

PART VI – PRIORITIES

I *Priority Disputes*

A *Introduction*

Priorities rules resolve conflict between different but inconsistent interests in the same object of property. Inconsistent interests purport to confer mutually exclusive property rights to two separate people at the same point in time. The most common example is where two mortgages are created over the same land.

The overarching issue in a priorities dispute is: ‘whose interest prevails?’ In the case of two competing mortgages, this is the same as asking, ‘which can be satisfied first?’ The party losing priority is said to have their interest ‘subject to’ or ‘postponed by’ the interest of the person with the better priority. In most cases, this means that there is no property left after the first mortgagee has dealt with the property (often by selling it to recover unpaid debts). However, if the value of the land exceeds the size of the mortgage, the second mortgage may be able to be partially satisfied.

Common law priorities rules are applied with decreasing frequency owing to the steady contraction of areas falling under general law land regimes. In part, this is because most Torrens statutes provide for automatic conversions of general law to Torrens land when dealt with or transferred (see, eg, *Transfer of Land Act 1958* (Vic) ss 9–26W). However, the rules remain important — both from a historical perspective and when interpreting Torrens statutes.

Exam: compare and evaluate the effectiveness of the Torrens and general law systems in regulating private dealings with land. Priorities rules play a central role in statutory schemes of regulation. Note normative values underpinning priorities rules (concepts of moral entitlement).

Examples of the harmonious coexistence of different interests in land:

- Joint owners of land
 - Not inconsistent: rights exercised jointly or in common
- Landlord and tenant
 - Not inconsistent: landlord has reversion, tenant immediate possession for a term of years
- Mortgagor and mortgagee
 - Not inconsistent: mortgagor has legal or equitable right to repayment; mortgagee has possession, equity of redemption if they fall into arrears; only inconsistent when mortgagor exercises foreclosure

Several rules determine which of two inconsistent interests should be accorded legal priority. The rule to be applied is determined by the type of each interest (legal, equitable, registered, unregistered, etc), along with several general principles of law and equity.

These general principles are first examined; the specific rules are then developed.

B General Principles

1 Chronology

Conflicting proprietary interests in land may arise because of dealings *inter partes* or be created by separate events.

In general, where two competing interests are of the same type in all respects except for the time of creation, the earlier prevails.

2 Postponement by Conduct

However, in some circumstances the earlier interest may be postponed to a later interest (as happened in *Latec*).

If the parties conduct themselves such that it would be inequitable to allow the earlier interest to prevail, then the later interest has priority.

3 Notice

Deferment will also occur where the later interest is that of a *bona fide purchaser for value without notice* of the earlier interest.

An earlier equitable interest will be deferred to a later legal interest acquired by a *bona fide purchaser for value without notice* of the equitable interest.

The doctrine of notice determines when a purchaser will be said to have notice.

II The Doctrine of Notice

A Introduction

The circumstances in which a purchaser has notice are confined to three categories: actual, constructive and imputed. These categories are codified by the *Property Law Act 1958* (Vic) s 199, which sets out the various requirements of each:

Section 199 — Restrictions on constructive notice:

- (1) A purchaser shall not be prejudicially affected by notice of any instrument, fact or thing unless
 - (a) it is **within his own knowledge**, or would have come to his knowledge if such inquiries and inspections had been **made as ought reasonably to have been made** by him; or
 - (b) in the **same transaction** with respect to which a question of notice to the purchaser arises, it has come to the **knowledge of his legal practitioner or other agent**, as such, or would have come to the knowledge of his legal practitioner or other agent, as such, if such inquiries and inspections had been **made as ought reasonably to have been made by the legal practitioner or other agent**.
- (2) This section shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant condition, provision or restriction contained in **any instrument under which his title is derived, mediately or immediately**; and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been passed.
- (3) A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been passed.

Section 199(1)(a) describes actual and constructive notice of the purchaser. Section 199(1)(b) describes imputed notice: actual or constructive notice of the purchaser's agent.

Importantly, s 199(3) maintains the common law position. The case law considered below thus remains an important (indeed the only) guide to interpreting the scope of the three classes of notice.

B Actual Notice

Actual notice constitutes a subjective awareness of the relevant facts giving rise to the prior interest (eg, possession of land). A party will only have actual notice if it can be established or inferred from their conduct (eg, visiting the property and seeing the tenant in possession) that they had actual knowledge.

C Constructive Notice

Constructive notice arises where the purchaser ought to have known about the prior equitable interest. The scope of constructive knowledge is limited to what would have been known had the purchaser made enquiries that ought reasonably to have been made.

Reasonable enquiries encompass two classes of conduct:

- **Inspection of title documents**
The chain of title must show good root title more than 30 years old; and
- **Inspection of the property**
A physical inspection to check for possession by another.

If, as a result of these enquiries, the purchaser obtains knowledge of facts which would put a reasonable person on notice (eg, suspicious activities or persons), he or she may be required to carry out further investigations (*Jared v Clements*).

1 Inspection of title documents

A purchaser will be held to have constructive notice of title documents relating to the property. However, it does *not* extend to documents or deeds that have been removed from the chain of title (*Pilcher v Rawlins*).

***Pilcher v Rawlins* (1872) UK Ch:**

Facts

- Pilcher is a trustee, holding money on behalf of a beneficiary for investment
- He is approached by Rawlins, a solicitor, who wants to borrow money
- In 1851, Pilcher advances money to Rawlins in exchange for Rawlins executing a common law mortgage over the general law land he owns
- Pilcher receives the legal title as security, subject to an obligation to repay and Rawlins' equity of redemption
 - The transaction is legitimate so far
 - However, Pilcher and Rawlins now try to defraud several others
- They borrow money from Stockdale and Lamb, trustees for other beneficiaries (able to loan money on interest)
 - Rawlins agrees to give a legal mortgage over the land — but, applying *nemo dat*, he cannot give a mortgage to S&L because he does not himself have legal title
 - He prepares an abstract title (list of all documents in the chain of title, who has owned/leased the land; cf Torrens — only need certificate)
 - However, he fraudulently omits to include the 1851 transaction showing the existing mortgage to Pilcher
- On 2 April 1856, Pilcher reconveys the land to Rawlins without receiving repayment from Mortgage
 - However, in reconveying without receiving payment Pilcher is in breach of his fiduciary duties to the beneficiary
 - The fiduciaries have an equitable mortgage over the land
- Rawlins now executes a mortgage over the land in favour of S&L
 - The result is that S&L are legal owners, the mortgage having been executed in their favour
 - However, the trustees of Pilcher have a prior equitable interest because the

reconveyance is in breach of trust

Issue

- Does the prior equitable interest prevail against the subsequent legal interest?
 - Were S&L *bona fide* purchasers for value without notice?
 - Relatedly, did S&L have notice?

Reasoning

- No actual notice (didn't see the title document showing Pilcher's fiduciary obligations)
 - S&L conducted a diligent search of title
- Constructive notice
 - No, a purchaser cannot be taken to have constructive notice of something fraudulently removed from a chain of documents where there was no reason to suspect that anything was amiss
 - Constructive notice does not extend to deeds removed from the chain of title
 - The result may have been different if S&L had reason to suspect wrongdoing (eg, if the parties were dubious) but everything here appeared normal

Decision

- Therefore, S&L take legal title and their interest is not subject to the Pilcher's prior equitable interest

Often, a court will be in a position where it must decide priority as between two claimants who are innocent of any wrongdoing (because the fraudulent party has eloped). This can result in harsh application of the doctrine of notice. *Jared v Clements* provides such an example.

***Jared v Clements* (1902) UK Ch:**

Facts

- Taylor purchases two leasehold properties, taking out an equitable mortgage on the land from Jared by depositing title deeds
- Taylor goes bankrupt and cannot make the repayments, but he is subsequently discharged
- Taylor later contracts to sell the land to Clements
- Parr, Taylor's solicitor, provides an abstract of title but does not make reference to the equitable mortgage
- Clements' solicitor actually discovers the existence of the equitable mortgage
 - This gives them notice of two things:
 - The prior equitable interest of Jared; and
 - That Parr is lying to them
 - Parr promises that the land is unencumbered by the mortgage security and forges documents to that effect, as well as a memorandum of receipt of the moneys (including Jared's signature)
 - However, Taylor hasn't actually repaid the money and is in arrears to Jared
 - Jared has no knowledge of these transactions; the equitable mortgage is still on foot
- Clements believes this, and takes legal title pursuant to the sale
- Jared seeks to enforce his mortgage as a prior equitable interest

Issue

- Does Clements have notice of the prior equitable interest?

Reasoning

- Clements knew about the mortgage
- The manner in which he discovered this interest put him on notice that there were suspicious circumstances
- He should have done more to satisfy himself that the land was actually unencumbered
- This 'raises the bar', creating an obligation to go further

Decision

- Clements is fixed with notice and Jared's equitable interest prevails

There is a further issue of how far the doctrine of constructive notice ought to extend. If a purchaser with notice sells to a second purchaser without notice, does the second purchaser also have notice? Conversely, what if someone with knowledge of the earlier equitable interest buys the estate from an initial *bona fide* purchaser? If good title is deemed to pass to or from a *bona fide* purchaser, there might be no limit to the enforceability of interests.

Wilkes v Spooner suggests prior interests will not be revived by subsequent notice. Thus, a *bona fide* purchaser of the legal estate for value without notice can indeed give good title to a subsequent purchaser, even one who has notice — so long as the subsequent purchaser did not fraudulently sell the property.

***Wilkes v Spooner* (1911) UK KB:**Facts

- Two butchers have shops on High Street; one, at no 170 and owned by Wilkes, is a general butcher, the other, at no 137, just sells pork
- Spooner Sr, the father of the defendant, operates the specialist pork butcher
- The operation of his pork butchery is subject to a restrictive covenant not to compete with the other in the supply of pork
 - The covenant is a proprietary interest
 - This is an agreement reached between lessees
 - The landlord of the pork butcher tenant has no notice of the agreement reached between lessees
- Spooner Sr surrenders his lease to the landlord, who subsequently grants a fresh lease to Spooner Jr, who begins to compete with the general butcher
- Spooner Jr was aware (had actual notice) of the agreement between his father and Wilkes

Issue

- Can Wilkes' proprietary interest (the covenant) prevail over that of the new lessee (the leasehold)?
 - Does Spooner Jr, as a purchaser with notice, take possession subject to Wilkes' prior equitable interest, even though it went through the landlord, who had no notice?

Reasoning

- The extent of notice is limited to the first lessee
- Spooner Jr, the new landlord, takes without notice
- Here, the old landlord is in effect a *bona fide* purchaser of the legal estate for value without notice, so he can give good title to a subsequent 'purchaser' (Spooner Jr) of the

legal estate who does have notice of the prior equitable estate

- That is to say, the prior equitable estate cannot be revived, even though the second purchaser has knowledge of the agreement entered into by his father with the other generalist butcher
- Exception:
 - A person who has sold a property fraudulently cannot protect himself by purchasing the property back from a *bona fide* purchaser who does not have notice

Decision

- Spooner Jr is not bound by the covenant

2 Inspection of the Property

Here we are concerned with the extent to which a purchaser is held to have knowledge of the rights of a person in possession of the property.

Because a reasonable purchaser would conduct inspections of the land prior to purchase, all purchasers of land will have constructive notice of any proprietary interest held by a person in possession who is not the vendor (*Barnhart v Greenshields*).

There are, however, several limits to matters in respect of which a purchaser will be deemed to have constructive notice. For example, there will not be constructive notice of an equity of rectification (*Smith v Jones*).

***Smith v Jones* (1954) UK HL:**

Facts

- See above Part V
- An oral variation was made to a lease shifting liability for repairs to the landlord; the new landlord now seeks to enforce the original written agreement which placed liability upon the tenant

Issue:

- Does the tenant's equity of rectification take priority over the new landlord's reversion?

Reasoning:

- The new landlord does not have actual notice
- A purchaser will not be deemed to have constructive notice of an equity

Decision:

- Here, the equity of rectification is not enforceable against the new landlord because he took without notice of it

Part of the justification for the outcome in *Smith v Jones* is that a purchaser has no way to discover the existence of the oral variation, short of asking each of the parties whether the written agreement accurately reflects their actual agreement. Effectively, the courts are willing to view sighting the written agreement as sufficient enquiries for the purpose of notice.

Nor will there be constructive notice of any interests held by a person to whom a tenant is paying rent (such as their landlord) (*Hunt v Luck*).

***Hunt v Luck* (1902) UK Ch:**

Facts

- Hunt is the owner of a parcel of land
- He is induced by fraud to convey the title to G, as a result of which Hunt has an equitable right to reconveyance (to set aside the fraudulent transaction)
- However, G has created a mortgage in the intervening time
- The situation is thus one of prior equity, like *Latec v Hotel Terrigal*

Issue:

- Did the new tenants (mortgagees) have constructive notice of Hunt's equity?

Reasoning:

- Mortgagee knew tenants were paying rent to an estate agent
- However, this is consistent with it going to the rightful owner, so the mortgagee does not need to make further enquiries

Decision:

- Tenants don't have constructive notice and the equity is postponed

Until recently, third party mortgagees were held to have limited constructive knowledge of informal equitable interests such as trusts. According to United Kingdom authority, the occupation of a wife is consistent with her husband having the whole estate (*Counce v Counce*).

***Counce v Counce* (1969) UK:**

Facts

- A resulting trust exists in favour of Mrs Counce, Mrs Counce's wife
- The Bank brings an action for foreclosure on behalf of Mr Counce

Issue:

- Is the wife's equitable interest enforceable against the bank?

Reasoning:

- 'Her occupation of the land was in the shadow of her husband'
- Her being there was consistent with either some interest or no interest
 - It is consistent with the husband having everything

Decision:

- The Bank did not have constructive notice
- However, this case has been frequently distinguished and is now of little significance

The position in *Counce v Counce* (that the bank held a legal mortgage free of the wife's equitable interest because her husband was also in possession) has since been modified dramatically.

See especially *Hodgson v Marks* [1971] Ch 892; *Williams & Glyn's Bank v Boland* [1980] 2 All ER 408; *Commonwealth Bank of Australia v Platzer* [1997] Qd R 266.

Commonwealth Bank of Australia v Platzer (1997):

Facts

- The Commonwealth Bank is aware that Mr and Mrs Platzer are husband and wife
- Neither of them are living on the property because it is being renovated
- When Mr Platzer defaults on mortgage repayments, the bank reclaims possession

Issue:

- Did the Bank have constructive notice of Mrs Platzer's equitable interest in the property?
- Ought the Bank to further enquire about the nature of the wife's interest?

Reasoning:

- Mrs Platzer's occupation is not in the shadows — it is an overriding interest
- If banks fail to ask about the nature of the interest and whether the wife has received independent legal advice, they will be deemed to have constructive notice

Decision:

- Here, the Commonwealth Bank failed to enquire about Mrs Platzer's interest and so has constructive notice of her equitable estate

D *Imputed Notice*

Imputed notice consists of the actual or constructive knowledge of the purchaser's agent or legal practitioner. Such parties must be acting in their capacity as agent or legal adviser for the purchaser when they obtain or ought to obtain the relevant knowledge. As required by s 199(1)(b) of the *Property Law Act 1958 (Vic)*, they must also be acting in connection with the particular transaction (and not generally).

Thus, where a party's lawyer discovers the existence of a prior registered interest, the lawyer is said to have actual notice of the interest and, by s 199(1)(b), the purchaser has imputed notice of same.

E *Summary*

- 1 A purchaser can only acquire land free from prior equitable interests if they are *bona fide* in their purchase, pay consideration, and take without notice of the equitable interest;
- 2 Notice can be actual, imputed or constructive;
- 3 The doctrine of notice offers protection for women and tenants whose interests might otherwise be easily defeated;
- 4 Notice is usually applied to unregistered interests in Torrens land;
- 5 In general, when two interests are of the same type, the first in time will take priority.

III Priority Rules

A Prior Legal v Subsequent Legal

The maxim *nemo dat quod non habet* (no one gives who possesses not) applies to prevent a party passing title to a better interest than that which they themselves possess.

Thus, as a general rule, if the interest transferred stems from good title, priority will rank in order of the time at which the interest was acquired. The first in time prevails. If it is possible for interests to coexist, the second (later) interest is subject to the first. If it is not possible, the second is nullified.

B Prior Equitable v Subsequent Legal

A subsequent legal interest has priority over an earlier equitable interest unless the legal title holder has notice (actual, imputed or constructive) of the prior interest or was a volunteer (ie, provided no consideration): *Pilcher v Rawlins*.

In short, the doctrine of the *bona fide* purchaser for value without notice applies and governs priority disputes of this nature.

C Prior Legal v Subsequent Equitable

Unless the legal owner is fraudulent or arms another with the authority to create an equitable interest, a prior legal interest will be preferred to that of a subsequent equitable interest (*Northern Counties of England Fire Insurance Company v Whipp*).

Northern Counties of England Fire Insurance Company v Whipp (1884) UK:

Reasoning (Fry LJ)

- The Court will postpone the prior legal estate to a subsequent equitable estate in certain circumstances
 - First, 'where the owner of the legal estate has assisted in or connived at the fraud which has led to the creation of a subsequent equitable estate, without notice of the prior legal estate; of which assistance or connivance, the omission to use ordinary care in inquiry after or keeping title deeds may be, and in some cases has been, held to be sufficient evidence, where such conduct cannot otherwise be explained'
 - Second, 'where the owner of the legal estate has constituted the mortgagor his agent with authority to raise money, and the estate thus created has by the fraud or misconduct of the agent been represented as being the first estate'
- However, 'the court will not postpone the prior legal estate to the subsequent equitable estate on the ground of any mere carelessness or want of prudence on the part of the legal owner'

Decision:

- The plaintiff company dealt with their securities carelessly; however, there was no collusion to lend money, and no motive to create the subsequent interest

- Therefore, there was no fraud
- Further, there was no agency or authority to create the interest
 - Although the agent of the defendant (the legal owner) had a key to the property, this did not entail authority to deal with the securities of the company
- The legal interest is preferred

This priority dispute is now dealt with primarily by the operation of the Torrens system. Registered legal title is, in general, indefeasible by either prior or subsequent informal interests: s 42(1) *TLA*. The registered proprietor has title 'free of all encumbrances'. However, if the registered proprietor so conducts himself as to create an equitable interest in another party's favour, their obligations may be enforceable *in personam*. This is an exception to indefeasibility sufficient to recognise a prior (or subsequent) unregistered equitable interest: s 42(2).

D *Equitable v Equitable*

Rule: where the equitable interests are equal, then the first in time prevails (*Rice v Rice*). *Prima facie*, the first in time is strongest when two interests are the same. However, there are several exceptions to this rule (see below).

***Rice v Rice* (1854) UK:**

Facts

- The plaintiff is the vendor of a parcel of land, which he sold to a purchaser, X
- X paid only part of the purchase price, so the plaintiff has a vendor's lien (equitable interest) over the balance
- However, the plaintiff prematurely handed over a deed of conveyance to Ede, a third party, so as to create an equitable mortgage
- Ede is now equitable mortgagee over the land
- The vendor seeks payment of its unpaid balance

Issue

- Which estate is to be preferred as a matter of priorities: the prior equitable interest of the vendor (the unpaid lien) or the subsequent equitable interest of Ede as mortgagee?

Reasoning (Kindersley VC)

- The basic rule is this:
 - 'As between persons having only equitable interests, if their equities are *in all other respects* equal, priority of time gives the better equity; or, *qui prior est tempore potior est jure*'
- In deciding whether the equities are equal, the court looks at
 - The nature and condition of the interests;
 - The circumstances and manner of their acquisition; and
 - The whole of the conduct of each party with respect to the interests
- The effect of the application of priorities rules is to protect the holder of the right in preference to the subsequent acquirer of the right
- In all contests between equitable interests, 'the conduct of the parties and all the circumstances must be taken into consideration in order to determine which has the better equity'
 - On the facts, this favours the defendant (the equitable mortgagee)

- The vendors allowed some of the purchase price to remain unpaid, but conveyed and executed a conveyance by deed wherein they declared that the whole of the purchase money had been paid
- They also failed to keep the certificate of title in their custody but instead handed it over to the purchaser, along with the deeds
- ‘Thus they voluntarily armed the purchaser with the means of dealing with the estate as the absolute legal and equitable owner, free from every shadow of incumbrance or adverse equity.’
- X mortgaged the property but did not cause harm to the vendor, ‘for he has only done that which the vendors authorised and enabled him to do’
- Edge relied, reasonably, on the presentation of the deed, and had no reason to suspect that the mortgagor had anything other than an absolute and indefeasible title in law and equity
- Ede is therefore not guilty of negligence and cannot be fixed with constructive notice of the prior equitable interest
- Whether one equitable interest has priority over another is not a matter of strict rules, but depends on all the circumstances
- Thus, ‘equitable interests, abstractedly considered, are of equal value in respect of their nature and quality; but whether their equities are in other respects equal, or whether the one or the other has acquired the better equity, must depend upon all the circumstances of each particular case, and especially the conduct of the respective parties.’
 - Possession of title deeds is a very material factor
 - [In the Torrens system, it might be conjectured that provision or surrender of the duplicate certificate of title might amount to a similar ‘arming’; on this point see *Breskvar v Wall*]
- It is only after a consideration of the parties’ conduct and circumstances that the maxim *qui prior est tempore potior est jure* has any application
 - Thus, the order of enquiry is, in English courts:
 - First, which is the better equity on account of the parties’ conduct?
 - If one has, by the conduct, the worse equity, the other’s will prevail of it
 - Second, if they are in all these respects equal, which was the first in time?
 - The first in time will have priority, but only if they are upon examination of the circumstances equal equities in all other respects

Decision

- This being the case, a consideration of all relevant circumstances, ‘and especially the fact of the possession of the deeds, which the mortgagee acquired with perfect bona fides, and without any wrong done to the vendors, I am of the opinion that the equity of the mortgagee is far better than that of the vendor, and ought to prevail.’

This type of conflict is still relevant to Torrens system land because unregistered equitable interests are possible (*Barry v Heider*). It most frequently arises when multiple successive equitable interests are created.

In *Rice v Rice*, the order of enquiry there posited began with an examination of conduct. Thus, it was first asked:

- 1 Are the interests equal (strictly speaking, in all other respects *except time*)?
 - Consider the nature and circumstances of acquisition

- Unpaid vendor's lien (arose by law) v subsequent equitable mortgage (arose by agreement)
 - The subsequent mortgage was possible because of the vendor's negligence and arm's length conduct
 - Consider the whole of the parties' conduct
 - Is one party estopped from asserting better title?
 - Has one party been negligent in asserting their claim or making enquiries?
 - Are the claims equally meritorious (deserving of equitable relief)?
- 2 If so, which of the two interests came first? (The earlier prevails)

Note the difference of approach between Australian and English courts. Whereas the latter (eg, *Rice v Rice*) start with an analysis of the merits of the parties' conduct, *then* move to chronological priority as a criterion of last resort, Australian courts first consider who is first in time, then consider whether the parties have done anything to lose their priority by conduct.

Thus, in *Rice*, the first in time was less meritorious so didn't have benefit of priority. An Australian court might have started with prima facie priority then modified the result on account of that party's lack of merit.

Note: would a different result be reached? The same result would probably be reached either way; however, the English approach lends itself more readily to a flexible normative evaluation of conduct. It may also shift the onus of proof onto the less meritorious party, rather than the party later in time.

E *Prior Mere Equity v Subsequent Equitable*

A subsequent equitable interest will take priority over an earlier mere equity unless the later party:

- Has notice; or
- Fails to provide consideration

(*Latec v Hotel Terrigal* (Kitto J and Menzies J)).

Order of enquiry:

- 1 Is the earlier interest a mere equity?
- 2 Is the subsequent interest equitable?
- 3 If so, the doctrine of notice applies
 - Does the subsequent purchaser have notice?
 - If so, their conscience will be bound in equity
 - If not, they take free of burden

IV Priority in the Torrens System

A Introduction

General law priority disputes are governed by a series of discrete rules which apply to different categories of proprietary interest. These rules are partially applicable to Torrens land. However, overriding all other interests is the act of registration. Registration may be seen as conferring the highest level of priority possible to accord to an interest (subject, of course, to s 42 and other exceptions to indefeasibility). This is because registration confers the legal interest 'free from all other encumbrances'.

Although general law priority rules are modified by the Torrens legislation, it remains important to identify the nature of the competing interests when assessing which would prevail. For this reason, an enquiry might take the following form:

1 What is the nature of the interest held by each party?

- (a) Is it proprietary?
- (b) If so, what sort of property right is it?
 - (i) Legal?
 - (ii) Equitable?
 - (iii) Mere equity?
- (c) Is it enforceable?
 - (i) If not, is there an equivalent equitable interest?

2 What is the status of the interest held by each party?

- (a) Registered?
 - (i) Do any of the exceptions to indefeasibility apply?
 - (ii) If so, the registered proprietor will take subject to prior interests
 - (iii) What other elements of the *TLA* are relevant?
- (b) Unregistered?
- (c) Caveatable?

3 Are there competing interests?

- (a) Define the conflict
- (b) What rule applies?
- (c) Which interest would be preferred as a matter of property law?
 - (i) Analogue with facts in other cases
 - (ii) Note differences and similarities

Exam note: Read Hughson, Neave and O'Connor, 'Reflections on the Mirror of Title: Resolving the Conflict between Purchasers and Prior Interest Holders' (1997) 21 *Melbourne University Law Review* 460. This is a very important article.

B *A Normal Transaction Involving Land*

Priority disputes can arise at any stage during a conveyance. The archetypal transaction is a sale by auction to a purchaser for value. This dealing may be summarised by the following steps (at each stage, note the relevant issues):

1 **Contract**

Where is the duplicate certificate of title?

2 **Caveat**

Is the purchaser's interest caveatable? Has one been placed on the property?

3 **Execution of instruments of transfer and mortgage**

Vendor holds signed transfer (and duplicate certificate of title may be held by vendor's mortgagee); purchaser's mortgagee holds signed mortgage
Has there been fraud? False attestation? Forgery?

4 **Settlement**

The vendor/mortgagee hands over the completed transfer, duplicate certificate of title, discharge of mortgage to purchaser/purchaser's mortgagee; purchaser/purchaser's mortgagee hands over money to vendor/vendor's mortgagee
Fraud at this stage? Have any intervening interests been created?

5 **Registration**

Purchaser/purchaser's mortgagee lodges documents for registration
Has the instrument of transfer been registered? Has the mortgage been registered?

C *Prior Registered v Subsequent Registered*

A person can be a registered proprietor of a range of estates in land. These include the fee simple, mortgage and lease.

Section 42 of the *Transfer of Land Act 1958* (Vic) ('TLA') provides that the first registration has priority. A later registered proprietor's interest will still be subject to earlier interests on the register.

Section 34(1) requires that registration proceed in the order in which documents are lodged with the Registrar at the titles office. This sometimes leads to a 'race to the register'.

Note the various exceptions to indefeasibility contained in s 42. If a prior registered interest is defeasible for, say, fraud, then a later registered interest will regain priority because the first will not be indefeasible but instead subject to such interests as may exist or may be created.

D *Prior Equitable v Subsequent Registered*

For Torrens land, a priority dispute between a prior equitable interest and a subsequent registered interest is resolved by s 42 of the *TLA*: the registered interest is paramount and indefeasible unless fraud or one of the statutory exceptions applies, such as an *in personam* claim.

Section 43 abolishes the doctrine of notice in relation to Torrens land. The effect of this is as follows. Under the general law, purchasers of legal estates would be subject to any equitable interests of which they had notice. The position was that if a *bona fide* purchaser for value took with notice of an earlier equitable interest they would be bound by that interest (*Mills v Stockman*). If, however, they had no such notice, then a legal interest would prevail over an earlier equitable one.

However, a purchaser under the TLA (of Torrens land) is not subject to any equitable interest — even one of which she has notice — *unless one of the exceptions to indefeasibility applies* (*Mills v Stockman* illustrates the distinction eloquently). Even if a person is aware of an unregistered prior equitable interest and obtains registration so as to defeat that interest, they receive a valid legal interest and that interest takes priority. The registered interest prevails unless there is fraud or one of the exceptions to indefeasibility has been made out (see, eg, *Loke Yew v Port Swettenham Rubber Co Ltd* [1913] AC 491).

Notice is therefore irrelevant when dealing with a purchaser who becomes registered proprietor, unless, in light of actual notice, the registration is dishonest and amounts to fraud or negligence.

E Prior Registered v Subsequent Equitable

Registered interests also prevail over subsequent unregistered interests, though if such an interest is created by the conduct of the registered proprietor there is likely to lie an *in personam* remedy at the action of the other party.

For example, in *Barry v Heider* an equitable interest prevailed over a prior registered legal interest because of a post-registration *in personam* claim. Barry's conduct 'armed' Schmidt with the purported authority to deal with the land; this was personal conduct which raised an equity against Barry as the registered proprietor. The result was that the subsequent equitable interest held by Ms Heider was enforceable as against Barry. Arguably, the Court did not give effect to Torrens principles: despite Barry's indefeasibility, an equitable interest is recognised and has priority over the legal interest of the registered proprietor.

Barry v Heider (1914) HCA:

Issues

- Is it possible to create equitable interests in Torrens title land?
- Can the equitable mortgages of
 - Mrs Heider; and
 - Gale
 be asserted against Barry?
- Is Barry's interest to be postponed to those of Heider and Gale?

Reasoning

- Griffiths CJ:
 - Barry's acts (executing the transfer and order) acted as a representation that Schmidt had an unencumbered equitable ownership
 - This raised a personal equity that was enforceable against the registered proprietor, and to give effect to which it is necessary to recognise Mrs Heider's subsequent equitable interest
- Isaacs J:

- In the priority dispute between Mrs Heider and Barry, Mrs Heider wins:
- Estoppel and the innocent person theory are indistinguishable
 - Estoppel does not rest on fraud by the person estopped
 - It is created by the *effect* of the conduct of the party to be estopped
 - Here Barry can be estopped from preventing Heider acquiring the subsequent equitable interest
 - This is because Barry's conduct, in handing to Schmidt a transfer acknowledging receipt of payment, enabled Schmidt to represent he had an unencumbered title and Mrs Heider acted on this
- In the priority dispute between Barry and Gale, Barry wins:
 - Gale knew that Barry had not been paid (because he knew of Barry's caveat)
 - Consequently, Gale was not misled by Barry's conduct (his representation in delivering the transfer that Schmidt was the unencumbered owner of fee simple title)
 - The removal of the caveat by Petersen was not a fresh representation that Barry did not have a lien
 - Gale should have satisfied himself that Barry no longer held the lien
 - There was therefore no representation upon which Gale relied when acquiring equitable mortgage

Decision

- An estoppel is raised so that Barry is estopped from asserting his registered legal title against Mrs Heider
 - His conduct in arming Schmidt allowed the later equitable mortgage to Mrs Heider to be created against his registered title
 - The arming conduct constitutes a representation that the land was unencumbered by a lien or other prior interest
- Estoppel can provide a basis for postponing a registered interest
 - Apply *Rice v Rice* test and look for postponing conduct
 - Implicitly, it would seem to be acknowledged that an equitable estoppel may amount to postponing conduct

The general rule is, however, that registered interests prevail against a subsequent unregistered interest: *TLA* s 42.

Exceptions:

- The facts may come within one of the statutory exceptions to indefeasibility; or
- The registered proprietor actually creates the equitable interest; or
- The equitable interest arises because of his or her conduct such as to bind him or her (*in personam* claim: *Bahr v Nicolay*); or
- The equitable interest arises because the registered proprietor is estopped from denying the subsequent interest on the basis of a representation made when dealing with his legal title (*Barry v Heider*).

F *Equitable v Equitable*

1 *General principles*

Two different views govern the determination of priorities between competing equitable interests:

- 1 **Notice is a separate and distinct test, subject to postponement**
If the holder of the subsequent equitable interest has notice of the prior interest, they cannot acquire priority unless the prior interest holder engages in postponing conduct;
- 2 **First in time prevails unless there is postponing conduct (including notice)**
The first in time interest prevails unless there is postponing conduct. Notice of the subsequent interest is just one circumstance relevant to determining who has the better equity. Thus, where the equities are equal, the earlier interest prevails (*Rice v Rice*).

The notice approach is premised upon the equitable principle that a party who knows of an earlier equitable interest will not be entitled to acquire a rival interest from someone who in equity is not entitled to create that interest (*Phillips v Phillips*). A later equitable interest will not prevail if its owner acquired it with knowledge of an earlier interest, unless the holder of the earlier interest has engaged in postponing conduct:

Generally, indeed almost universally, where the holder of an equity acquired it with notice of a prior equity, its claim to priority must fail. There are none the less exceptions to this of which the most obvious are an agreement to postpone or waiver of priority. There may also be other conduct on the part of the holder of the prior equity which may estop her from asserting her priority.¹

The conduct approach determines priority in accordance with time, unless the first equitable interest holder is 'guilty of some conduct deserving of postponement and reversal of the "natural" order. This conduct has been variously described as "estoppel", "negligence" or "gross negligence". However described, the focus is upon the conduct of the first equitable encumbrancer.² See, eg, *Abigail v Lapin* (Lord Wright).

The conduct approach may be further described as follows:

unless the priority which time gives to [the first] equitable interest ... is to be lost by reason of [that party's] own conduct, there is no need in my opinion, to consider the conduct of [the later party]. That conduct might be relevant if, after the [first party's] priority derived simply from earlier creation of its interest had been lost, a further question of the comparative claims of the holders of the equitable interest should arise.³

The differences between these approaches are encapsulated by the judgments of Brooking and Ormiston JJA in *Moffett v Dillon*, respectively.

The essential difference between these two approaches is the extent of the role afforded to the doctrine of notice. According to notice approach, notice is all but determinative (subject to only minor exceptions). By contrast, the conduct approach subsumes notice into a larger enquiry about the better equity.

¹ *Platzer v Commonwealth Bank of Australia* [1997] 1 Qd R 266, 273 (Davies JA).

² Edgeworth, Rossiter and Stone at 603.

³ *J & H Just Holdings Pty Ltd v Bank of New South Wales* (1972) 125 CLR 546, 554–5 (Barwick CJ).

Moffett v Dillon (1999) Vic SC:Facts

- In September 1985, Moffett, the registered proprietor of a house, enters a contract with Dillon for the sale of that land
- Dillon cannot afford to pay the deposit under the contract and instead gives a promissory note (which is dishonoured)
- Moffett seeks to rescind the contract, and negotiates to that effect
- Moffett and Dillon execute an instrument of charge over Dillon's Essendon home
 - Moffett lodges a caveat in respect of that charge
 - It is an equitable (unregistered) charge, which supports a caveat (*Crampton v French*)
- In February 1986, Dillon takes out a mortgage with Westpac, the mortgagee, also over the Essendon home
 - Westpac wrote to Moffett attempting to have the caveat removed; Westpac concedes that it had actual knowledge of Moffett's earlier interest
 - The mortgage is mistakenly registered, but the caveator was not notified (possibly due to an administrative error)
 - However, this is treated as an unregistered mortgage by the Court
- Dillon cannot meet the terms of the original contract; Moffett rescinds the contract, sells the land for less than the value he would have received under the contract with Dillon
- Moffett therefore seeks to claim the difference between sale prices from Dillon and enforce the charge

Issue

- Does Moffett's equitable charge take priority Westpac's later equitable mortgage?

Reasoning

- Brooking JA (Buchanan JA agreeing):
 - 'Knowing that someone was already the holder of an equitable interest, he has chosen to acquire a rival one from a person who in the eye of equity is not entitled to create that interest: *Phillips v Phillips*...'
 - 'The authorities use language suggesting that a later equitable interest can never prevail over an earlier one where the holder of the later interest had at the time of its acquisition notice of the earlier interest.'
 - Citing Lord Browne-Wilkinson in *Barclays Bank plc v O'Brien*:
 - 'The doctrine of notice lies at the heart of equity. Given that there are two innocent parties, each enjoying rights, the earlier right prevails against the later right if the acquirer of the later right knows of the earlier right (actual notice) or would have discovered it had he taken proper steps (constructive notice)'
 - [To these possibilities may be added, by s 199(1)(b) of the *PLA*, imputed notice of an agent]
 - 'In the present case there are two reasons for treating the charge as unaffected by the bank's mortgage. The first is the rule that a person taking with notice of an equity takes subject to it. The second is the rule that where the equities are equal the first in time prevails. As regards the second rule, no good reason has been advanced for postponing the prior equity.'
 - 'the "better equity" does not mean...(the equity that is) better in the sense that it is the more efficacious security' at [43]
 - The fact that Westpac's mortgage was in registrable form does not, therefore, indicate that it has a better equity
 - 'As regards the second rule, I have referred to the wide view taken by Mason and Deane JJ in *Heid* ... that broad principles of right and justice will guide the

court in determining whether the equities are equal. As what I have already written should make plain, I do not regard the question whether a person who acquired an equity did so with notice of a prior equity as no more than a consideration to which regard is to be had in determining whether one of the equities is better than the other. I regard the rule about notice as a distinct and fundamental one and I do not consider that Mason and Deane JJ intended to question its existence or to subsume this particular matter of notice under a broad question so as to make it no more than a consideration bearing upon which was the better equity.'

- Note the discussion of whether the basis of postponement is estoppel or some broader theory of equity
 - Mason and Deane JJ suggest that 'broad principles of right and justice will guide the court in determining whether the equities are equal'
 - Is notice a distinct test?
 - The notice rule is distinct from the first in time rule: [41] and [46]
 - '...a deeply rooted rule or principle that a person taking with notice of an [equitable interest] takes subject to it, since his conscience is affected by the [equitable interest] of which he had notice' at [36]
 - The earlier interest will have priority if the later interest holder had notice of the earlier interest
 - However, there is an exception:
 - If the holder of the earlier interest has done something to induce the belief that the interest no longer exists, then the later interest holder will prevail: [45]
 - This is similar to an estoppel basis for postponement
 - '... if the holder of the subsequent equity acquired it with notice of the prior equity, his claim for priority necessarily fails in any event, unless it can be shown that the possessor of the prior equity has been guilty of some act or omission which has conduced or contributed to a belief on the part of the holder of the subsequent equity, at the time when he acquired it, that the prior equity was no longer in existence.'
 - *Wu v Glaros* (1991) 55 SASR 408 (approved by Brooking JA at [32])
 - Application:
 - 'at the time the bank took its mortgage it had full actual knowledge, not casually acquired, of the creation and continued existence of the charge. At least in the circumstances of the present case, this is fatal to the contention that the later equitable interest should prevail over the earlier.'
- Ormiston J:
 - Favours the traditional test: the better equity prevails; ordinarily, this will mean that first in time prevails unless there is postponing conduct
 - Notice is not relevant unless the interest first created is to be postponed for some reason
 - 'only then ... the later interest would be the better equity and ... notice of the earlier interest would come into play': [87]–[89]
 - 'What Brooking JA has to say about notice or knowledge is, with respect, attractive both in its logic and its simplicity but, as he acknowledges, there must be some qualifications other than cases where the holder of the later interest may have been led to believing that the interest is no longer enforceable.'
 - As was noted in *Platzer*, an additional exception must be 'by reason of any estoppel arising from the creation in the later holder of a belief that the earlier interest would be postponed or would not be insisted upon'
 - 'This in turn suggests that the apparently simple requirements of the first proposition, namely that the holder of the later interest is postponed if

- that holder has notice of the earlier interest, may not be so easily established as they have been in the present case.'
- Notice is only relevant if the later interest is the better equity
 - See Butt, 'Priority between unregistered Torrens Title Interests' 73 *Australian Law Journal* 538
 - The burden remained on the holder of the later interest to show that their later interest should prevail:
 - Prima facie the first in time prevails, unless the later interest holder can adduce evidence of postponing conduct
 - Here, Westpac failed to do so

Decision

- The charge does not lose priority against the subsequent mortgage
- The vendor therefore succeeds because he is the first in time and Westpac had notice of the earlier interest
- Brooking JA: the general law doctrine of notice applies to and is determinative of competing equitable interests in Torrens land
- Notice of an equitable interest acquired first in time will result in that interest taking priority in most cases
- Ormiston JA: exhibits some reservations about the determinacy of notice, suggesting (at [89]) that it is part of a larger enquiry about which is the 'better equity'

In summary:

- If A holds an unregistered interest, and B acquires another unregistered interest later in time with notice of A's interest, A's interest prevails
- Did the second interest holder have notice of the first equitable interest? (*Moffett v Dillon*)
 - If the second interest holder did not have notice:
 - Are the merits between the equitable interests equal?
 - Is there any conduct of the first interest holder that warrants the interest first in time being postponed?
 - If A's conduct leads B to believe that the prior interest is no longer in existence or will not be enforced against B, B's interest prevails (Brooking JA in *Moffett v Dillon*)
- *Moffett v Dillon* per Ormiston JA: unclear whether B's notice is a freestanding rule or simply part of the broader 'better equity' enquiry: A prevails unless there is postponing conduct; however, if there is no such conduct, B's notice is irrelevant

Thus, according to Brooking JA, a priority dispute between equitable interests should be resolved by a separate and independent rule that the earlier interest (almost) always gains priority if the holder of the later interest had notice of the earlier one. The doctrine of notice is not, under this approach, subsumed within the broader 'better equity' test.

By contrast, Ormiston JA focuses on postponing conduct: if it exists, the later interest prevails; otherwise, notice is irrelevant because the first in time prevails as of right. See further *IGA Distribution Pty Ltd v King & Taylor*.

Note that s 43 of the TLA does not apply to these disputes, because the section only has effect once an interest is registered. This priority conflict concerns two unregistered interests.

2 The nature of postponing conduct

Postponing conduct arises where the possessor of a prior equity 'has been guilty of some act or omission which has conduced or contributed to a belief on the part of the holder of the subsequent equity, at the time when he acquired it, that the prior equity was no longer in existence' (*Moffett v Dillon* per Brooking JA).

There are two theories of postponing conduct:

- **Estoppel**
The holder of the earlier interest is estopped from asserting his or her priority because of a representation made through dealings with their title that their interest does not exist or will not be enforced (*Rice v Rice*; *Abigail v Lapin*); or
- **Broad theory**
The parties' conduct, assiduousness and other circumstances, including estoppel, will determine whether the later interest is to be preferred.

According to Sykes, the broad theory seeks to

determine the better equity by bearing in mind the conduct of both parties, the question of any negligence on the part of the prior claimant, the effect of any representation as possibly raising an estoppel and whether it can be said that the conduct of the first or prior owner has enabled such a representation to be made...⁴

As a general principle, a holder of an equitable interest will be postponed if he or she has 'armed [a person] with the means of dealing with the estate as absolute legal and equitable owner' and that has enabled the person to create the later equitable interest.

Rice v Rice provides an example of 'arming conduct'. There, the holder of the first equitable interest armed a third party 'to go into the world under false colours'. The third party then represented himself as an unencumbered owner of the fee simple.

These two theories give rise to different orders of enquiry:

- **Better equity (English) view**
When applying the test, weigh the merits of each equitable interest. The time at which each was created is considered only as a last resort (*Rice v Rice*);
- **First in time (Australian) view**
Prima facie the first in time has priority, then consider whether the conduct of the first interest holder warrants postponement (*Abigail v Lapin*; *J & H Just Holdings*).

Several kinds of postponing conduct can exist:

- *Arming conduct*
Where the registered proprietor delivers the certificate of title or a blank and signed transfer form to a third party, whether agent or purchaser;
- *Estoppel*
Where the prior interest holder represents through their dealings (possibly the same

⁴ BMM at 91.

conduct as the armoring conduct) that the prior interest no longer exists or will not be enforced;

- *Fraud*
Where the prior interest holder acquiesced in or was a party to and hence guilty of fraud (more than negligence is required, but can be less than actual dishonesty); or
- *Agreement*
Where the prior interest holder agreed to postpone or not enforce their prior interest (this could also be an estoppel; see above).

Common to all these kinds of postponing conduct is that there is a foreseeable, relevant, causal connection between the earlier interest holder's action and another party's acquisition of a later interest.

3 Caveats and postponement

One significant issue in this area is whether a failure to use caveats to protect a prior equitable interest will amount to postponing conduct such that a prior interest holder will lose priority to a subsequent equitable interest.

At present, there is no clear, unequivocal view on the precise effect of such a failure. However, the issue has been succinctly stated as follows:

*Is the holder of an [earlier] equitable interest to be postponed to the holder of a later equitable interest because the holder of the earlier interest failed to lodge a caveat to protect his or her interest?*⁵

This question has received various answers from courts throughout the last century.

Butler v Fairclough is authority for the view that a party's failure to lodge a caveat to protect an equitable interest is itself sufficient to result in that party losing priority to a later equitable interest.

***Butler v Fairclough* (1917) HCA:**

Reasoning

- Where all other things are equal, the earlier of two equitable claimants is entitled to priority
- However, the interests will not be equal if the earlier claimant does any act or omits to do any act which had or might have the effect of inducing a claimant later in time to act to his prejudice

Decision

- By failing to lodge a caveat before Fairclough paid his purchase money, Butler lost his priority for the equitable interest created first in time

Abigail v Lapin emphasises that a failure to caveat is just one factor among many that will be relevant to determining whether postponement has occurred from the conduct of the prior interest holder. The Privy Council held that the later interest holder should get priority even though he did

⁵ Bradbrook, MacCallum and Moore at 172.

not rely on the state of the register (and thus a failure to caveat was of no practical effect). What is relevant is that the prior interest holder armed the intermediary with the title documents necessary to go out into the world 'under false colours' and thereby to procure creation of the subsequent interest, purportedly under the prior interest holder's authority.

Abigail v Lapin (1943) Privy Council:

Facts

- Lapin is the registered proprietor of land
- He executes transfers by way of security and acknowledges receipt of payment
- Heavener obtains registration of the fee simple interest
- Heavener subsequently gives a mortgage to Abigail, the mortgagee
- Abigail fails to prove that he searched for title prior to taking the mortgage interest
- Lapin lodges a caveat before the mortgage can be registered
- Abigail attempts to lodge the mortgage for registration, and seeks removal of the caveat

Issue

- Was Lapin's conduct in failing to caveat until after the creation of the mortgage sufficient to postpone his interest to that of Abigail?

Reasoning

- High Court in *Lapin v Abigail*:
 - Majority: no
 - Minority: yes
- On appeal to the Privy Council:
 - Test:
 - Prima facie the first interest holder has priority
 - Is there any postponing conduct?
 - There will be when by an act or omission, the prior interest holder has induced or contributed to a belief on the part of the later claimant at the time when the claimant acquired the equitable interest that the prior equity was not in existence
 - Lapin armed Mrs Heavener to go into the world under false colours
 - He gave her the means of dealing with the estate as if she were the absolute legal and equitable owner
 - Lapin is therefore bound by the natural consequence of their acts
 - The effect of a failure to caveat
 - On the facts, Abigail did not search the register, so he couldn't say that he had relied on clear title before giving the mortgage
 - This is relevant but as the final factor, in a subsidiary way
 - If Lapin had caveated it would have disarmed Mrs Heavener and neutralised the arming conduct
 - Also, Mrs Heavener was acting within the apparent indicia of authority as agent for Lapin but exceeded its actual limits: this creates a form of estoppel
 - The Court will look at all the circumstances — including but not limited to any failure to caveat — in order to decide whether the holder of the earlier equitable interest should be postponed
 - Thus, the failure to caveat can lead to a loss of priority regardless of whether or not the later claimant searched and relied on the state of the register
 - The Lapins had 'armed' Heavener with the means of representing that she had authority to deal with the land (this is so even if she exceeded that authority)

Decision

- Privy Council: yes
 - Lapin bound by the natural consequences of their acts
 - Failure to caveat part of a general inquiry into the conduct of Lapin (interest holder who is first in time)

Abigail v Lapin was subsequently applied in *Breskvar v Wall*.

J & H Just (Holdings) Pty Ltd v Bank of New South Wales concerns a priority dispute between two mortgagees. The first mortgagee failed to caveat its interest, but the second did. In these circumstances, the first mortgagee will not necessarily lose priority by failing to caveat its interest. The decision rests partly on the function of a caveat (being a protective rather than notice-giving instrument) and partly on the fact that the first mortgagee could protect itself by an alternative method: maintaining possession of the duplicate certificate of title.

J & H Just (Holdings) Pty Ltd v Bank of New South Wales (1971) HCA:Facts

- Josephson is the registered proprietor of a residential property in Sydney
- In 1961, he executes a registrable mortgage in favour of the bank and deposits his duplicate certificate of title
- However, the bank does not register the mortgage or lodge any caveat
- In 1964, Josephson decides to take out a second mortgage in favour of J & H Just
- Because the certificate is still being held by the bank, Josephson tells J & H Just that the certificate of title is just being held for safekeeping by the bank
- The company solicitor for J & H searches title and finds no registered mortgages
- However, J & H Just does not enquire as to the nature of the prior dealing
- Subsequently, in June 1964, J & H Just lodges a caveat to protect their mortgage
- In August 1964, the bank lodges its own mortgage for registration
- J & H Just is notified by the Registrar-General of the attempt to register the bank's mortgage, and J & H Just commences proceedings seeking a declaration that its second mortgage is entitled to priority over the bank's prior mortgage

Issue

- Which mortgage has priority?

Reasoning

- Barwick CJ:
 - The bank's failure to caveat did not make it inequitable for it to retain priority
 - The purpose of a caveat is to act as an injunction to the Registrar to prevent registration of dealings: it is therefore protective
 - However, it is not a mechanism by which to give notice to the world about the existence of an equitable interest
 - The bank protected itself by an alternative means; namely, it retained possession of the duplicate certificate of title and rested comfortably in the knowledge that the Registrar would not register any interest without production of the certificate (this is a standard conveyancing practice)
 - However, the failure to caveat may combine with other conduct that, when viewed together, may be said to 'conduce or contribute to the belief by the holder of the subsequent equity at the time he acquired the interest that there was no

other prior equitable interest'

- Windeyer J:
 - A caveat can provide notice to the world that an equitable interest is claimed purely because it is noted on the folio of the register and so discoverable if an interested person happens to conduct a search
 - However, the absence of a caveat is *not* notice to the world that no such interest is claimed
 - 'To say that would ... be to equate the noting of a caveat in the register book with the registration of a dealing: it would make competing equitable interests depend not upon priority of creation in time, but upon priority of the lodgement of caveats.'
 - If that were the case, then it would be to equate lodgement of a caveat with registration of a dealing and would make priority depend not on the time of lodging the dealing but on the time of lodging the caveat
 - After all, the primary purpose of a caveat against dealings is not to give notice to the world of an interest: it is to warn the Registrar-General of a claim
 - If caveats gave notice, the result would be that the first in time caveator has priority: this would compound problems of the race to the register and undermine the system of caveats: it would make the caveat process just like registration
 - Consequently, a mere failure to caveat is not of itself sufficient to cede priority to a later interest; something more is required
 - There may be situations in which failure to caveat may combine with other circumstances to justify the view that the act or omission on the part of earlier interest holder contributed to the belief of the subsequent holder when acquiring their interest that no earlier equitable interest existed
 - However, this did not arise on the facts

Decision

- Establishes that the holder of an earlier equitable interest does not necessarily lose his or her priority by failing to caveat his or her interest
- This will be so at least if:
 - The competition is between earlier and later equitable mortgagees; and
 - The earlier claimant had possession of the certificate of title; and
 - It was reasonable for the earlier claimant to rely on possession of the certificate of title as protection against subsequent mortgages being created
- Here, the bank's failure to caveat did not make it inequitable for them to retain priority
 - The bank held the duplicate certificate of title
 - This is a common conveyancing practice, so it had another means of protection other than lodgement of a caveat

Just may in many ways be seen as the opposite of *Butler*. Whereas in the latter case, failure to caveat was in itself reason for postponement, *Just* turned that position on its head to decide that a failure to caveat was *not* in itself sufficient. If *Just* may be regarded as the high water-mark of leniency towards prior equitable interest holders, then *Person-to-Person Financial Services Pty Ltd v Sharari* represents a slightly stricter approach.

According to *Person-to-Person*, the prior interest holder's failure to caveat leads to postponement where it does not conform with existing conveyancing practices. The rationale is actually quite similar to the exception noted in *Just*: subsequent parties form assumptions on the basis of

standard practices, so a failure to conform with those practices may be said to induce or contribute to the later interest holder's belief that no earlier interest existed. To this extent, then, *Person-to-Person* and *Just* may be reconciled.

Person-to-Person Financial Services Pty Ltd v Sharari (1984) NSW SC:

Facts

- A mortgagor purchases Torrens land from the defendant
- A first mortgage is created to Tredgolde, and is registered
- A second mortgage is created to Sharari, but is unregistered and no caveat is lodged
- A third mortgage is granted by P2P: the mortgagor represented that only the first mortgage existed
- P2P requests the duplicate certificate of title from Tredgolde but never registered their mortgage
- In 1982, P2P lodge a caveat as mortgagee
- P2P argue that Sharari's failure to caveat should lead to a loss of its priority

Issue

- Who should have priority between the two unregistered (equitable) mortgages?
- Prima facie Sharari has priority (first in time); was their postponing conduct such as to cede priority to P2P?

Reasoning (McLelland J)

- 'As between two equitable interests ... the earlier in time is entitled to priority unless the circumstances are such as to make it inequitable as between the holders thereof that the earlier should have priority.'
- 'Such circumstance[s] may be found where some act or omission by the holder of the earlier interest has led the other to acquire his interest on the supposition that the earlier did not exist...'
- *Just*: a failure to caveat by the earlier party does not *necessarily* led to postponement
 - However, it does not mean that a failure to caveat can never lead to postponement
 - The decision thus proceeds on the basis that *Butler v Fairclough* was not displaced by *Just*
 - However, it does suggest that the *Just* dictum (that failure to caveat will not of itself postpone) is ambiguous: see CB 600
- McLelland J cites authority in other states suggesting that failure to caveat can bring about postponement
 - [Note *AVCO* (a Victorian case)]
 - [It is unlikely that this reasoning would now be applied in Victoria]
- Looks to current conveyancing practice in New South Wales
 - It is settled practice to register a second mortgage or lodge a caveat to protect it
 - This practice leads people to naturally assume that there is no second mortgage
 - 'The failure by the defendant ... to conform to this practice would naturally lead those who searched to assume there was no outstanding second mortgagee'
 - This reasoning seems to assume that, unlike *Just*, the absence of a caveat can itself provide notice that no equitable interest exists

Decision

- Sharari's failure to caveat makes it inequitable that the mortgage of Sharari should have priority over that of P2P
- It is their failure that allowed the third interest to be created
- Therefore, P2P interest takes priority

Summary of authorities dealing with the effect of a failure to caveat:

- *Butler v Fairclough*
 - Failure to caveat is a reason in itself to postpone the prior interest
- *Abigail v Lapin*
 - Failure to caveat is subsumed within a larger enquiry as to the conduct of the first in time interest holder
- *J & H Just Holdings v Bank of New South Wales*
 - Failure to caveat is not of itself a basis for postponement
 - Lodging a caveat is not notice, so a failure to caveat does not mean that no interest is claimed
 - However, when the earlier party's conduct induces a belief in the later party that no prior interest existed, that earlier party will lose priority
- *Person-to-Person*
 - Failure to caveat leads to postponement where it does not conform with existing conveyancing practices and therefore led to the later interest holder's belief that no earlier interest existed

4 *Broader formulations of postponement*

A failure to caveat is far from the only kind of potentially postponing conduct. More recent cases adopt a wider test of postponement, viewing priority as connected with the natural consequences of the earlier party's conduct. Thus, having engaged in 'arming' conduct, it is reasonably foreseeable that a third party could create a later equitable interest. This formulation has been described as follows:

- **Estoppel**
If the first interest holder makes a representation to the second interest holder on the basis of which they alter their position to their detriment, priority is lost (Gibbs CJ in *Heid*). Such a representation will only usually be if the earlier party arms another (usually their solicitor) with title deeds or a blank transfer and evidence of payment; and
- **Reasonable foreseeability**
Postponement will result if from the earlier party's conduct it is 'reasonably foreseeable 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' (*Heid* per Mason and Deane JJ). If it is a 'natural consequence' of the earlier party's conduct that a deception would occur, so that the earlier party has 'armed' the deceiving party with the ability to falsely represent themselves, the earlier party will cede priority to the later (*IAC Finance v Courtenay*).

IAC Finance adopts a reasonable foreseeability test: if it is a natural consequence of the earlier party's conduct that the later interest will be created, they will hold subject to that interest. The significance of this test is that it determines when conduct may be described as 'arming' another party 'with the power of going into the world under false colours' so as to create the later interest.

However, a prior interest holder will not be held responsible for 'the assurances of a rogue' agent (eg, unauthorised statements by their solicitor), and it will not be reasonably foreseeable that a third party would surrender money solely on the basis that a prior instrument had been withdrawn from registration when it was in the best interests of the earlier party to have it registered and they were entitled so to do.

IAC Finance v Courtenay (1963) HCA:Facts

- A Miss Austin is the registered proprietor of a parcel of Torrens land in New South Wales
- She enters into a contract of sale with the Courtenays
- The purchasers leave relevant documents with Miss Austin's solicitor solely for the purpose of registration
- Miss Austin's solicitor lodges the transfer and mortgage for registration
- Meanwhile, Miss Austin enters another contract with Denton and IAC to sell the land to them, and so she needs to repurchase the land from Courtenay in order to complete this second contract
- She enters a contract with Courtenay to repurchase, but cannot complete *this* contract because Austin's solicitor misappropriates the settlement money
- The solicitor also withdraws the transfer to the Courtenays and the mortgage in favour of Austin, which had originally been lodged for registration after the first sale
- This is done without Miss Austin's authority and pursuant to a standard practice permitted by the Registrar of allowing solicitors to withdraw documents they have lodged prior to their registration
- Denton now wants to complete the sale of land, and during the course of discussions, Miss Austin's solicitor falsely claims to Denton's solicitor that the repurchase from the Courtenays has been completed (in fact it has not); he shows the contract of sale
- Denton's solicitor does not ask whether the contract has in fact been completed or the purchase money paid; instead, he assumes that the Courtenays' interest in the land has ceased to exist
- Denton and IAC complete the second purchase from Miss Austin and lodge their transfer documents for registration; Courtenay claims priority
- No caveats were lodged

Issue

- Should the Courtenays' prior equitable interest under the contract of sale be postponed?
- What was the significance of their failure to caveat?

Reasoning

- Kitto and Taylor JJ: apply ordinary equitable principles to resolve the conflict
- Kitto J:
 - Denton argues that, since it is entitled to registration, it should be protected by the provisions granting immunity to a registered proprietor from notice of a prior interest
 - This submission is rejected
 - 'It is settled law that the immunity thus conferred, upon a purchaser, for example, is afforded to him if and when he becomes registered and not before.'
 - 'A purchaser, his interest before registration being necessarily equitable only, derives no priority over the holder of a pre-existing equitable interest from absence of notice. Consequently, a provision that a person is not to be affected by notice of prior interests has no application to him so long as he remains unregistered. For the same reason, it has no applications even to one who has become registered, if he acquired his estate or interest as a volunteer.'
 - 'It is only a person having a legal estate ... acquired for value...'
 - There was no authority for Miss Austin's solicitor to withdraw the transfer documents or mortgage
 - There is no general authority implied to act 'where a memorandum of

- transfer is lodged by ... the solicitor for the transferor only, and whose possession of the instrument ... is to be accounted for by the fact that the transferor is taking a mortgage back and requires the transfer in his hands so that he may be in a position to perfect his security by lodging it for registration and lodging the mortgage immediately afterwards.'
- 'It seems to me that in such a case, even if both solicitors know that the Registrar-General's office follows the loose practice [of allowing withdrawal], there is nothing to make it a reasonable inference that the transferee meant to make the transferor's solicitor his agent not only to apply for registration but also to withdraw the application if he should choose to do so.'
 - As Isaacs J noted in *Barry v Heider*, 'the authority to lodge (the instrument) is complete in itself, and is exhausted when the (instrument) is lodged... The person [so] authorised ... is then *functus officio*'
- Denton's third submission is that in a contest between equitable interests, its later interest should have priority because 'the Courtenays have by act or omission made it inequitable that they should be allowed to insist upon the priority which order in time prima facie gives them'
- Relies on *Abigail* — the practice of giving the documents to the vendor's solicitor in these circumstances was normal conveyancing practice
 - The relevant test is as follows:
 - Was the conduct of the party holding the first in time interest such that the creation of a subsequent interest was a *natural consequence* of that party's actions?
 - This is a reasonable foreseeability test
 - That is, the first in time should only lose priority if it is reasonably foreseeable that a competing later interest might be created as a result of their conduct (act or omission)
 - As Mason and Deane JJ noted in *Heid*, estoppel is too narrow a basis for postponing conduct
 - This test broadens the enquiry
 - Applies *Abigail v Lapin*:
 - 'The possessor of the prior equity is not to be postponed to the possessor of a subsequent equity unless the act or omission proved against him has conducted or contributed to a belief on the part of the holder of the subsequent equity, at the time when he acquired it, that the prior equity was not in existence' (at 576)
- Application to the facts:
- 'Denton's solicitor took the chance that the Courtenays' rights as purchasers from Miss Austin had ceased ... but he did not trouble to go into the question whether the contract had been completed, and in particular he made no inquiry of the Courtenays or their solicitor.'
 - 'The question is whether Denton is entitled in equity to insist that the Courtenays' statutory right to get a legal title be postponed to its own; and in order to succeed it must show that by "something tangible and distinct having grave and strong effect to accomplish the purpose" the Courtenays led it to acquire its interest in the belief that the Courtenays' interest did not exist.'
 - 'what was there to induce the belief that [the contract of resale] had been so terminated? Nothing whatever, beyond the statement of Miss Austin's solicitor to that effect; and for that statement the Courtenays neither gave any authority nor can properly be held responsible.'
 - '...the question is not whether anything [the purchasers] could possibly have done would have prevented the deception of Denton's solicitor [for

example, by lodging a caveat]; it is **whether their conduct was such that the deception was a natural consequence**, so that they may fairly be said to have “armed” Miss Austin’s solicitor, ... “with the power of **going into the world under false colours**”...’

- ‘in the circumstances it was not reasonably to be foreseen by the Courtenays or their solicitor that a third party might, without inquiring of them, part with money on an assumption that, contrary to all ordinary experience, their transferor’s solicitor had their authority to withdraw from registration the transfer which to all appearances they were absolutely entitled to have registered.’
- The mere lodging of the transfer gave clear notice that the purchasers’ interest had come into existence, and put persons in the position of Denton Subdivisions and IAC upon inquiry as to whether the interest had ceased to exist
 - Ie, the onus was on Denton to determine whether there was still a contract between Austin and Courtenay
 - ‘the Courtenays did lodge their transfer for registration, and in my judgment it is not to be laid at their door that Denton’s solicitor was deceived by **the assurances of a rogue**.’
- Taylor J:
 - Was Courtenay neglectful?
 - The relevant conduct is giving documents to solicitor to register and failing to lodge a caveat when those documents fail to be registered
 - No: significantly, Denton acquired with notice
 - This suggests that notice will be decisive
 - Did Courtenay acquiesce?
 - Ie, did it acquiesce to the fraudulent conduct of Austin’s solicitor: did Courtenay come to the court of equity with clean hands?
 - No evidence to support such an accusation
- Dixon CJ:
 - Deals with the priorities dispute on the basis of competing rights to registration (ie, a race to the register)
 - A priority giving a right to registration under the statute cannot be lost on equitable grounds of such a character
 - The fact that the Austins had their transfer lodged (regardless of how acquired) meant that they were the first in line, so their interest becomes registered and they get the land

Decision

- The appeal is dismissed; the Courtenays have priority over Denton and IAC

The following propositions may be gleaned from Kitto J’s judgment, so that *IAC Finance* may be summarised as follows:

- The solicitor did not have authority to withdraw documents from registration;
- There was no postponing conduct of first interest holder so that it would not be inequitable for them to rely on their prima facie priority in order of time;
- The first purchaser’s failure to caveat was not such that deception was a natural consequence; they cannot be said to have armed the fraudulent solicitor;
- This is because it is not reasonably foreseeable that the documents would be withdrawn;
- Lodging a caveat might have given notice but so did lodging a transfer for registration.

Applying IAC to novel factual situations:

- What is the normal conveyancing practice?
 - Are there other means of 'protection' beyond a caveat?
 - Eg, holding the duplicate certificate of title (*Just*)
 - Eg, lodging the documents for registration (*IAC*)
- What does 'natural consequence' mean?
 - Is the later interest likely to be created as a result of failing to caveat? (See *Heid*)
 - Reasonable foreseeability might be difficult to determine but is related to particular facts and accepted practices
- Failure to caveat will not lead to loss of priority where it is not reasonable to assume that the non-caveator's conduct will be a significant factor in the creation of a later equitable interest

Heid v Reliance Finance Corp Pty Ltd (1987) HCA:

Facts

- Heid is the registered proprietor of Torrens land
- He makes an agreement (actually a complex financial deal: initial payment, subsequent payments over several months) to sell to Connell Investments
- Only \$65 000 of the \$165 000 has been paid
 - However, a signed transfer is made acknowledging receipt of payment (like *Barry v Heider*)
 - Gibby, supposedly a 'solicitor' (but not really) was also an employee of a Connell-related company; he acted for both parties
 - Heid allows the bank to provide Gibby with the certificate of title
 - Payment is made by cash, deposit and mortgage back
 - Heid acquires a vendor's lien and equitable mortgage
- Heid leaves for a holiday in the United States
- Connell takes out a mortgage to Reliance Finance
 - Reliance registers the transfer, does not register the mortgage, holds the certificate of title, but does not lodge a caveat
- Mortgage to Alexander (and others)
 - Lodged caveat, not registered
- Heid discovers the transfer and lodges a caveat before the mortgage can be registered in favour of Reliance
- This is also the first point at which the mortgagees learn of Heid's interest

Issue

- Reliance has an equitable unregistered mortgage
- Heid has an equitable vendor's lien
- Is Heid entitled to priority?
 - Was Heid entitled to trust his solicitor and leave signed documents with him in anticipation of settlement?
 - This accords with normal conveyancing practice

Reasoning

- Gibbs CJ (Wilson J agreeing):
 - The issue is one of estoppel
 - If 'the owner of property clothes a third person with the apparent ownership', he

- loses priority
 - Here, Heid gave Gibby [a false solicitor] the certificate of title
 - This reflects the principle that a person who hands over title deeds to an agent with authority to deal with the property in a restricted manner cannot rely on the restrictions being observed
 - Thus, the transfer was Heid's representation allowing the later interest to be created
 - It is not relevant that there was no direct representation to Reliance
 - Here the representation is broader
 - It is the conduct of supplying the certificate to Gibby and acknowledging payment
 - This represents to third parties that the purchaser has an unencumbered right of ownership
 - By allowing Gibby to have the CT, Heid armed Gibby with the ability to go out into the world with false colours
 - Reliance acted in detrimental reliance
 - This armed Connell Investments 'with the power of going into the world under false colours'
 - Reliance Finance acted to its detriment on the assumption, to which the Heid's conduct had contributed, that no adverse equitable interest existed
 - Heid is therefore estopped from setting up his equitable interest
 - Consequently, Heid's failure to caveat his interest is not of itself fatal to his claim
 - It was ultimately other factors (like his representation that Connell was the unencumbered owner) that led to his interest being postponed
 - The first in time has prima facie priority
 - Only secondarily is it necessary to consider which is the better equity
 - Estoppel by representation is a basis for postponement where the earlier party voluntarily arms another with an indicia of title
 - This could also be couched in terms of agency (ie, that Gibby was given authority as agent)
 - Heid could also be viewed as constituting Gibby as his agent with limited authority
 - He therefore cannot rely on restrictions against a third person who had no notice of them
 - For an estoppel to be raised, there needs to be representation by words or conduct upon the faith of which the representor has acted to his detriment
 - Delivering to Gibby the certificate of title?
 - Not reasonable for Heid to believe Gibby was a solicitor
 - In any case, it was imprudent to believe without inquiry Gibby was a solicitor
 - Gibby was acting for both parties
 - So Heid failed to ensure that subsequent interest holders would not be misled
 - Failure to caveat?
 - Not of itself fatal but would have given the means of giving notice to Reliance
 - When the owner of property cloaks a third party with an apparent right of ownership by acknowledging that the transferee has paid consideration, he is estopped from asserting good title (which would otherwise have priority as) against a subsequent *bona fide* purchaser for value without notice
- Mason and Deane JJ:
 - 'It may be that an equitable interest will not be postponed to one created later in

time merely because there is a causal nexus between an act or omission on the part of the prior equitable owner and an assumption on the part of a later owner about the existence of an equitable interest'

- 'Fairness and justice demand that we be primarily concerned with acts of a certain kind — **those acts during the carrying out of which it is reasonably foreseeable 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.**'
- Which is the better equity — is it inequitable to retain priority in time?
 - It is difficult to accommodate all postponing conduct within a single theory of estoppel, as Gibbs CJ and Wilson J seem to have done
 - Mason and Deane JJ prefer a more general and flexible principle: which interest has priority depends on a consideration of all relevant circumstances
 - The test for determining whether it would be inequitable for the prior interest holder to retain priority is: 'was it **reasonably foreseeable** that a later equitable interest would be created and that the holder of that later interest would assume the non-existence of the earlier interest?'
 - The holder of an equitable interest will be bound by the natural consequences of their acts or neglect: similar to Kitto J in *IAC*
- The mere failure of a prior equitable interest holder to caveat is not of itself sufficient to lose priority notwithstanding that a later interest holder searched the register
 - it is just one of the circumstances to be considered in determining whether it would be inequitable for the prior holder to retain priority
 - Also consider standard conveyancing practices, other arm's length conduct, general assiduousness and other circumstances, etc
- Theoretical bases for granting priority to the later interest
 - The traditional analysis is that postponement depends on estoppel: that some conduct of the holder of the earlier claimant is regarded as a representation inducing detrimental reliance by the later claimant
 - However, it is not possible to accommodate all postponement cases within the estoppel rubric
 - Instead, a broader approach should be adopted that takes into account *all reasonably foreseeable consequences* of the earlier claimant's conduct: that is, the claimant's conduct is relevant if it is 'reasonably foreseeable 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'
 - This is a very broad test
- Murphy J :
 - A party is liable for the consequence of dangers created by them

Decision

- Heid's priority as the earlier claimant was lost:
 - By employing and relying upon a person who was not a solicitor and who was also employed by the purchaser; and
 - By handing over a transfer acknowledging payment of the full purchase price and the certificate of title, by which act Heid had armed the purchaser with the capacity to represent itself as the true owner and to engage in fraudulent conduct
- Mason and Deane JJ:
 - The risk of this occurring was reasonably foreseeable
 - Priority should be given to the better equity in all the circumstances
 - A mere failure to lodge a caveat will not in itself result in a loss of priority

- Rather, consider whether any act or omission made it reasonably foreseeable that a later equitable interest will be foreseeable
- Gibbs CJ and Wilson J:
 - The same acts constituted a representation that Connell was the unencumbered owner, upon which Reliance detrimentally relied, so as to estop Heid from asserting priority

It might well be argued, as a result of *IAC Finance* and *Heid*, that the lodgement of a caveat should be definitive of priority. If the reality that caveats do provide notice was recognised by courts, this would encourage parties to immediately lodge caveats where equitable interests arise and give rise to an associated conveyancing practice of searching the register for caveated equitable interests. This would have the effect of bringing more unregistered interests onto the register and hence rendering it a more accurate ‘mirror’ of the actual interests held with respect to a parcel of land. Consequently, such a change be consistent with the objectives of Torrens legislation.

However, it would also substantially undermine the role played by equitable interest, in effect making the caveat procedure equivalent to registration in that an ‘uncaveated’ interest will lose priority to a caveated one, even if it arises later in time. Because many unregistered or unregistrable instruments are by their nature informal (eg, constructive trusts), parties may not be aware of their existence until the creation of an alternative interest. Where that innocent party has acted responsibly and done nothing to arm a third party, it would be grossly unfair to postpone their interest, which they never knew existed.

Summary of modern approaches:

- *IAC, Heid*:
 - Approving *Abigail*, a broad test of the better equity is favoured
 - Thus, failure to caveat is just one factor in a consideration of the parties conduct
 - Postponement will occur when it is reasonably foreseeable that the earlier party’s conduct would allow the creation of a later interest without awareness of the earlier equitable interest

On balance, the cases suggest that failure to caveat will not *of itself* result in a loss of priority for an earlier equitable interest (cf *Butler v Fairclough*).

5 Victorian treatments of postponement

Victorian courts have grappled with postponement in a recent string of cases:

- *Osmanoski v Rose*
- *Jacobs v Platt Nominees Pty Ltd*
- *AVCO Financial Services v Fishman*
- *IGA Distributors Pty Ltd v King & Taylor*

Osmanoski v Rose appears to support the view that failure to caveat will cause a prior equitable interest to lose priority. However, in light of *Heid* and *IAC Finance*, its current authority is doubtful.

Osmanoski v Rose (1974) Vic SC:Facts

- Osmanoski enters a contract of sale with an owner of property
- She does not lodge a caveat to protect her interest
- A second contract is made with respect to the same property, to Rose
- Rose searches the register and, finding nothing, pays money to the registered proprietor, receiving the duplicate certificate of title
- Rose had done nothing that could be said to be imprudent but had relied upon search of register

Issue

- Does Osmanoski's failure to lodge a caveat postpone her prior equitable interest to that of Rose?

Reasoning

- Adopts *Butler/Person-to-Person* approach: failure to caveat leads to loss of priority
- Osmanoski postponed her interest as her inaction armed the registered proprietors with the capacity to defeat her equitable interest
- Rose had done nothing wrong (and would have expected to find a caveat: notice principle)
 - The Court effectively treats a caveat as notice of the prior interest
 - *Contra J & H Just Holdings* per Barwick CJ and *Heid* per Mason and Deane JJ

Decision

- In the circumstances, Rose was entitled to expect to find a caveat if there were any prior equitable interest
- Decision not preferred now: doubted in *Jacob v Platt Nominees* and *AVCO v Fishman*

In *Jacobs v Platt Nominees*, the earlier party's failure to lodge a caveat to protect an option to purchase did not result in priority being lost because there was an alternative means of protection available to that party. This had the effect of making it reasonable to rely on that alternate means. Noteworthy is the Court's two-stage analysis: it first considers whether there is evidence sufficient to found an estoppel in favour of the later interest holder; this not being established, it then moves to the broader equities approach of Mason and Deane JJ in *Heid*.

Jacobs v Platt Nominees (1990) Vic SC:Facts

- Mr and Mrs Platt are the directors of Platt Nominees; the company owns a hotel and negotiates with Country Comfort to sell the land
- Lucy Jacobs is their daughter; she knew of the negotiations and that they had ceased in February (but she did not know they had recommenced in July)
- Platt Nominees had previously granted Jacobs an option to purchase the hotel; the option is signed by Mr and Mrs Platt
- Jacobs does not lodge a caveat because she thinks that this would affect her relationship with her parents
 - Lucy didn't caveat because she didn't want to offend her father
 - She thought her mother would protect her interest
 - She also believes her mother would not allow the property to be sold to Country

Comfort until she had had time to exercise her option

- A contract of sale to Country Comfort is later signed by Jacobs' brother, who had power of attorney over his mother's affairs
- Jacobs finds out about the contract of sale, then lodges a caveat and commences proceedings

Issue

- Is Jacob's equitable option to be preferred as a matter of priorities over Country Comfort's equitable interest as purchaser?

Reasoning

- Applied *Heid*:
 - There are two methods of deciding the postponement question
 - **Estoppel by representation** (the second interest holder must change their position, to their detriment, on faith of a representation made by the earlier interest holder); and
 - **The broad principle** articulated by Mason and Deane JJ in *Heid* (prima facie priority to the first in time unless there is, in all the circumstances, conduct such as to make it fair and just to postpone the earlier to the later interest)
- Estoppel analysis
 - There was no representation
 - The purpose of a caveat is protective; it is *not* to give notice to the world
 - Therefore, failure to lodge could not amount to a representation by the earlier party that there was no prior interest (*Heid*; *J & H Just*)
 - Although the normal practice would be for an option-holder to lodge a caveat when the option was granted and/or exercised, this is not invariably done
 - Nor is it invariably the practice for a purchaser to search the register prior to entering into a contract to purchase land
 - The effect of the statements required by section 32 of the *Sale of Land Act 1962* (Vic) was that a purchaser would expect to discover restrictions on the registered proprietor's title from the statement rather than from a caveat
 - As a result, there was no relevant representation that was relied on
 - Even if there was a representation, there was no detriment:
 - Country Comfort could simply rescind the contract to purchase the motel and suffer no loss
 - Estoppel is 'more appropriate to the cases where parties armed the third party "with the power of going into the world under false colours" ... by arming him with title deeds and evidence of payment.'
 - 'That is not the situation here.'
- Broader approach (based on the analysis of Mason and Deane JJ in *Heid*):
 - Starting point: first in time has priority, unless there is something 'tangible and distinct having grave and strong effect to accomplish the purpose' (Lord Cairns LC in *Shropshire Union Railways and Canal Co v R*)
 - Next step: characterise the earlier party's conduct to determine 'whether in all the circumstances, that conduct is such that, in fairness and in justice, the earlier interest should be postponed to the latter interest.' (*Heid* per Mason and Deane JJ)
 - Primary consideration must be given to the conduct of the first equitable interest holder

- Estoppel and negligence are both relevant but neither is determinative
- Failure to lodge a caveat 'does not in itself involve the loss of priority, being only one of the circumstances to be considered'
- Application to the facts:
 - In this case Jacobs' failure to caveat was reasonable and she retained her priority
 - The Court regarded the special circumstances in this case as relevant to identifying what were the reasonably foreseeable consequences of Jacobs' conduct
 - She was entitled to assume that Platt Nominees would not enter a contract to sell the property while her option was on foot
 - There was no reasonable expectation that a failure by Jacobs to caveat could create another conflicting interest because there was another means of protecting her interest
 - Her mother would prevent the sale
 - There were thus other ways for Lucy to protect herself
 - Failure to caveat was, in the circumstances, reasonable
 - **It is not a reasonable expectation that a failure to caveat would result in the creation of another conflicting interest**
 - As a result, 'it was not reasonably foreseeable that her failure to lodge a caveat exposed herself ... to a risk of a later sale' to Country Comfort
- 'In the result we find that the evidence compels a finding — that in fairness and justice the appellant should not be deprived of her *prima facie* priority in time and we propose to make appropriate orders accordingly.'

Decision

- Jacobs' appeal is allowed; she retains priority and is able to exercise her option
- Confined to the unusual facts of this case, a failure to lodge a caveat in relation to an option to purchase does not lead to postponement of that interest to the later purchaser under a later contract of sale because there was an alternate means of protection

Where an unregistered mortgagee fails to lodge a caveat to protect its interest it will not necessarily be postponed to the interest of a later, unregistered mortgagee (*AVCO Financial Services v Fishman*).

***AVCO Financial Services v Fishman* (1993) Vic SC:**

Facts

- The state bank registers a mortgage and holds the duplicate certificate of title
- The bank also has an unregistered second mortgage to the Fishmans
 - The Fishmans had neither register nor caveat the mortgage
- Fishman seeks to borrow from AVCO
- AVCO, conducting a background check into Fishman's assets, contacts the state bank and receives information about the amount outstanding (which proves incorrect)
- However, AVCO is not informed of the existence of the second unregistered mortgage
- AVCO later lodges a caveat to protect its later interest as mortgagee
- The state bank lodges the second mortgage for registration

Issue

- Should the state bank's prior equitable mortgage be preferred to AVCO's later, third equitable mortgage?

Reasoning

- Tadjell J:
 - The earlier equity has *prima facie* priority unless it would be inequitable to retain priority as a result of postponing conduct
 - A failure to caveat is not neglect warranting postponement
 - AVCO was not entitled to rely on the absence of a caveat to indicate that no unregistered second mortgage existed
 - This is because the purpose of a caveat is protective, not to give notice
 - The bank's possession of the certificate of title is sufficient to protect itself
 - AVCO relied on its own inquiries not on the non-existence of caveat, so this cannot be said to justify their reliance
 - Where a registered first mortgagee who holds the certificate of title fails to register or lodge a caveat to protect a subsequent mortgage, it will *not* be postponed to a later, further unregistered mortgage
 - An earlier equitable interest will have priority unless some action or neglect by the holder means it would be inequitable for the later equity to be denied priority
 - The Bank's failure to lodge a caveat was not such a neglect
- AVCO took the risk by proceeding without all the relevant information
- In the case of Torrens Title land, a registered first mortgagee would usually be expected to hold or control the duplicate certificate of title
- Moreover, it is a standard practice that registration of a second or subsequent mortgage cannot ordinarily be procured without production of the duplicate certificate of title
- AVCO was not entitled to rely at all on the absence of any caveat to indicate that there had been no unregistered second mortgage given to the bank

Decision

- The bank's second mortgage has priority over AVCO's third mortgage

Jacobs established that *Heid v Reliance* is applicable in Victoria. It supports a two-stage approach, determining priority on the basis that the first in time prevails unless 'something "tangible and distinct having grave and strong effect to accomplish the purpose"' occurs such as to render it inequitable for the first in time to retain priority. This conduct might be by way of estoppel (narrow view) of general conduct and other circumstances, including estoppel (broad view).

IGA Distribution Pty Ltd v King & Taylor Pty Ltd elaborates upon the nature of postponing conduct. Justice Nettle incorporates notice into the 'better equity' enquiry, treating actual, constructive or imputed notice by the second purchaser as one factor indicating that the earlier interest should prevail (see *PLA* s 199). In this sense, a subsequent interest holder is bound by the knowledge acquired by their solicitor of a prior interest.

***IGA Distribution Pty Ltd v King & Taylor Pty Ltd* (2002) Vic SC:**Facts

- A specifically enforceable lease agreement is made between a lessor and IGA
- IGA therefore has an equitable interest in performance
- However, the lessor has since sold the land to King & Taylor, who has an equitable interest in completion

Issue

- There are two equitable interests: King's agreement for the lease and IGA's equitable interest under the contract of sale
- Is IGA's equitable interest subject to King's interest under the separate contract for the sale of the land the subject of the lease?
 - That is, should the purchaser be bound by the lease?

Reasoning (Nettle J)

- Effect of failure to lodge a caveat
 - Should the first in time interest of IGA be postponed?
 - No
 - Applies *Jacobs*: failure to caveat not of itself sufficient to postpone the earlier interest
- Test to resolve priorities
 - Because there was 'no registration of the first defendant's interest [for the] time being it is still a matter of competing equitable interests'
 - Hence, the first in time prevails unless there be something 'tangible and distinct having grave and strong effect to accomplish the purpose' (at [42])
 - This is to say that there is something in the conduct of IGA which 'in all the circumstances dictates that in fairness and in justice the interest of IGA should be postponed to the interest of the Delahey.' (at [44])
- The role of notice
 - Notice is one factor to be considered in 'better equities' approach
 - Constructive notice as set out in s 199 of the *Property Law Act* is applicable to Torrens land
 - Did the second in time interest holder have actual, constructive or imputed notice of earlier interest?
 - No actual or constructive notice
 - But yes, there was imputed notice
 - Notice is imputed on the basis that Szentel (Delahey's solicitor) was retained to act in a certain capacity, and that in the course of that capacity he learnt of the earlier interest
 - Szentel knew of IGA's earlier interest
 - There is nothing to suggest that Delahey (later interest) relied on the register or the absence of a caveat
 - Knowledge of the solicitor is therefore imputed back to the principal because of their fiduciary relationship: therefore, applying *respondeat superior*, knowledge of the agent is imputed back to Delahey (s 199(1)(b) of the *PLA*)
 - Therefore the second in time interest holder had notice
 - *Moffett v Dillon*: notice an independent rule; postponement is the result
 - Note effect of s 32 statement: not decisive
 - Delahey did not rely on s 32
 - Even if he had, it would not have made any difference to the practice of Szentel in providing s 32 statement or in drawing requisitions on title which omitted reference to the interest of IGA
- Absence of detriment
 - The decision in *Jacobs* makes clear that mere change of position is not enough to have the effect of postponing an interest earlier in time to one subsequently created on the basis of estoppel
 - 'Consistent with ordinary principle, it is necessary for a party who seeks to reverse the order of priorities to go further and show that it has suffered detriment the consequence of the failure of the earlier interest holder to caveat'

- 'It is true that the Appeal Division's observations as to the need for detriment were made in the context of a consideration of whether failure to caveat could amount to estoppel by representation.' (at 219)
- Can failure to caveat be equivalent to estoppel by representation?
 - No: see *Jacobs*
- 'The court dealt separately with what it termed the second method of deciding the postponement question, namely, whether in all the circumstances the conduct of the earlier interest holder is such that in justice and fairness it ought be postponed to the subsequent taker'
- 'But given that what is in issue is a question of competing [equitable interests], it is difficult to envisage anything short of detriment which would make it inequitable for the prior interest holder to insist upon priority' (at 219)
- There is no detriment on the facts

Decision

- The first interest is preferred

6 Summary

(i) Bases for postponement

There are two bases for postponement:

- **Estoppel** (narrow)
The first claimant may be estopped from denying the later interest (*Heid* per Gibbs CJ and Wilson J)
 - A caveat is protective rather than a means of giving notice: *Just, AVCO*; contra *Osmanoski*. Consequently, failure to lodge a caveat is not a representation that no prior interest exists
 - Is the first in time estopped from denying the subsequent interest?
Heid per Gibbs CJ and Wilson J
- **Reasonable foreseeability** (broad)

The first claimant will lose priority if creation of the second interest was a reasonably foreseeable result of some act or neglect by them (*Heid* per Mason and Deane JJ; *Jacobs*)

General rule:

In a competition between two unregistered (equitable) interests, the earlier interest will prevail unless there is some act, neglect or default by the holder of the earlier interest as a result of which it is reasonably foreseeable 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

- Was creation of the second interest reasonably foreseeable?
Heid per Mason and Deane JJ; *Jacobs*

(ii) Effect of notice

- Does the second interest holder have notice?
 - *Moffett v Dillon* per Brooking JA
 - If so, the later interest will not prevail
 - Notice rule independent of better equities test
 - *Moffett v Dillon* per Ormiston JA
 - Are the merits equal or is the first interest to be postponed?

(iii) Effect of failure to caveat

Failing to lodge a caveat is not fatal (*Heid, Jacobs; contra Butler*).

However, such a failure may combine with other factors to postpone the earlier interest: *Just*. It is necessary to look at all the circumstances: *Jacobs; Just; Heid; IGA*.

The first claimant will not be postponed where he or she was entitled to rely on other protection of his or her interest (*Jacobs*). For example, a registered first mortgagee who holds the certificate of title will be entitled to rely on that so that his or her second unregistered mortgage will not be postponed to a later equitable interest (*AVCO*).

Whether lodging a caveat is or is not a standard conveyancing practice will depend on the nature of the transaction and the evidence led by the parties about the general practices of prudent conveyancers (*Jacobs; cf IAC; Sharari*).

The earlier claimant will not be postponed if the later claimant did in fact know about the earlier claimant's interest *Moffett v Dillon* (Brooking JA), or there is constructive or imputed notice (*IGA Distribution*).

- A caveat is protective rather than a means of giving notice
Just; AVCO; contra Osmanoski
- Failure to lodge will not necessarily result in postponement of earlier interest
Jacobs; contra Butler
- A failure may combine with other factors to postpone priority
Just
- Look at all the circumstances
Jacobs; Just; Heid
- Was there another means of protection?
Just; Jacobs
- Did the transaction involve common conveyancing practices?
Courtenay
- Was lodging a caveat common practice?
Osmanoski; contra Jacobs
- Can lodging a caveat disarm otherwise arming conduct?

G Prior Mere Equity v Subsequent Equitable

An a competition between a prior mere equity and a subsequent equitable interest, the equitable interest will win: *Latec Investments v Hotel Terrigal*; *Breskvar v Wall*.

Latec Investments v Hotel Terrigal (1965) HCA:

Issue

- Which interest should take priority out of a prior mere equity and a later equitable interest?

Reasoning

- Kitto J:
 - A person who acquires a subsequent equitable interest in good faith for value and without notice of an earlier mere equity will not be bound by the mere equity
 - A mere equity is of lesser priority than an equitable interest
- Menzies J and Taylor J, in their Honours' respective judgments, adopt an equivalent view
- The Court does not directly decide the issue of whether a mere equity is not proprietary in character
- Taylor J:
 - Views Hotel Terrigal as having held a full equitable interest
 - However, Hotel Terrigal lost priority based on their postponing conduct (unreasonable delay)

By contrast, in *Swanston Mortgage* it was held that a mere equity is not an 'estate or interest in land' for the purposes of lodging a caveat under s 89 of the *TLA*.

Breskvar v Wall was decided on the basis that Breskvar, the holder of the earlier equitable interest, had armed Petrie, the fraudulent solicitor, with the capacity to create the subsequent interest and was therefore postponed. The right to set aside for fraud was construed on its fullest basis (equitable interest) but the issue of whether it was a mere equity or an equitable interest was not directly decided.

Breskvar v Wall (1971) HCA:

Facts

- The Breskvars are registered proprietors of Torrens land in Queensland
- In March 1968, they execute a memorandum of transfer for \$1200, but leave the name of the transferee blank
- A blank transfer is 'absolutely void and inoperative' according to s 53(5) of the *Stamp Act 1894 (Qld)*
- In September 1968, Petrie took possession of the transfer and inserted the name of his grandson, Wall, into the blank space
- Breskvar registered the transfer
- In October 1968, Wall contracted to sell the land to Alban Pty Ltd
- In November 1968, this transfer occurred; Alban was a *bona fide* purchaser for value without notice of the Breskvars' interest or the fraud that had taken place

- In December 1968, the Breskvars discover Wall's registration and lodge a caveat preventing further dealings
- In January 1969, Alban lodges its transfer for registration but registration cannot proceed because of the caveat
- The Breskvars seek a declaration that the memorandum of transfer of March 1968 was void and ineffective to transfer title to Wall
- The trial judge finds that Wall and Petri's conduct is fraudulent
 - The Breskvars therefore had a mere equity (Kitto and Menzies JJ in *Latec*) to set aside the sale to Wall for fraud
 - Meanwhile, Alban has an equitable interest in completion of the sale and registration of the transfer

Issue

- Which should take priority out of a prior mere equity and a later equitable interest?

Reasoning

- Note:
 - The conduct of the Breskvars (first in time holders) was conceived of as postponing conduct in terms of reasonable foreseeability
 - The Breskvars did caveat upon their discovery that Wall had become registered proprietor but after Wall had contracted to sell to Alban: this gave rise to the subsequent equitable interest
- Barwick CJ:
 - 'There is thus a competition between the respective interests of the [Breskvars] and of [Alban] to be resolved on equitable principles'
 - Applies *Abigail v Lapin* test to conclude that the Breskvars armed Petri, the solicitor, and therefore lose priority:
 - 'The creation of the [Breskvars'] interest is prior in point of time. It arose at the time [Wall] became the registered proprietor.'
 - 'The priority of the creation of that right will only be lost by some conduct on the part of the [Breskvars] which must have contributed to the assumption, false as the event proved, upon which the holder of the competing equity acted when that equity was created. Here the [Breskvars] armed [Petri] with the means of placing himself or his nominee on the register. They executed a memorandum of transfer, without inserting therein the name of a purchaser; they handed over the relevant duplicate certificate of title and they authorised [Petri], if occasion arose for the exercise of his powers as a mortgagee, to complete and register the memorandum of transfer.'
 - 'The [Breskvars] therefore lose the priority to which the prior creation of their interest in the land would otherwise have entitled them.'
 - 'the right of the appellants to recover their land from the first respondent should be postponed to the equitable interest therein of the third respondent as a purchaser *bona fide* for value and without notice.'
 - The case becomes one of 'an agent exceeding the limits of his authority but acting within its apparent indicia.'
 - The effect of a caveat
 - Not considered important or relevant, since priority is decided on other grounds
 - Barwick CJ repeats the views his Honour expressed in *Just*: a failure to caveat is not to be regarded as of itself a reason for loss of priority
 - In some circumstances failure to caveat in association with other conduct may lead to loss of priority

- A majority of Justices did not definitively decide whether the Breskvars' right to have the transaction set aside for fraud was a mere equity or an equitable interest
 - Barwick CJ gave the right its fullest possible interpretation (equitable interest); since even this was insufficient, their claim was bound to fail regardless of the classification adopted

- Walsh J:
 - 'It is not necessary ... to enter into the question whether [the] appellants should be regarded as having an equitable estate or interest in land or as having ... a "mere equity as distinguished from an equitable estate." I am of the opinion that if it is assumed that [the] appellants had [an] equitable estate after [the] transfer [was] registered, that interest is not entitled to priority over the interest Alban acquired in the land.'
 - Thus, the prior interest of the defrauded mortgagor lost priority because the Breskvars armed Petrie (this was postponing conduct), not because the interest was treated as a mere equity

- Menzies J:
 - Wall did not obtain an indefeasible title because the registration was procured by fraud
 - However, Wall was still registered as proprietor by means of the registration of the transfer instrument
 - 'The blank transfer, however, with no effect in law or in equity, once it had been wrongly filled in and lodged with the certificate of title, became the means whereby Wall was able to become registered proprietor and to deal with [Alban] as such.'
 - 'Upon the authorities cited, this, I think, is enough to require the postponement of the appellants' right or claim to that of [Alban]. They did not put Petrie or Wall in a position to have Wall lawfully registered as proprietor. nevertheless, in executing the transfer in blank they were in breach of the [Act], and it was their breach of the law that enabled Wall ... to become registered proprietor'

The *Latec* approach has subsequently been followed in *Ruthol Pty Ltd v Mills*.

***Ruthol Pty Ltd v Mills* (2003) NSW CA:**

Facts

- Mills holds the first equitable interest, an option to purchase land that could be exercised within a certain period
- However, exercise of the option was made conditional on another party not exercising their own option
- Mills was fraudulently told that the option had been exercised by that other, and did not exercise their rights as a result
- In the meantime, a further equitable interest had been created in favour of Tricon
- Mills discovers the fraud and seeks to enforce its option
- There are thus two competing equitable options to purchase the land

Issue

- Which equitable option has priority?

Reasoning

- At first instance, held:
 - First option granted to Mills was an equitable interest and had priority

- On appeal:
 - However, after the expiry of the time period it was a mere equity
 - Applying *Latec*, the mere equity does not take priority over Tricon's later interest
 - Tricon has priority, particularly since they acquired their interest without any wrongdoing
 - Mills not gain priority

- Sheller JA: the equitable maxim that no party may take advantage of its own wrong cannot enable Mr and Mrs Mills to defeat Tricon's claim to priority
 - Ruthol cannot rely on its wrongdoing in misleading the Mills in order to defeat their claim, but Tricon was not guilty of any wrongdoing and the maxim did not prevent its asserting its priority over the interest claimed by the Mills
 - Accordingly, Tricon's equitable interest as purchaser of the property took priority over Mr and Mrs Mills' equity to proceed against Ruthol for breach of contract in reliance on their late exercise of the option

Decision

- The subsequent equitable interest takes priority over the earlier mere equity

Ruthol illustrates an application of the reasoning of Kitto J in *Latec* to a right to sue for breach of contract and specific enforcement of an option. That right being a mere equity until asserted, a subsequent equitable right will take priority according to established priority rules. The authority of *Latec* must therefore remain undoubted, despite its lack of internal uniformity.