

Priority Rules

First step: Classify the interest / hierarchy; **Second step:** apply the appropriate priority rules

1. Legal interest:

- eg, for old system land: **s23B, 23D(2)**; ~ in order to transfer legal interest
- **s41 RPA**: dealings are ineffectual to pass any legal interest, until registration
 - *System of title by registration not registration of title (Barwick CJ in Breskvar)*
- Unregistered = (occasionally) legal:
 - **s 23D(2) CA** lease: can be created without writing, provided (i) under 3 years (incl. option), (ii) tenant is in possession, (iii) best market rate available.
 - **s 43A RPA**: Deemed legal estate

2. Equitable interest

- (i) Unregistered Torrens
 - **S 41** denies effect to instrument until registration, but does not touch the rights arising from the underlying transaction: *Heider, Cresdon*
- (ii) Specific enforceability of contract for sale of land: *Lysaght*
- (iii) Lessee under valid agreement for a lease (specific performance): *Walsh v Lonsdale*
- (iv) Vendor's lien: right of unpaid vendor to retain possession of land until balance paid, receive purchase money, and has a lien on estate as security: *Heid v Reliance*
- (v) Equitable mortgage:
 - money advanced under specifically enforceable agreement to grant mortgage; writing: **s23C**
 - where equity recognises a mortgage after deposit of title deeds under doctrine of part performance: depositing deeds with lender is act of PP: **23E(d), 54A(2) CA**
- (vi) Equity of redemption:
 - Mortgagor's interest under an old system mortgage;
 - Second mortgage of the equity of redemption, being of necessity an equitable interest.
- (vii) Grantee's interest under an option
- (viii) Beneficiary's interest under a trust

3. Mere Equity: *Double Bay Newspapers*

- Claims to rectify a deed for mistake: *Smith v Jones [1954] EWCA*.
- Claims to set aside a transfer on the basis of fraud: *Latec Investments*

Prior equitable interest v later legal interest

Rule: Bona fide purchaser for value without notice doctrine applies, and legal interest holder will take free of prior equitable interest: *Wilkes v Spooner*

- 'bona fide' - without fraud
- 'purchaser of the legal estate' – holder of a legal interest (fee simple, lease, easement)
- 'for value' – consideration in money or money's worth
- 'without notice' - Actual (actual knowledge); constructive
 - imputed (agent put on notice – notice imputed to you as principal)

Rule in *Wilkes v Spooner*: Someone who takes an interest from a BFPFVWN can shield or shelter behind their good title, even if successor had notice of earlier interest or volunteer.

Prior legal v subsequent equitable

The **general rule is that the prior legal interest prevails**. However, it can be postponed and bound by the equitable interest, where legal interest-holder has:

1. Legal owner expressly created equitable interest
2. Fraudulently connived in the creation of the equitable interest.
 - a. Not enough to be careless with documents (*Whipp*)
3. Fails to get 'get in deeds' and this allows someone to represent themselves as legal owner.
 - a. Requires 'gross' negligence in failing to inquire title deeds (*Walker v Linom*)
4. Gives title deeds / indicia of title to an agent, and the agent exceeds that authority.

Earlier equitable v Later equitable

In a priority contest between equitable interests, the maxim *Qui prior est tempore* provides that the first in time prevails, subject to the merits being equal: *Abigail*

- However, a prior equitable interest will be guilty of postponing conduct where their < act or omissions > had the effect of inducing a belief that their interest did not exist (*Butler*)
 - **OR** 'armed B with the power to go into the world as absolute owner – *Abigail v Lapin*
- Facts state that X has < not lodged a caveat, retained the CT or registered their interest.

Does a failure constitute postponing conduct?

- (i) Mere failure to caveat, *of itself*, does not constitute p.c: *Butler, J&H Just (Holdings)*
- (ii) **Test**: Whether failure to caveat, considered in all the circumstances, contributed to the assumption that no prior interests exist.
 - Consider whether Y ***searched*** the Torrens register, to determine whether the failure to caveat had the effect of inducing a belief that the earlier interest did not exist.
 - If did not search, failure to caveat did not induce a belief that earlier interest did not exist
 - **C.f.** if there is postponing conduct independent of failure to caveat (arming with indicia of title) and later interest holder does not search register: *Abigail* ~ Privy Council focused on Lapin's (arming) and not whether Abigail searched the register
 - **Postponed: Butler**: X failed to caveat (7 day delay), Y searched register.
 - **Acquired CT: J&H Just**: function of caveat is about self-protecting an unregistered interest, rather than giving notice; here, X retained duplicate CT and could protect itself.
 - **Family relationship**: D may argue that analogies should be drawn with the decision in *Jacobs v Platt Nominees*, where the close family relationship between < > is similar to the trust Jacobs had in her mother, and hence, it was not reasonably foreseeable that a failure to caveat would lead to B entering into new transactions and creating new interests
 - (i) Nature of interest under an option not an interest usually protected by a caveat
 - **However: Jacobs** is a Victorian decision which is may not be reflective of conveyancing practice in NSW. Moreover, in *Black v Garnock*, the HC suggested that it is prudent conveyancing practice to lodge a caveat as a matter of course, even when protecting interest under an uncompleted contract to purchase

Other Postponing Conduct

- X may be guilty of postponing conduct if they ***armed*** a party with indicia of title to enable them to represent themselves as absolute unencumbered owner and create new interests
 - X (earlier) gave signed transfer form and CT to B, allowing B to be on register and appear as unencumbered owner (*Abigail v Lapin* ~ disguised mortgage)
 - Arming X with legal title documents such as a transfer form acknowledging full receipt of purchase price, which enables them to make a representation to the world under false colours (*Heid v Reliance*)
 - Transfer left in blank (*Breskvar v Wall* ~ void instrument)
 - Transfer voidable for fraudulent misrepresentation: *Barry v Heider* ~ A 'clothed' B with the ability represent themselves as owner of the land
 - If there is postponing conduct independent of failure to caveat (arming with indicia) and later interest holder does not search register – still postponing conduct: *Abigail*

Notice: The holder of a later interest cannot claim that the earlier interest holder is guilty of postponing conduct if they had ***notice of the earlier interest***, as implicitly they cannot claim to be misled by the earlier interest-holder's <failure to caveat>. Notice may be:

- Actual (actual knowledge)
- Constructive
- Imputed notice / knowledge of agent to principal **s 164(1)(a) CA**

Constructive notice: P will be considered as having constructive notice of the existence of earlier equitable interests that would have come to their attention had they made searches, inspections or inquiries that ought reasonably to have been made by the purchaser as part of conveyancing practice: **s 164(1)(a) CA**

- ***Torrens***: search of the Torrens Register
 - If purchaser does not, and a caveat existed, then the purchaser has constructive notice of the earlier equitable interest.
 - Does not extend to searching companies register (*Finlay; s43A(2)*)
- The purchaser ought to inspect the land to ascertain who is in possession (e.g., a tenant) or who is using it (e.g., holder of an easement): *Hunt v Luck*
- As P has an unregistered interest in land, they may lodge a caveat pursuant to **s74F** which prohibits R-G from recording a dealing which would affect the interest claimed without their written consent (**s74H(1)(a)**).
 - ***However***, if dealing has been lodged before the caveat, **s74H(4)** provides that the caveat will not prevent registration. P can still seek an injunction to restrain R-G from recording the already-lodged dealing.