CASE NOTES

OSMANOSKI v. ROSE[1]

Sale of land—Competing equitable interests—Effect of failure to lodge caveat—Transfer of Land Act 1958 ss. 89, 89A.

The circumstances surrounding the suit commenced under s. 90(2) of the Transfer of Land Act 1958 by the Osmanoskis were relatively simple. The essential facts, as found by Gowans J. were:

(a) on 9 May 1973 the registered proprietors sold land, by sale note, to M. and S. Osmanoski (the applicants) who paid a deposit and obtained an equitable interest;

(b) the applicants did not immediately lodge a caveat with the Registrar of Titles;[2]

(c) on 16 May the registered proprietors executed another sale note selling the land to I. Rose. This contract was rescinded by mutual assent on 25 May and on this day the registered proprietors assented to sell the land to Rose and another (the respondents) as joint purchasers;

(d) a search of title was made on the respondents' behalf on 29 May disclosing no caveat or prior equitable interest;

(e) on 22 June the respondents received answers to requisitions on title from the registered proprietors which confirmed the result of the search of title. Copies of the contract of sale were exchanged and the respondents acquired an equitable interest in the land as from 22 June;

(f) the respondents paid the balance of their purchase money on 4 July;

(g) on 18 July, ten days before the respondents lodged their transfer for registration, the applicants lodged a caveat.

Gowans J. found that the respondents were induced, by the absence of any caveat affecting the certificate of title, to acquire their interest and pay the balance of their purchase money. He postponed the applicants' interest.

The significance of the decision is that it indicates the purpose of the caveat provisions under the Transfer of Land Act 1958:

> The lodging of a caveat under the Victorian Act operates . . . as an obstacle to a registered proprietor making title to a purchaser and to a purchaser obtaining title from the registered proprietor.[3]

His Honour arrived at this conclusion after examining primarily s. 89(2) of the Transfer of Land Act 1958. Section 89(2) should be noted:

> A memorandum of every caveat lodged under this section shall be entered on the Crown grant or the certificate of title for the land or on the instrument to which it relates.

[1] [1974] V.R. 523, Supreme Court of Victoria, *per* Gowans J.
[2] As facilitated by s.89(1) of the Transfer of Land Act 1958.
[3] [1974] V.R. 523, 528 *per* Gowans J.

This section, together with s. 89A(1) and other provisions[4] enabled Gowans J. to distinguish Barwick C.J's judgment[5] in *J. & H. Just (Holdings) Ltd. v. Bank of New South Wales*,[6] a case under the Real Property Act 1900 (N.S.W.), where it was held that the purpose of a caveat was to act as an injunction to the Registrar to prevent registration of dealings with the land until notice had been given to the caveator. The holder of a prior equitable interest, although it had failed to lodge a caveat, was not postponed to a subsequent equitable interest holder. Gowans J. chose to emphasize the differences between the Victorian and New South Wales legislation to avoid *Just's* case. His Honour was thus able to apply the principles relevant to competing equitable interests under Torrens system land as laid down in *Butler v. Fairclough*[7] (a case which arose in Victoria) and *Abigail v. Lapin*[8] (a New South Wales case). His Honour summarized the basic principle:

> the applicants, as the possessors of the prior equity, may lose their priority to the respondents, as the possessors of the subsequent equity, if some act or omission is proved against them which had or might have had the effect of inducing the respondents, as claimants later in time, to act to their prejudice.[9]

On the effect of lodging a caveat Lord Wright in *Abigail v. Lapin* repeated a statement by Griffith C.J. in *Butler v. Fairclough*:

> 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 the registered proprietor's title is subject to the equitable interest alleged in the caveat.[10]

Had the Osmanoskis availed themselves of the caveat provisions of the Victorian Act on acquiring their interest the respondents would have had notice of another interest and thus would not have been induced to proceed with the purchase. The caveat ultimately lodged by the applicants prevented the Registrar from registering the respondents' transfer because of s. 91 but this was too late. It follows that an important facet of the Victorian caveat provisions is to give notice of interests in land. A failure to give such notice may result in postponement of the interest.[11]

Although the differences in the Victorian and New South Wales Torrens legislation enabled Gowans J. to avoid *Just's* case it is disappointing that His Honour did not take the opportunity to closely analyse Barwick C.J's decision. A judicial analysis of the judgment would have helped to lessen the doubts about the principles to be applied in a competition between equitable interests and in particular the rules governing the effect of a failure to lodge a caveat.[12] The facts of *Just's* case are well known to property lawyers. The salient points to consider are:

(i) the holder of the prior equitable interest did not lodge a caveat but did obtain and hold the duplicate certificate of title to prevent further dealings with the land;

[4] Presumably s.91 which, like s.89A(1), gives inferential support to the conclusion.
[5] McTiernan, Windeyer and Owen JJ. expressly agreeing.
[6] (1971), 125 C.L.R. 546; [1972] A.L.R. 323; (1971) 45 A.L.J.R. 625; High Court of Australia.
[7] (1971), 23 C.L.R. 78; 23 A.L.R. 62; High Court of Australia.
[8] [1934] A.C. 491; [1934] All E.R. Rep. 720; Privy Council.
[9] [1974] V.R. 523, 526 *per* Gowans J.
[10] [1934] A.C. 491, 502; [1934] All E.R. Rep. 720, 736.
[11] Gowans J. did not hold that a failure to lodge a caveat would necessarily result in postponement of an interest nor did earlier cases relevant to this area—See Sackville R., 'Competing Equitable Interests in Land under the Torrens Systems—A Postscript' (1972) 46 *A.L.J.* 344.
[12] A perceptive and cogent criticism of the judgment of Barwick C.J. in *Just's* case has been made. See Sackville, *op.cit.*

(ii) the holder of the subsequent equitable interest was grossly negligent in advancing his money without obtaining the duplicate certificate of title so that he could register the dealing in his favour;

(iii) it was the practice in New South Wales for the Registrar General to note caveats on the relevant certificate of title but it was not mandatory for him to do so. The facts were significantly different from those of the earlier competing equitable interest cases.

The New South Wales Court of Appeal[13] considered whether Griffith C.J.'s principle in *Butler v. Fairclough* was an absolute principle that a failure to lodge a caveat would postpone a prior holder's interest to that of a subsequent holder or whether it was limited to circumstances where the subsequent holder could only proceed to deal with the registered proprietor safely *i.e.* where there were no circumstances which would put the subsequent holder on guard.[14] The Court of Appeal held that the principle was limited and further noted that the lodging of a caveat to give notice was a way of protecting an interest but could not interpret Griffith C.J. 'to mean that this is the only way'.[15] The prior interest could be protected by the retention of the duplicate certificate of title. The subsequent interest holder should have been put on guard by the registered proprietor's failure to produce the certificate of title. His foolishness in proceeding in the circumstances resulted in the loss of his interest. The Court of Appeal's reasoning was not incongruous with the earlier decisions. The factual differences of the cases explain the apparent conflict in the decisions.[16] In the High Court, on appeal, Menzies J. agreed with the decision of the Court of Appeal. His Honour did not see himself disagreeing with Griffith C.J. in *Butler v. Fairclough* or Lord Wright in *Abigail v. Lapin* about a caveat operating as notice to protect an equitable interest.[17]

Barwick C.J.'s approach to *Butler v. Fairclough* and *Abigail v. Lapin* was different in two significant respects. First his Honour denied that the purpose of a caveat was to give notice of the caveator's estate—

> Its purpose is to act as an injunction to the Registrar-General to prevent registration of dealings with the land until notice has been given to the caveator.[18]

Secondly his Honour saw Lord Wright's comments in *Abigail v. Lapin* 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* as *obiter dicta* because *Abigail v. Lapin* was ultimately a case 'of an agent exceeding the limits of his authority but acting within its apparent indicia'.[19] This reasoning has been criticized at length elsewhere[20] but most importantly it overlooks Lord Wright's statement in *Abigail v. Lapin* that the agency argument was supplementary reasoning. Barwick C.J.'s decision on the purpose of a caveat mentioned above is weakened also by his Honour's own comments later in the case. He recognized that in some situations a failure to lodge a caveat may combine with other circumstances to justify the conclusion that the prior holder's acts or omissions contributed to the subsequent

[13] (1970), 92 W.N. (N.S.W.) 803; Jacobs J.A. delivering the judgment with which Mason and Moffitt JJ.A. concurred.
[14] (1970), 92 W.N. (N.S.W.) 803, 805-6.
[15] *Ibid.* 806.
[16] Sackville R., 'Competing Equitable Interests in Land under the Torrens System' (1971) 45 A.L.J. 396, 399, 413.
[17] [1972] A.L.R. 323, 328.
[18] *Ibid.* 326 *per* Barwick C.J.
[19] *Ibid.* 327 *per* Barwick C.J. citing Lord Wright in *Abigail v. Lapin,* [1934] A.C. 491, 508.

[20] Sackville's *Postscript* 345.

holder's belief that the prior interest did not exist.[21] This comment appears to be contrary to his Honour's earlier discussion of the purpose of caveats and treatment of *Abigail v. Lapin*.

Finally, Barwick C.J. found that in the circumstances before him the prior interest holder's failure to lodge a caveat would not postpone that interest as the prior holder had held the duplicate certificate of title. Under normal practice in New South Wales this would prevent the registered proprietor from further dealing with the land.

With respect, much of what Barwick C.J. said in *Just's* case was not necessary to the decision and was thus *obiter dicta*. To arrive at the same decision his Honour could have relied on the peculiar facts before him, and the principle that the failure to lodge a protective caveat of itself will not result in postponement of a prior interest unless the failure has induced the subsequent purchaser to acquire his interest. There was no need to attempt 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.

Shortly after the decision in *Just's* case the High Court gave judgment in *Breskvar v. Wall*[22] a case which ultimately became a competition between competing equitable interests. It is apparent from the judgments that unanimity on the decision in *Abigail v. Lapin* and the effects of the failure to lodge a caveat did not exist. Suffice it to say that Barwick C.J. (Owen and Windeyer JJ. again concurring) commenting on *Abigail v. Lapin* applied not dissimilar reasoning to that used in *Just's* case (the agency argument) ignoring the important fact that in the circumstances before the court the failure to lodge a caveat was a part of the 'arming' process whereby third parties could be induced to acquire interests in the land. The remaining judges[23] saw more in *Abigail v. Lapin* than a decision which relied on the apparent scope of an agent's authority. In particular Walsh J. recognized that the 'failure at the relevant time to place on the register any notice of any interest . . . in the land'[24] played an important part in the circumstances which enabled third persons to be misled into believing that the title was unencumbered.

It is submitted that Gowans J. in *Osmanoski's* case could have explained *Just's* case rather than merely distinguishing it by relying on the differences in the Transfer of Land Act 1958. This is not to suggest that the differences in the Victorian caveat legislation are not significant, or that Gowans J. was incorrect, but considering the differences of opinion displayed in the High Court in *Just's* case and later in *Breskvar v. Wall*, and some of the seeming weaknesses in the reasoning, the decision in *Just's* case need not have been the obstacle it seemed to be.

In any event it is now clear for Victorian solicitors that the prompt lodgment of a caveat is important in land transactions as one of its effects is to give notice to the world of an interest in land. The failure to lodge a caveat may result in the postponement of an interest. The facts in each case would be important however. Gowans J.'s decision does not solve all problems which may arise in this area[25] but the decision is in accord with the policy of the Torrens system legislation that interests in land should be ascertained from the register.

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[21] [1972] A.L.R. 323, 327.
[22] [1972] A.L.R. 205.
[23] McTiernan, Menzies, Gibbs and Walsh JJ.
[24] [1972] A.L.R. 205, 222.
[25] See a solicitor's letter (1973) 47 *Law Institute Journal* 482.