UNREGISTERED INTERESTS

Can exist in the Torrens system as equivalent to equitable interests in land: *Barry v Heider* (1914).

- The Torrens system does not make registration compulsory.
- S 40(1) TLA – Subject to this Act, no instrument until registered as in this Act provided shall be effectual to create, vary, extinguish or pass any estate or interest or encumbrance in, on or over any land under the operation of this Act.
- DOES NOT acquire the benefit of indefeasibility; the doctrine of notice still applies – i.e. liable to be defeated by the good faith registration of an inconsistent dealing – even if the registered interest is acquired with knowledge or notice of the interest.

CATEGORIES OF UNREGISTERED INTEREST IN LAND

1. Interests Capable of Registration: validly created, evidenced by instrument in registrable form but not achieved the final step of actual registration in Torrens;
2. Interests Capable of Registration: but not evidenced now executed in registrable form;
3. Interests Incapable of Registration: interest of a beneficiary under a trust is incapable of registration under s 37 TLA –
   - A trust can be created over Torrens land but an interest arising under the trust cannot be registered;
   - Beneficial ownership arising under a trust is a form of an unregistered interest
   - Rationale for Exclusion: Notification of a trust on the register would make the title cumbersome and unwieldy, thereby undermining the virtues of a simple and efficient system of documentation.

Case Law on Unregistered Interests –

*Barry v Heider* (1914) – Barry was the RP of land and executed a transfer of that land over Schmidt in consideration of $1,000. S did not register the transfer and it was subsequently alleged by Barry that the transfer was voidable for fraud because B actually agreed to transfer the land for $4,000. S subsequently borrowed money from Heider on the security of the transfer. The mortgage in favour of H also remained unregistered. B sought an injunction to prevent the registration of the transfer and a declaration that the land was not encumbered by the mortgage in favour of Heider. The NSW Supreme Court concluded that the transfer could be set aside but that the land remained bound by the mortgage. B appealed to the HC but this appeal was dismissed. One of the issues before the HC was a consideration of whether the unregistered transfer and the subsequent unregistered mortgage constituted interests in land – HELD – Griffith CJ concluded that registration under Torrens was NOT the touchstone for the creation of an interest in land because equitable interests that have now been registered are recognised in the system.

- Although trusts may not be registered, provision is made for declaration of a trust and the deposit of the trust document with Registrar-General.
- The provision of the Act relating to caveats embody a scheme expressly devised for the protection of equitable rights – equitable claims and interests are recognised under the Real Property Act.
- Isaacs J – HELD that the suggestion that no interest in Torrens land can exist until registered was absolutely opposed to accepted notions in Australia with regard to the TLA Acts – the fact that the system sets up a caveat system providing for the protection unregistered and caveatable interests makes clear that the Torrens legislation assumes unregistered interests can exist.

Circumstances that would lead to the creation of an equitable interest under general law land, could also lead to the creation of an unregistered interest in Torrens title land.

- Equitable interest created under general law land may be created for valuable consideration as unregistered proprietary interest in land under the Torrens system.
- In many instances an unregistered interest is an equitable interest – but not always.
- To validly create an unregistered interest, the basic legal formalities for creating an interest must be observed.

EXAMPLES OF UNREGISTERED INTEREST

- The equitable interest of a purchaser under a contract for the sale of land who has paid a deposit.
- The equitable lien of a vendor who has transferred land to a purchaser, but has not yet received all of the purchase price.
- The interest of a purchaser in possession of land who is paying the purchase price in instalments to the vendor who remains registered as the proprietor of the land.
- The interest of a mortgagee under an unregistered mortgage.
- The interests of beneficiaries under an express, implied, resulting of constructive trusts involving Torrens land.
- The interests of a tenant under an unregistered lease; and
- The holder of an option relating to land e.g. option to renew – option to purchase.

PRIORITY RULES FOR UNREGISTERED INTERESTS

1. Priority B/w Registered and Subsequent Registered Interests

Legislation in all jurisdictions determine where two interests are lodged they are registered in order of lodgement, and their priority will be determined by date of registration: s 34(1) TLA.

2. Priority B/w Registered and Unregistered Interests

RULE: Unregistered interest is extinguished by registration of another interest – subsequent interests gains indefeasible title.

- This can be overruled by proving that one of the statutory/non-statutory exceptions to indefeasibility applies.
• If an unregistered interest constitutes a paramount interest — it is NOT EXTINGUISHED by registration — s 42(2) as these types of interest gain protection from the effects of registration.

3. Priority B/w Unregistered Interests – Common Law Priority Rules Apply

RULE: The courts will confer priority upon the prior unregistered interest (prior in time) provided all merits are equal: Rice v Rice.

• TEST - Whether in fairness and justice the overall circumstances justify the priority of a prior holder and preference should be given to what is the better equity in an examination of the relevant circumstances.
• Doctrine of Notice APPLIES to unregistered priority disputes.

MERIT ANALYSIS FACTORS
• Nature of the unregistered interest;
• Circumstances under which interests were acquired
• The date upon which the interest was created
• The overall conduct and equitable behaviour of the parties involved
• Whether the prior interest holder has in any way contributed to the creation of the subsequent interest – contributory conduct
• Whether the prior interest holder has in any way protected his interest – protective conduct
• Whether or not the prior unregistered interest holder has caveated his/her interest
• Usual conveyancing practice regarding caveats/
• Retention of title documents as alternative protection
• Whether documents have been lodged for registration;
• Notice of prior unregistered interest by holder of subsequent unregistered interest.

CATEGORIES OF POSTPONEMENT
An earlier equitable interest may be postponed in favour of a later (subsequent) one:

a) Where the holder of the earlier equitable claim has a mere equity and requires the court’s assistance to gain an equitable interest in the property
b) Waiver of prior equitable interest has taken place
c) Where the prior equity is in favour of a volunteer and the later claimant gave value and took the interest without notice of the earlier claim
d) Where the holder of a prior equitable interest has armed a third party with the indicia of ownership and this action has permitted the third party to deal with property as apparent owner
e) Where the first holder failed to lodge a caveat.

Cases on Priority Rules –

Heid v Reliance Corp Pty Ltd HC - Heid agreed to sell land to Connel Investments. Heid signed a memorandum of transfer indicating that he had received the full purchase price (untrue). Heid also gave an authority to collect his duplicate certificate of title. Heid held an equitable interest for the unpaid purchase price – vendor’s lien. Connel represented to Heid that Gibby was the company’s solicitor (untrue). Gibby obtained the duplicate certificate of title and it was used by Connel to obtain a loan from Reliance Finance. Reliance Finance passed money on reliance of documents. An equitable mortgage was created in favour of Reliance Finance. Issue: was whether the equitable interest of Heid to unpaid purchase price (vendor’s lien) took priority over the subsequently created equitable mortgage in favour of Reliance Finance? – HELD – HC held in favour of Reliance Finance (postponed priority). Gibb CJ – if a claim to enforce an equitable interest is opposed on the ground of a subsequently acquired equitable interest the better equity has to be determined – Interests of Heid was first in time; whilst interest of Reliance Finance was subsequent acquired.

If merits are equal – priority in time of the creation is considered to give the better equity: Rice v Rice.

If the merits are unequal due to conduct of owner of an earlier interest – the prior interest may be displaced and priority accorded to the latter interest.

The conduct of Heid was to hand over to Gibby the completed memo of transfer, containing an acknowledgment of payment and means to obtain the duplicate CT.

• Heid’s conduct enabled Connel to represent itself to Reliance Finance as having a title free from outstanding equitable interests.
• Estoppel – by clothing one with apparent ownership and right of disposition and acknowledging of payment, the owner is estopped from asserting title against a person to whom the property was disposed and who took it in good faith and for value.

ESTOPPEL IN THIS CASE - Held that:

(a) where the interest holder had provided the indicia of title, it amounted to representation and constituted estoppel:
  • The conduct of Heid in allowing Gibby to have the certificate of title, memorandum of transfer and proof of payment, allowed Connel to appear as the owner (armed with the power to go into the world with false colours).

(b) Reliance acted to its detriment on the assumption that no adverse equitable interest existed
  • Heid was estopped from claiming his equitable interest
  • Heid is bound by the natural consequences of his act
  • Principle: Handing documents (indications of title) over to solicitor in ordinary course of conveyancing is not negligent (no estopped) if solicitor acts fraudulently > > However, it was not necessary to decide this principle - because it was not such a case, as Gibby was not a solicitor.
Black v Garnock HC - Black obtained a judgment debt against the proprietor of farm. Proprietor sold farm to Garnocks (deposit paid) (equitable interest) who did not lodge a caveat. Prior to settlement a writ of execution was recorded in favour of Black preventing transfer to Garnock. At issue: (1) whether prior equitable interest of Garnock as purchaser was enforceable against the registered writ and (2) the relevance of failure of purchaser to lodge a caveat – HELD – Failure to lodge a caveat was vital because it could have prevented subsequent registration of writ: loss/defeit interest by purchaser.
- Case of failure of holder of unregistered interest to lodge a caveat to protect the interest against subsequent registration.
- RULE - Expected protocol is to caveat interest to ensure its validity and do not lose it.

J & H Just (Holdings) Pty Ltd v Bank of NSW HC - Josephson was a registered proprietor of land. He created an (1) equitable mortgage in favour of Bank of NSW. Bank did not register a mortgage but retained possession of the duplicate certificate of title and a memorandum of mortgage in a registrable form. In accordance with normal conveyancing practice in NSW, no caveat was lodged to protect the equitable mortgage. Josephson (2) created a second equitable mortgage in favour of J & H Just. The company accepted the explanation that the duplicate certificate title was merely with the Bank of NSW for safekeeping. Their view was reinforced by a title search. Bank of NSW lodged its mortgage for registration but J & H Just lodged a caveat to stop registration. Issue: whether the equitable mortgage of J & H Just should be given priority because of the failure of Bank of NSW to lodge a caveat – HELD – Bank did not lose its priority due to the failure to caveat.
- Court held that the failure by the prior mortgagee to caveat its interest did not in itself constitute postponing conduct – retention of duplicate CT and conveyancing practice were sufficient to protect the interest of the Bank of NSW.
- The court referred to the practice of the Registrar General's office to refuse and accept an instrument of transfer of mortgage for registration without production of the duplicate CT of title – a Bank can reasonable rely upon this practice and its possession of the duplicate CT as a reasonably sufficient protection – NO SPECIFIC NEED TO CAVEAT a mortgage.

IAC Finance Pty Ltd v Courtenay HC - The Courtenays purchased land from the registered proprietor and mortgaged the land back to the vendor. The Courtenays did not caveat their interest as this was the usual practice not to do so. The vendor’s solicitor lodge the transfer and mortgage for registration. The solicitor withdrew the transfer and sold it to Denton who was being financed by IAC on a mortgage. Transactions were presented for registration but not registered. The Courtenays asked the court for a declaration of rights. Competition between prior unregistered equitable interest of Courtenays (as purchasers) and the subsequent equitable mortgage of IAC. At issue whether failure of Courtenays to caveat their interest amounted to postponing conduct? – HELD – HC found in favour of the Courtenays.
- For postponement – their act or omission must have contributed to a belief on the part of the holder of the subsequent equity, at the time it was acquired, that the prior equity was not in existence. Question was whether the conduct of the Courtenays was such that deception was a natural consequence, so they could be said to have armed the solicitor with the power to go into the world under false colours – found it was not reasonably foreseeable for the Courtenays that a TP might, without enquiring from them, part with money on the assumption that Denton had the authority to withdraw from registration a transfer they were entitled to have registered.
- Failure to caveat – DID NOT LEAD TO POSTPONEMENT – Court found that the mere lodging of transfer gave clear notice that an interest had come into existence, and put persons in the position of Denton upon enquiry as to whether the interests of the Courtenays have ceased.
- They have taken reasonable steps to protect their interests and it could not be laid at their door that Denton was deceived by rogue solicitor.
- The failure to lodge the caveat was a result of an established practice not to do so in light of impending registration of transfer, and therefore did not lead to postponement.

Jacob v Platt Nominees - Mrs Jacobs held an option to purchase a motel from Platt Nominees Pty Ltd. Her mother and father were sole directors of Platt. Despite being advised to caveat her interest Mrs Jacobs refused to do so because she did not wish to worsen the relationship with her father. Platt subsequently sold the land to Perpetual Trustee Co (her brother undersigned the agreement to sell and her mother was unaware of the sale). At issue was whether Mrs Jacobs prior unregistered option to purchase should be postponed in favour of the subsequent unregistered interest of Perpetual Trustee due to her failure to lodge a caveat? Argued that it was settled conveyancing practice in Victoria to lodge a caveat after acquisition of an equitable interest, especially after the grant of an option. Practice to search the title after contracts have been exchanged and not before entering into a contract.
- Either estoppel or ‘reasonable foreseeability’ approach may be appropriate to resolve dispute depending on facts of case;
- No general expectation to lodge a caveat
- Failure to lodge a caveat is not a decisive consideration
- Failure to lodge a caveat does not involve loss of priority

HELD – A settled practice to lodge caveats after the grant of an option to purchase was not proven in Victoria. Therefore, a failure to caveat could not reasonably amount to a representation that no option to purchase existed. Mrs Jacobs had secured an option from her parents in such a way that it was inconceivable that further interests could be created without her mothers permission.
- Her explanation that she did not want to upset her father further by lodging a caveat was consistent;
- It was not reasonably foreseeable that her failure to caveat exposed her to the risk of a later sale and that an interest in favour of Platt would be created.
- In fairness and justice Mrs Jacobs should not be deprived of her priority in time.

**Failure to Caveat not fatal in this case (although such failure is taken into account)**

**FAILURES TO CAVEAT**

Leros Pty Ltd v Terara Pty Ltd – HC – noted that failure to caveat should not directly impact upon priority disputes as it primarily concerned the enforceability of the claimed interest.

**Differing Views** –
A failure to caveat is just one of the factors to be taken into account in a priority dispute along with all of the circumstances of the case (Abigail v Lapin and Held v Reliance Finance Corp Pty Ltd);
A failure to caveat will not automatically postpone the priority of an earlier interest where the interest holder has taken steps to protect that interest (J&H Just (Holdings) Pty Ltd v Bank of NSW)
A failure to lodge a caveat should not have a bearing on the priority analysis because its purpose is to provide protection rather than priority (Jacobs v Platt Nominees Pty Ltd)

Whether it is usual or not in terms of conveyancing procedure to caveat is also relevant during merit analysis: General Principles –

- Relevant in priority analysis if the holder of an equitable interest is aware of the fact that he/she hold such interest and is in a position to protect it, however, failed to caveat or obtain any other form of protection: may offset priority analysis
- Not relevant in priority analysis if holder holds an equitable interest and is in a position to protect it and do so via a method other than lodgement of a caveat: sufficient alternative measures were adopted
- Not relevant in priority analysis if the prior interest holder is aware of the fact that they hold an equitable interest but usual conveyancing practice does not require lodgement of caveat
- Not relevant in priority analysis if there was a failure to caveat because of reasonable belief that it is not necessary to do so
- Problem with this factor is that test for negligence is objective and subjective factors such as reasonable belief should not be taken into account.

RELEVANCE OF NOTICE

Notice has been abolished at Torrens: s 43 TLA.

- Any notice that a subsequent interest holder may acquire is simply one factor to take into account in a merit analysis.
- Notice should NOT be of greater significance than other factors considered.

Moffet v Dillon VCA - Moffett sold land to Dillon. To secure payment Dillon provided Moffett with an equitable charge over the land. Moffett lodged a caveat to protect his interest. Dillon obtained a mortgage from Westpac Bank in a registrable form. Westpac was aware of the earlier equitable charge of Moffett. Issue whether the interest of Moffett under the equitable charge prevailed over the subsequent unregistered, but registrable, mortgage of Westpac – HELD – Court was unanimous in support of Moffet's interest but differed in reasoning.
  - HELD that the rule that a person taking with notice of an equity takes subject to it is distinct from the rule that where the equities are equal first in time prevails.
  - Brooking JIA – suggested that if it can be proven that a subsequent unregistered interest holder has taken the interest with notice of the existence of a prior interest – the subsequent interest holder takes subject to notice since its conscience is affected by equity of which he has notice.

Ormiston JA –
  - Notice should not be given any greater significance than any of the matters which may be taken into account to determine whether an interest is to be postponed in “fairness and justice.” Reserved opinion on this matter.
  - If merit analysis is still correct approach, then existence of notice is only relevant if there were some other factor pointing that the latter interest is the better equity.

RULE FROM CASE: if the holder of the subsequent equitable interest had notice of the prior equitable interest then the first equitable interest holder will prevail (have priority) regardless of the merit of the later equitable interest.

→ Priority disputes should be resolved by assessment conduct of each party and assessing whether they acquired it in a balanced and fair manner.
→ There is NO reason why subsequent equitable interest holder should be elevated to a status akin to a legal estate holder and have a test akin to a bona fide purchaser for value without notice because notice does exist on the facts.

CAVEAT SYSTEM

A caveat provides protection to unregistered interests in land and can be lodged to prevent the registration of any dealing inconsistent with an unregistered interests.

- Provides notice of the existence of potential interest in land.
- Caveat informs all future dealers with the land of the existence of the unregistered interests.
- DOES NOT confer indefeasible title.
- Is NOT a defect in title (does NOT alter anything in the title) or an encumbrance.
- Is a form of statutory injunction – prevents the registration of any subsequent inconsistent dealing over the land for a specific time frame, thereby providing time for a judicial determination of the conflicting claims.

S 89 TLA - Caveats temporarily forbidding dealings with lands

(1) Any person claiming any estate or interest in land under any unregistered instrument or dealing or by devolution in law or otherwise or his agent may lodge with the Registrar a caveat in an appropriate approved form forbidding the registration of any person as transferee or proprietor of and of any instrument affecting such estate or interest either absolutely or conditionally and may, at any time, by lodging with the Registraran instrument in an appropriate approved form, withdraw the caveat as to the whole or any part of the land.
EXAMPLES OF CAVEATABLE INTEREST

4.

Interests CAPABLE of Caveat

REQUIREMENT:

CAVEAT BY REGISTRAR

until an inconsistent dealing is lodged for registration.

PROCEDURE: Once lodged, a memorandum of the caveat remains on the Register until proceedings are brought to have it removed or until an inconsistent dealing is lodged for registration.

- Ensures all future dealings will be SUSPENDED for a specific time - usual period: 30 days - pending proof of validity of the caveat.
- If caveat fails to commence proceedings within the prescribed time the caveat will lapse - lodged dealings will then be registered.
- Description of caveat - must be such that the RG or reader of caveat could know whether a dealing will affect the interest claimed.

CAVEAT BY REGISTRAR - s 106(a) TLA - The Registrar

(a) May lodge a caveat on behalf of Her Majesty or of any person under the disability of minority unsoundness of mind or absence from Victoria, to prohibit any transfer or dealing with any land belonging or supposed to belong to any such person, or to prohibit dealing with any land in any case in which it appears that an error has been made by mis-description of such land or otherwise in any folio of the Register or for the prevention of any fraud or improper dealing.

REQUIREMENT: s 89 TLA there must be an estate or interest in land under any unregistered instrument or dealing or devolution in law.

- The caveats must direct itself to an existing identifiable interest in Torrens land - where no existing title is conferred: interest is NOT caveatable.
- Must clarify the interest to which the caveat relates with certainty.

Interests CAPABLE of Caveat – What one must do to lodge –

1. A proprietary right constitutes a caveatable interest.
   - A caveatable interest includes recognised legal interests or equitable interests in land (including equitable interests by way of specific performance).

2. HELD in Vic that mere or personal equities are NOT caveatable because they do NOT constitute an estate or interest in land.
   - WHERE REGISTERED PROPRIETOR HAS DEFAULTED ON MORTGAGE LOAN AND PURPOSES TO EXERCISE POWER OF SALE - A right of a registered proprietor to set aside the mortgagee's sale (undervalue sale) was HELD NOT to be an interest capable of being caveat: Swanston Mortgage Pty Ltd v Trepan Investment Pty Ltd [1994] - MERE EQUITY VICTORIA – contention with NSW position.
   - Distinction was made b/w equitable interest which would support a caveat and mere equities which would not.
   - Right to rectify a fraud is a right to seek an equitable remedy – not an equitable interest.
   - Registered proprietor of land has a caveatable interest where mortgagee has improperly exercised its power of sale: Re McKean's Caveat.
   - Sinclair v Hope Investments (NSW) it was held that the equitable right of a mortgagee to set aside a fraudulent sale was a Caveat.
   - Caveatable interest.
     - The fact that the mortgagor remains registered owner does NOT prevent him from holding equitable right as well.
     - Equitable right to prevent the completion of a voidable sale is not a right arises solely from his position as registered proprietor – rather; arises from (1) the charge created by him in entering the mortgage; and (2) the action of the mortgagee in entering into a voidable contract.
   - THUS the mortgagor may LODGE A CAVEAT to protect his right to have the sale set aside.

3. All Caveatable interests must be supported by being caveatable:
   - For lodgement of a caveat the provisions require that all Caveatable interest must be supported by an existing registrable instrument or the caveator is able to require the registered proprietor to execute a registrable dealing - Classic Heights Pty Ltd v Black Hole Enterprises Pty Ltd (1994) - HELD that an interest in Torrens title land is NOT Caveatable unless it is either evidenced by an existing registrable dealing or the caveator is able to require the registered proprietor to execute a registrable dealing.
   - Interests under a registrable lease are NOT Caveatable: Classic Heights Pty Ltd v Black Hole Enterprises Pty Ltd (1994).

4. The caveatable interest CANNOT exist for personal rights or contractual rights (license to occupy land – unless the contract expressly or impliedly grants a proprietary interest).
   - A Caveatable interest CANNOT merely arise where a contract confers it, because interests must be construed from the agreement: Murphy v Wright [1992] NSW.
     - Where a registered proprietor consents by contract to the lodging of a caveat against his or her land in aid of a money claim, the agreement will support the implication of an equitable charge sufficient to maintain the caveat: FTFS Holdings Pty Ltd v Business Acquisitions Australia Pty Ltd (2006).

EXAMPLES OF CAVEATABLE INTEREST

- the interest of a builder under a charging clause in a building agreement;
- the interest of a purchaser after signing a contract of sale;
- the interest of a mortgagee under an unregistered mortgage or charge, including the interest of a mortgagee by deposit of title deeds;
- the beneficial interests arising under a trust;
- the interest of a lessee under an unregistered lease (although there is probably no need, given the wide exception of section 42(2)(e) of the TLA);
- the interest of a person arising from contributions made to the purchase price of property;
- benefit of a restrictive covenant.
**FAILURE TO LODGE CAVEAT**

*Leros Pty Ltd v Terara Pty Ltd (1992)* - the issue was whether an option to renew a lease for further term of 7 years was valid and enforceable against the appellant (Leros) which, became the registered proprietor of an estate in fee simple. The option was protected by two caveats.

The **first caveat** was lodged when Leros’ predecessor in title, W, was the registered proprietor. It was lodged by the lessee, Terara, and claimed a leasehold interest with an option to renew. Prior to the lodged of the caveat, title to the leased premises changed and Jass Pty Ltd became the registered proprietor. The caveat forbade the registration of any instrument affecting the claimed interest unless it was expressed to be subject to the caveator’s claim. However, before this caveat could be lodged, the landlord transferred the reversion to 75% Jass Nominees. JN became registered prior to the lodgement of the caveat by T and the registration whilst subject to the lease, was not expressed to be subject to the option to renew. This meant that the option to renew was not protected at the point when JN became registered.

The **second caveat** was lodged by the National Australia Bank (NAB) to protects its interest under a mortgage by T, securing the repayment of moneys. The caveat forbade the registration of any instrument affecting the interest claimed by the bank unless such instrument was expressed to be subject to the Caveator’s claim. The caveat was noted on all subsequent transfers.

- The validity of T’s existing lease was not in dispute, as it is protected as a **paramount interest**. However, an option or purchase or renewal in a lease is **NOT** valid against subsequent registered interest unless the lease is registered or protected by a caveat.

**HELD**

If an interest is **NOT** protected by a caveat, registration of a subsequent dealing **extinguishes** all prior interests which, for registration, would have conflicted with the proprietor’s interests.

- The **option to renew NOT PROTECTED by caveat of T at Leros** – interest extinguished when predecessors became registered – an interest which is extinguished upon registration of a subsequent dealing **CANNOT** BE ASSERTED against any later proprietor.

- **Caveat subject to claim** – upon registration of a subject to claim caveat the title of the transferee is subject to the rights of the caveator.
  - Registration of such a transfer **DOES NOT** validate the interest claimed by the caveat.
  - Registration in **conformity** of the caveat prevents registration from destroying or defeating the prior valid unregistered interest.
  - Whether the claimed interest is valid and enforceable remains a matter for resolution after registration.

- The registered proprietor takes transfer subject to the claim made by the caveator and **NOT** subject to the interest claimed by caveator.

- **FOUND – NAB’s caveat** protected its interest as mortgagee with leasehold but not option to renew because the option was **NOT** specifically specified.
  - NAB’s caveat protecting its security **DID NOT** specify an interest in the option, which was, therefore, not protected by NAB’s caveat.

*Right of renewal WAS NOT ENFORCEABLE AGAINST LEROS.*

**DEALING WITH AN UNREGISTERED INTEREST**

- **If NOTHING** is done and a subsequent inconsistent interest is registered, the registration may **defeat** the unregistered interest.
- **If no caveat is lodged**, the interest will be **extinguished** and cannot be **asserted** against any subsequent proprietor.

*Black v Garnock (2007) 230 CLR 438* - Black obtained a judgement debt against the proprietor of farm. Proprietor sold the farm to G (deposit paid; equitable interest) who did not lodge a caveat. Prior to settlement a writ of execution was recorded in favour of Black preventing transfer to G.

**Issue:** whether prior equitable interest of Garnock as purchaser was enforceable against the registered writ; and the relevance of failure of purchaser to lodge a caveat.

- References to past careful practice of conveyances to lodge caveats for persons acquiring registrable estates/interests in Torrens title land.

**Problem:** in present case would not have arisen if this prudent was practice of the past (which had fallen in disuse – had been followed.

- Not clear why a comparable prudent practice could not developed to accommodate electronic lodgement, searching and registration.

**HELD** - Failure to lodge caveat was vital because it would have prevented subsequent registration of writ – **loss/defeat of interest by purchaser**.

**CAVEAT MUST RELATE TO EXISTING INTERESTS**

- Caveatable interest must be clearly described.
- The characterisation and description of the nature of the estate, interest or right claimed by the caveator is more than a mere **formal requirement** of the provisions of the Act relating to caveats.
- **Description of interest** went to the **heart and substance** of the operation of the provisions because without such a description, neither the Registrar-General or the person reading the caveat, could know whether a dealing would affect the interest claimed.

**Consequences of Failure to Lodge a Caveat**
In a priority dispute, b/w unregistered interests the failure to lodge a caveat may be relevant for purposes or merit analysis in a range of situations –

- Prior interest holder is aware of the fact that he holds a caveatable interest and is in a position to protect it but failed to lodge a caveat or obtain other form of protection.
- Prior interest holder is aware of the fact that he holds a caveatable interest and is in a position to protect it and do so with a method other than the lodgement of a caveat – ex retention of title documents.
- Prior interest holder is aware of the fact that he holds a caveatable interest and is in a position to protect it, but it is unusual conveyancing practice not to lodge a caveat.
- Prior interest holder is aware of the fact that he holds a caveatable interest but no caveat is lodged due to a reasonable belief that is not necessary.
- Prior interest holder is unaware of the fact that he holds a caveatable interest.

**AUTOMATIC LAPSING OF CAVEAT**
The caveator may commence proceedings to establish his/her right to maintain caveat upon notice of inconsistent dealing: s 90(1).

- Lapses within 30 days.
- If inconsistent dealing is withdrawn or removed the Registrar will reinstate the caveat: s 105(1).

**REASONABLE GROUNDS FOR LODGEMENT OF CAVEAT**

**TEST:** The court will consider whether the caveator has an honestly belief based on reasonable grounds for lodgement.

- **ONUS** is on the P’s to establish that the caveator acted without reasonable cause.
- **Reasonable cause:** It is not necessary that the caveator actually hold a caveatable interest, but rather, they hold an honest belief, based on reasonable grounds, that they hold such an interest.
  - *Arkbay Investments Pty Ltd v Tripod Funds Management Pty Ltd* [2014] HELD that ‘an honest belief on the part of the caveator based on reasonable grounds may not be sufficient to provide a reasonable cause for lodging or maintain a caveat if the caveat is lodged not for the protection of his interest BUT for an ulterior motive and without regard to its effect on transactions to which the caveator had agreed.*
  - *Natuna Pty Ltd v Cook* [2007] – the test: is subjective in that it required an examination of the caveator’s actual belief and whether it is honestly held. It is objective in that it requires that the belief be held on reasonable grounds.
- Where a caveat is lodged without reasonable cause – the caveator may be required to compensate any person sustaining damage as a result of the wrongful lodgement: s 118.