deliver a registrable interest

A RP can't caveat their own title unless they have an estate or interest that is distinct and separate from their registered legal interest (no caveat for being merely a RP in Victoria)

- **Swanston v Trepan**: the right to set aside fraud or improper mortgagee sale isn't a full equitable interest, so isn't sufficient to support a caveat (it is a mere equity; a right to come to court to have the transaction set aside)
- But can try to argue against/distinguish **Swanston v Trepan** (which concerned caveats) on facts

**Breskvar v Wall** (HCA 1971):

Equity to set aside an improper mortgagee sale was regarded as a full equitable interest

**Latec v Hotel Terrigal** (HCA 1965):

Kitto and Menzies JJ: mortgagor's interest in the property (right to set aside an improper power of sale) is a mere equity, not an equitable interest, which becomes a full equitable interest once the right to set aside has been determined by a court (this case didn't concern caveatability; purchaser's interest was already registered; was a priority dispute issue)

**Swanston v Trepan** (VSC 1993):

Brooking J: mortgagor's equity to set aside the sale exercised fraudulently or in breach of statute by a mortgagee does not give rise to a caveatable interest (need a separate and registrable interest other than being RP)

Cited Kitto and Menzies JJ in **Latec v Terrigal** (cf Taylor J's dissent), but there the purchaser was registered so the case is arguably distinguishable

**Capital v Bayblu** (NSWSC 2011):

Mortgagor's equity to set aside the sale exercised fraudulently or in breach of statute by a mortgagee does give rise to a caveatable interest

Pembroke J: 'the decision and reasoning of Brooking J is clearly wrong and I'm not bound to follow them' (criticised **Swanston Mortgage v Trepan** for relying on **Latec** which was about priority disputes, when **Swanston** was about caveats)

**Vasiliou v Westpac** (VSCA 2007):

3 member bench was bound to follow **Swanston**, until overturned by a 5 member bench

**Patmore v Upton** (TASSC 2004):

'Insofar as **Swanston** is authority for the proposition that the equitable interest of a mortgagor in the case of a voidable sale by a mortgagee, not yet completed, is insufficient to create an equitable interest in land, it should not be followed' - Underwood J

**Stone v Leonardis** (SASC 2011):

White J refused to follow **Swanston Mortgage v Trepan**

### Process of lodging a caveat:

- **TLA s 89(1)**: The caveator must be claiming an estate or interest in land for it to be a caveatable interest (a proprietary equitable interest where SP could be awarded, not a merely personal right eg a personal licence or mere equity)
- **TLA s 89(2)**: A caveat is noted on the folio of register
- **TLA s 89(3)**: The Registrar notify the registered proprietor of the caveat
- **TLA s 90**: Registrar cannot effect certain transfers or dealings once a caveat has been lodged
- **TLA s 91**: A caveat prevents the Registrar from registering a dealing lodged after the caveat that is inconsistent with the interest claimed, but no already registered instrument shall be affected by any caveat lodged after registration
- **TLA s 118**: Any person lodging a caveat without reasonable cause, (an 'honest belief on reasonable grounds that the caveator has such a caveatable interest'), is liable to compensate any person who sustains damage thereby

### Process of removing a caveat:

- **TLA s 89(1)**: withdrawal by the caveator
- **TLA s 90**: inconsistent dealing is lodged (1) – 30 days to act before caveat lapses but only to the extent necessary to permit registration of the transfer
- **TLA s 90**: proceedings brought against caveator and court may make such order as it thinks fit (3)
- **TLA s 89A**: application for removal to the Registrar – 30 days to act before caveat lapses, unless application is abandoned or caveator plans to substantiate their claim in court
- **TLA s 91(4)**: a caveat that has lapsed or been removed cannot be renewed by the caveator for the same claim

Application to court by caveator to maintain caveat considered in accordance with mortgagor's interlocutory injunction, must show:

1. A prima facie serious question to be tried that they have the proprietary estate or interest which they claim

### **Piroshenko v Grojsman**

- Applicant must show a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending a trial, not that it is merely more probable than not that he or she will succeed at trial
- Consider whether the caveat is absolute (harder to justify) or conditional (easier to justify)

2. That a balance of convenience favours maintenance of the caveat until trial (based on where damage will lie eg where applicant is required to give an undertaking or pay off outstanding debt)

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| <p><b>Barry v Heider</b></p> <ul style="list-style-type: none"> <li>• B was RP of land, signed contract and executed transfer to S for consideration of 1,200p, certificate was in process of being issued by Registrar</li> <li>• In the meantime, S arranged loan of 800p from H in return for a mortgage over the property</li> <li>• H's solicitor said S should obtain from B a letter authorising that when the certificate of title was issued it would be sent to S, letter was obtained, so H advanced funds in reliance of B's statements</li> <li>• S took another mortgage in favour of G (acting for H) for 400p</li> <li>• All instruments were unregistered because the Registrar wanted to adjust boundaries of the land</li> <li>• B claimed he was fraudulently induced to sign the transfer by S and hadn't received any part of purchase money from S, sought injunction to stop transfer to S</li> <li>• B was still RP so sought to rely on legal title (S held transfer but hadn't registered it yet and both mortgages to H and G were unregistered)</li> <li>• B argued those other instruments couldn't create any interest in land (equitable contractual but not proprietary rights)</li> </ul>  |
| <p><b>HCA held:</b></p> <ul style="list-style-type: none"> <li>• H has a good equitable claim against B to have her loan secured over the land</li> <li>• Transfer to S was void for fraud, but B's fee simple estate was still subject to mortgage to H (because of estoppel)</li> <li>• G was also entitled to a mortgage in respect of his 400p, but this was subject to B's unpaid vendor's lien for 1,200p</li> <li>• Unregistered interests are recognised by TS before and irrespective of registration, but don't take priority over a registered interests (eg recognition of trusts, specific performance of a contract to sell land, caveats to protect equitable rights)</li> <li>• TS land includes legal and equitable estates, interests and liability</li> <li>• Registration gives a greater certainty to titles of RP's, but doesn't destroy the fundamental doctrines by which equity has enforced conscientious obligations against RP's</li> <li>• An equity against a RP arising out of a transaction taking place after he became RP may be enforced against him</li> <li>• Equity can operate behind TS to uphold basic contractual principles; a proprietor may contract as he pleases, and his obligation to fulfil the contract will depend on ordinary principles and rules of laws and equity, except as expressly or by necessary implication modified by the TLA</li> </ul> |
| <p><b>Swanston Mortgage v Trepan</b></p> <ul style="list-style-type: none"> <li>• T was RP of land subject to a mortgage to S, T defaulted, S improperly exercised power of sale</li> <li>• S entered into a contract of sale with B, a bona fide purchaser</li> <li>• T lodge a caveat to stop transfer to B from proceeding</li> <li>• S argued caveat should be removed as it didn't support an estate or interest on land</li> </ul>   |
| <p><b>VSC held:</b></p> <ul style="list-style-type: none"> <li>• RP (T) cannot lodge a caveat on their own title to stop an improper sale proceeding (but can lodge an injunction)</li> <li>• A RP cannot caveat their own title unless they have an interest that is separate and distinct from their own registrable interest (T had no other legal or equitable interest other than being RP)</li> <li>• Until the court makes an order setting aside a voidable sale by a mortgagee, the RP has a mere equity which isn't a full equitable interest and will not support a caveat</li> <li>• Relied on Kitto and Menzies JJ in <i>Latec Investments</i> to justify classifying the right as a mere equity (although arguable Menzies J didn't agree)</li> <li>• However criticised for relying on <i>Latec</i> because in that case the subsequent purchaser had become registered by the time the mortgagor sought to set aside the sale (didn't determine caveatability, merely resolved a priorities conflict)</li> </ul>   |
| <p><b>Mere equities:</b></p> <ul style="list-style-type: none"> <li>• Are a personal not proprietary right and won't support a caveat because they aren't an estate or interest in land</li> <li>• A procedural right which is ancillary to a proprietary right and which limits or qualifies it in some way (eg a right to have a transaction set aside for fraud or undue influence or to have a document rectified for mistake), cf an equitable interest</li> <li>• No more than the right to seek an equitable remedy, whether or not that remedy is sought in aid of a property right</li> </ul>   |

### Competing equitable interests under TS:

All CL jurisdictions recognise the existence of equitable interests but there is far more litigation in Australia, which could be prevented if caveats were lodged promptly (only 5% of Victorian purchasers lodge to protect interests before registration)

#### **Butler v Fairclough** (earlier approach to priorities)

Griffith CJ: 'It must now be taken to be well settled that under the Australian system of registration of titles to land the courts will recognise equitable estates and rights except so far as they are precluded from doing so by the statutes. This recognition is, indeed, the foundation of the scheme of caveats. In dealing with such equitable rights the courts in general act upon the principles which are applicable to equitable interests in land which is not subject to the Acts'

1. Who are the priority disputes between? What is each party arguing?  
What are the interests? Are they equitable, legal or mere equities? When was each created? (prior or subsequent)
2. Apply preliminary notice test: was the subsequent interest acquired with notice (actual, constructive or imputed) of the existence of the prior interest? (eg should have known because of the nature of the business *Perpetual*)  
If yes, first interest holder will generally have priority unless he or she has waived it or is estoppel by his conduct  
Whether yes or no, still go through the merits test  
**PLA s 199**: can be actual or constructive (would have known had they or their lawyer made reasonable enquiries)  
**Moffett v Dillon** (VSC)
4. Apply merits test:  
Prima facie first in time has priority, unless prior interest holder engaged in postponing conduct by act or neglect (but don't consider if there is no postponing conduct)  
**Abigail v Lapin, Heid v Reliance** (Gibbs CJ and Wilson J), **Jacobs v Platt Nominees**

What makes it inequitable that the prior interest holder should retain priority? (justifies postponement)

- a. **Heid v Reliance**: Estoppel-based approach (Gibbs CJ and Wilson J): fits with 'arming' cases
  - Should the prior interest holder be estopped from asserting their interest for unconscionability because of their representation that induced detrimental reliance?
  - RP arms another party with the means to present himself as the unencumbered owner which leads to the creation of a subsequent equitable interest
  - RP arms with duplicate certificate of title and registerable instrument and fails to caveat  
**Abigail v Lapin, Breksvar v Wall, Heid v Reliance, Rice v Rice, Butler v Fairclough**
- b. **Heid v Reliance**: Reasonable foreseeability/negligence approach (Mason and Deane JJ): fits with 'inconsistent interest' cases
  - Was it RF at the time of the relevant conduct that a subsequent interest would be created in the belief that the prior interest did not exist? (or were there inconceivable circumstances – consider relationship)
  - RP creates a prior interest in one party then subsequent inconsistent interest in another party and the earlier interest holder fails to register the interest and fails to caveat  
**J&H Just Holdings, Jacobs v Platt, Black v Garnock, Butler v Fairclough** (Griffiths CJ)

Identify acts or omissions of the first interest holder that contributed to a misapprehension by the subsequent interest holder:

Only consider the conduct of the second interest holder if there is postponing conduct on the part of the first

- Caveats: MUST HAVE A CAVEATABLE INTEREST!  
Failure to caveat by prior interest holder relevant, not fatal (not notice to world, merely to Registrar)  
**Butler v Fairclough, Abigail v Lapin, Heid v Reliance, Black v Garnock**
  - Arming where practical and prudent to caveat ie where failure to caveat induced detriment by subsequent interest holder (**Butler v Fairclough**) or where not in possession of certificate of title (**J & H Just Holdings**)  
**Heid v Reliance** (Gibbs CJ, Wilson and Murphy JJ): failure to caveat amounts to a representation, is arming conduct
  - Not arming in a family context and where reassurances and protection have been given or where caveat wouldn't prevent new dealing being made (**Jacobs v Platt**)  
**Heid v Reliance** (Mason and Deane JJ): failure to caveat is only one circumstance to be considered
- Possession of duplicate certificate of title (and due diligence in checking certificate/register) is a very material factor  
**Just Holdings, Rice v Rice, Butler v Fairclough, Abigail v Lapin**
- Possession of land amounts to constructive notice (eg tenancy in possession), therefore no need to caveat  
**Perpetual Trustees v Smith**

**Rice v Rice** better equity test:

Measured from the time the interest arises (if equal use first in time test as last resort)

Priority goes straight to the better equitable interest, depending on the nature, conditions and manner of acquisition of interest, fairness and justice in circumstances of the case, and conduct of the parties

**Rice v Rice, Butler v Fairclough, Heid v Reliance** (Mason and Deane JJ)

6. Conclude which interest will have priority  
Consider if your answer would be different if you applied the other tests  
What does the outcome of the priority dispute mean for the party or parties you are advising? Eg 'beneficiary's interest is not subject to the equitable mortgage'

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| <p><b>Butler v Fairclough</b></p> <ul style="list-style-type: none"> <li>• G was RP of Crown lease which was already subject to a registered mortgage</li> <li>• Then agreed to charge the lease with a debt owed to him by B, B agreed to exercise a proper and legal mortgage if required, B didn't caveat his interest</li> <li>• 2 days later G agreed to sell the lease to F, subject only to the existing registrable mortgage</li> <li>• F searched title finding no caveat, paid purchase price and obtained a signed transfer from G, unaware of B's equitable charge</li> <li>• 5 days later, B lodged a caveat in relation to the charge</li> <li>• F then lodged his transfer, but it couldn't be registered because of B's caveat</li> <li>• Competition between prior equitable charge and subsequent specifically enforceable contract in equity</li> </ul>   |
| <p><b>HCA held:</b></p> <ul style="list-style-type: none"> <li>• Failure to caveat was postponing conduct, because B's failure to caveat had induced F to act to his detriment and acquire an interest in the land</li> <li>• B's prior equitable interest (the equitable charge) was postponed to F's subsequent equitable interest (specifically enforceable contract)</li> <li>• Note B's postponing conduct was only 7 days but was still sufficient to overcome his equitable interest</li> <li>• A caveat gives notice to all the world that the RP's title is subject to the equitable interest alleged in the caveat</li> <li>• Failure to caveat had induced F to act to his detriment in acquiring an interest in the land (estoppel-based)</li> <li>• Griffiths CJ took a negligence-based approach: had the prior interest holder taken all reasonable steps to prevent the RP dealing with the land without notice of the prior interest? (reasonable foreseeability based approach)</li> </ul>   |
| <p><b>Moffet v Dillon</b></p> <ul style="list-style-type: none"> <li>• P entered into a term contract of sale of his land to D which was later rescinded</li> <li>• Parties agreed that moneys owing under the contract be secured by a charge given by D to P over D's land</li> <li>• P lodged a caveat for her charge over D's land</li> <li>• D granted a mortgage to a bank over the land</li> <li>• Bank took its mortgage with notice of P's earlier charge over the land and asked P to withdraw her caveat</li> <li>• Bank lodged mortgage for registration, and by mistake the mortgage was registered</li> <li>• P took proceedings for an injunction</li> <li>• Dispute between two unregistered interests (prior equitable charge, subsequent equitable mortgage)</li> </ul>  |
| <p><b>VSC held:</b></p> <ul style="list-style-type: none"> <li>• P's earlier interest prevails over bank's later interest</li> <li>• When the bank took its mortgage, it had admitted full knowledge (actual notice) of the creation and continued existence of the earlier equity</li> <li>• Brooking and Buchanan JA: A subsequent equitable interest holder cannot take priority over a prior equitable interest holder where the subsequent interest holder; <ul style="list-style-type: none"> <li>○ Has actual knowledge of the prior interest (actual notice) (except for exceptions of estoppel and waiver - waived priority)</li> <li>○ Would (ought to) have known about prior interest if they had made the enquiries expected of a reasonable purchaser (constructive notice)</li> <li>○ Facts were known to his or her agent (imputed notice)</li> </ul> </li> <li>• Notice isn't just a mere consideration in determining the better equity, it is determinative and there is no need to make further inquiries (but do merits test anyway)</li> <li>• Unless engaged in postponing conduct, notice protects the prior equitable interest holder</li> <li>• Ormiston JA: a later interest holder must show why his equity is preferred over first interest holder (merits test), in which notice is an important consideration in determining whether there is postponing conduct</li> <li>• Where the equities are equal (guided by broad principles of justice), the first in time prevails unless subsequent equity holder can prove otherwise – that they took the interest without notice or otherwise has the better equity</li> </ul> |

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| <p><b>Abigail v Lapin</b></p> <ul style="list-style-type: none"> <li>• L's were RP's and owed their solicitor H money in relation to legal costs</li> <li>• As security of the costs, they executed transfers to H's wife for the land, handed over the duplicate certificate of title, and did not lodge a caveat</li> <li>• Transfers to Ms H were registered shortly after and she became RP</li> <li>• H registered a mortgage with a bank who held the certificates of title</li> <li>• A then lent H's money in form of equitable mortgage</li> <li>• Existing registered mortgage was discharged to the bank and A then held duplicate certificates of title</li> <li>• Unclear whether A searched register, but 2 days later he did lodge a caveat in relation to his equitable mortgage</li> <li>• Months later, A lodged his mortgage for registration, but it had to be rectified for formal defects</li> <li>• Meanwhile L's lodged a caveat and sought to redeem the property, preventing A from registering the mortgage</li> <li>• L's argued their prior equity of redemption took priority over A's subsequent equitable mortgage</li> <li>• Argued they handed over the certificates of title as collateral security for a loan which had since been discharged, so they should be RP's and possess the certificates of title</li> <li>• Argued they had been induced to sign the transfers by H in the belief they were security for his professional costs</li> <li>• H alleged the land was transferred in order to discharge the bank mortgage and in payments of costs due to him</li> <li>• A was joined as defendant by L as having no better title than H, because A didn't take bona fide as a purchaser for value and without notice</li> </ul> |
| <p><b>PC held:</b></p> <ul style="list-style-type: none"> <li>• A's subsequent equitable interest prevailed as L's had engaged in postponing conduct unlike A who merely did what an equitable interest holder is expected to do</li> <li>• L's interest should be postponed because they failed to caveat and had armed H with the unfettered indicia of title, allowing her to register herself as legal owner in fee simple (notwithstanding that she exceeded her actual authority) which is such unreasonable and negligent conduct and made their equity inferior to A's</li> <li>• L's knew they were signing the transfers of the properties as transferors and that the transferee was Ms H</li> <li>• Prima facie the first in time test prevails, unless there is some act or omission on the part of the first interest holder than makes it inequitable from them to retain priority (rejects prior equity approach)</li> <li>• Must be something tangible and distinct having grave and strong effect eg inducing a claimant later in time to act to his prejudice</li> <li>• Handing over everything that lets the recipient acts as if they have an unencumbered title without lodging a caveat is postponing conduct, but failure to caveat isn't necessarily (not definitive)</li> <li>• A was enabled to enter into the transaction with H on good faith as anyone dealing with H would have no idea that the L's had a prior interest in the properties</li> </ul>  |
| <p><b>Rice v Rice</b></p>   |
| <ul style="list-style-type: none"> <li>• Vendor had a prior equitable lien for unpaid purchase moneys from purchaser</li> <li>• Purchaser was engaged in a subsequent equitable mortgage to an equitable mortgagee, deposited title deeds</li> <li>• Vendor delivered the title deeds with a written receipt endorsing full payment (which hadn't been received) to the purchaser</li> </ul>  |
| <p><b>All ER held:</b></p> <ul style="list-style-type: none"> <li>• Subsequent interest holder (mortgagee) is preferred as they had the better equity</li> <li>• In a contest where parties only have equitable interests that are in all other respects equal, first in time is the better equity (as a last resort)</li> <li>• If one party has a better equity than another, priority of time is immaterial</li> <li>• Better equity means according to the principles of right and justice which a court of equity recognises and acts upon</li> <li>• Here, vendors lien and equitable mortgage are equal value in respect or their nature and quality</li> <li>• Vendors had voluntarily armed the purchaser with the means of dealing with the property as the absolute legal and equitable owner, free from every shadow of encumbrance or adverse equity</li> <li>• Should've retained the title deeds in their custody until the full purchase moneys paid and used the lien as protection</li> <li>• The purchaser only did what the vendor authorised and enable him to do</li> <li>• Mortgagee was perfectly justified in trusting of the security of the mortgage by deposit of the deeds, bona fide held the deeds (was invited and encouraged to rely on the purchaser's title)</li> <li>• The mortgage was created by the special contract of the parties, whereas the lien is a right created by a rule of equity without any contract</li> </ul>   |
| <ul style="list-style-type: none"> <li>• Conduct of parties and all other circumstances must be taken into account in determining who has the better equity <ul style="list-style-type: none"> <li>○ Nature and condition of the respective equitable interests</li> <li>○ The circumstances and manner of their acquisition</li> <li>○ The whole conduct of each party</li> </ul> </li> </ul>  |

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| <p><b>Heid v Reliance</b></p> <ul style="list-style-type: none"> <li>• H was RP of land which he orally agreed to sell to C, who was controlled by a firm of mortgage brokers, N</li> <li>• Part of purchase price was to be paid in cash (\$15,000), part was to be secured by way of mortgage back to H (\$50,000), and the remainder was to be deposited by another company controlled by N for the benefit of H</li> <li>• H accepted N's advice that G, an employee of N, should act as solicitor for H in the conveyancing transaction</li> <li>• Unknown to H, G wasn't a qualified solicitor</li> <li>• H gave G an executed contract, the transfer and the duplicate certificate of title addressed to the bank</li> <li>• On settlement, H was to place a substantial part of the proceeds of sale as investment with one of N's companies, and another sum by way of mortgage secured over the land</li> <li>• N lodged transfer for registration and obtained finance by way of mortgage over the land</li> <li>• C used the property (having duplicate certificate of title and the transfer) to grant mortgages</li> <li>• One mortgage was to R, which advanced money to N before the transfer to C was registered</li> <li>• R caused the transfer from H to C to be lodged, then lodged a caveat to protect their mortgage (equitable mortgage)</li> <li>• After registration of C's transfer but before registration of R's mortgage, H discovered C and N's fraud and took proceedings claiming an equitable interest in the land paramount to that of R</li> <li>• However H was only ever paid \$15,000 of the purchase price</li> <li>• C still owed H \$100,000 in relation to the sale (equitable vendor's lien), and another \$50,000 that H had loaned to C (equitable mortgage)</li> <li>• None of the subsequent equitable mortgagees were aware of H's prior equitable vendor's lien or mortgage, which had been deliberately concealed by C</li> <li>• H argued he was entitled to believe G was a solicitor, and that he was entitled to trust his solicitor and leave signed documents with him in anticipation of settlement (normal conveyancing practice)</li> <li>• Argued prior equitable interests (lien and mortgage) took priority over the subsequent equitable mortgages, in particular over R's mortgage</li> <li>• What was the relevance of H's conduct in relation to the priority dispute?</li> </ul> <p><b>HCA held:</b></p> <ul style="list-style-type: none"> <li>• H's interest should be postponed and R's subsequent interest took priority, so R gets to sell property and gets first portion of the proceeds, and H may not get all of his money back</li> <li>• H armed G and C with the ability to represent to third persons that C was the unencumbered owner of the land in fee simple, therefore H should be estopped from denying that R's interest took priority</li> <li>• Not reasonable for H to believe G would act honestly and in H's best interests, when H knew G was an employee of N which controlled C</li> </ul> <p><b>Gibbs CJ, Wilson and Murphy JJ: estoppel-based approach</b></p> <ul style="list-style-type: none"> <li>• H (prior interest) was estopped from asserting priority over R (subsequent interest), by his own actions</li> <li>• In handing over the transfer and duplicate certificate of title, and acknowledging payment of full purchase price, H had placed C in a position to represent itself as unencumbered owner</li> <li>• H had armed C with the ability to represent to third parties (R and subsequent mortgagees) that C was the unencumbered owner of the land</li> <li>• Failure to caveat in handing over title documents amounted to a representation that he had no interest in the land</li> <li>• R then acted to their detriment on the representation believing it to be true</li> </ul> <p><b>Mason and Deane JJ: reasonable foreseeability/negligence-based approach</b></p> <ul style="list-style-type: none"> <li>• Concerned with acts of a certain kind where it is RF that a later equitable interest will be created and that the holder of that later interest will assume the non-existence of the earlier interest</li> <li>• RF when H handed over the transfer and authority to collect duplicate certificate of title, that C might create a subsequent equitable interest in ignorance of H's interest, and that any person that acquired that later interest would assume that no earlier interest existed</li> <li>• Failure to caveat is only one circumstance to be considered when determining whether a prior equitable interest should be postponed or whether his priority should be retained</li> <li>• H would've been entitled to leave documents with his own solicitor if it was an independent solicitor, therefore wouldn't have lost priority (not a RF consequence that your solicitor would do this)</li> </ul> |
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| <p><b><i>J &amp; H Just Holdings v Bank of NSW</i></b></p> <ul style="list-style-type: none"> <li>J was RP, granted mortgage to BNSW however bank didn't register the mortgage or lodge a caveat, but took possession of certificates of title (equitable mortgage)</li> <li>Then J mortgaged property to JH, who did a title search and found no encumbrances, assumed no prior interest</li> <li>JH didn't register interest or take certificate of title but did lodge a caveat to protect their mortgage</li> <li>J told JH the certificate was being held at the bank for safekeeping</li> <li>Months later, BNSW lodged its mortgage for registration, which was blocked because of JH's caveat</li> <li>Competition between prior equitable mortgage (BNSW - certificate but no caveat) and subsequent equitable mortgage (JH - caveat but no certificate)</li> </ul>  |
| <p><b>HCA held:</b></p> <ul style="list-style-type: none"> <li>BNSW entitled to priority as holder of the earlier interest, supported by the fact they held the certificate of title</li> <li>A failure to caveat is not necessarily postponing/armoring conduct, is only one factor taken into account</li> <li>Failure to lodge a caveat may combine with other circumstances to conclude the act or omission of the prior equity holder contributed to a belief on the part of the subsequent equity holder that the prior equity wasn't in existence</li> <li>Can rely on possession of the certificate of title as protection, as in practice you can't lodge an instrument of transfer or mortgage without it</li> <li>The question of the comparative claims of the equitable interest holders only relevant if the interest first in time priority has been lost</li> <li>Purpose of a caveat is to act as an injunction to the Registrar to prevent registration of dealing with the land until notice has been given to the caveator, enabling the caveator to pursue remedies (protective)</li> <li>Not to give notice to the world or to persons who may consider dealing with the RP of the caveator's interest</li> <li>Windeyer J: caveat is notice to the world in that it is visible to anyone who searches the register, but that doesn't mean the that absence of a caveat is a notice that no interest is claimed (it is not equivalent to registration)</li> <li>A caveat isn't the only way in which a purchaser from the RP can be made aware of prior equitable claims</li> </ul> |
| <p><b><i>Jacobs v Platt</i></b></p> <ul style="list-style-type: none"> <li>P's were RP's of land, directors of P nominees and parents of J</li> <li>J had been granted an option to purchase the land by P, which she exercised but did not register a caveat</li> <li>P then entered into a contract to sell to Perpetual</li> <li>J argued her prior equitable interest (exercise of option to purchase) took priority over Perpetual's specifically enforceable contract, because this was a family arrangement and it was not RF that her parents would enter into any dealing that would defeat her interest</li> </ul>  |
| <p><b>VSC held:</b></p> <ul style="list-style-type: none"> <li>J could exercise her option to purchase, Perpetual can claim damages for breach of specifically enforceable contract</li> <li>Failure to caveat a full equitable interest in land acquired by exercise of option to purchase doesn't necessarily amount to postponing conduct</li> <li>It shouldn't deprive a person of their prime facie priority as the holder of the earlier interest</li> <li>This was concluded in fairness and justice, taking into account a number of factors; wasn't the practice of Victorian conveyancers to lodge a caveat to protect an interest under an option, no settled practice for purchasers to search the title for prior interests before entry into a contract</li> <li>Adopted Mason and Deane JJ approach; wasn't RF that J's failure to caveat would lead to a creation of a later equitable interest, as the grantee was her parents (inconceivable they would breach the option)</li> <li>A caveat may only be lodged in respect of an estate or interest in land, including interests arising under an enforceable option to purchase</li> <li>The practice of lodging caveats is not a duty to protect the caveator, much less a duty to the world at large</li> <li>No estoppel argument (no representation and detriment) as that is more relevant for armoring conduct</li> </ul>  |
| <p><b><i>Black v Garnock</i></b></p> <p><b>HCA held:</b></p> <ul style="list-style-type: none"> <li>Immediate indefeasibility is fundamental to the TS and facilitates land transactions by providing certainty</li> <li>The holder of a subsequent equity couldn't rely upon the absence of any notification of caveat</li> <li>Gleeson J: Purpose of caveat is to act as an injunction (protection), not to give notice to the world (agreed with Barwick CJ in <i>Just Holdings</i>)</li> <li>Caveats protect prior interest holders</li> <li>Callinan J disagreed: caveat serves both as an injunction to the register, and to give notice to anyone searching the register that another dealing or transaction is on foot</li> <li>Prior interest holder should promptly register a caveat to give notice to potential subsequent purchasers</li> <li>Unfair for a subsequent person who is entitled to deal with land, who hasn't acted fraudulently, to be suddenly and unexpectedly be postponed to an equitable interest which could've been but wasn't caveated</li> <li>Caveats protect subsequent interest holders</li> </ul>   |