

CAVEATS¹ — TWO QUESTIONS

This article brings into question some aspects of the nature, function and effect of the caveat in the Singapore Torrens system. Two questions are posed and the attempt to answer them has involved essentially an examination of the provisions of the Land Titles Act and gleanings from the experiences of other Torrens jurisdictions.

I. THE FIRST QUESTION

SECTION 38 of the Land Titles Act (LTA)² states that the proprietor of registered land holds that “land free from all encumbrances, liens, estates, and interests whatsoever, except such as may be registered or *notified in the land register.*” [emphasis added] Section 105 (2) states: “If a caveat relates to registered land, and the requirements of this Act have been complied with, the Registrar shall in due course enter a *notification of the caveat in the land register.*” [emphasis added] Suppose a claimant of an interest in land lodges a caveat under section 104. An instrument is lodged by another for registration which triggers off the procedure under section 108.³ However, the Registrar omits to give notice to the caveator and registers the conflicting instrument. In these circumstances will the proprietor of the registered interest hold it free of the caveated interest? The real question then is whether a caveated interest is an interest notified in the land register within the meaning of section 38.

In such a situation the High Court of Australia held under the Victorian Torrens legislation⁴ as it stood in 1917 that the proprietor holds his registered interest free of the caveated interest. In *Butler v.*

¹ Under the Land Titles Act there are two types of caveats; that of the Registrar under s. 7(b) and the “private” caveat which under s. 100 may be lodged by any person claiming an interest in land. This article deals with the private caveat.

² Cap. 157, 1985 (Rev. Ed.).

³ Section 108(1) provides: “Upon lodgment for registration of an instrument the registration of which is prohibited by a caveat, the Registrar shall serve on the caveator a notice of his intention, at the expiration of 21 days from the date of the notice, to register the instrument, and he shall so register the instrument unless within that period of 21 days-

(a) an order to the contrary has been made by the Court and served on the Registrar; or
 (b) the instrument has been uplifted or withdrawn or otherwise becomes incapable of registration.”

⁴ Transfer of Land Act 1915 (Vict.). Section 72 provides: “Notwithstanding the existence in any other person of any estate or interest... which but for this Act might be held to be paramount or to have priority, the proprietor of land or any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same subject to such encumbrances as are notified on the folium of the register book constituted by the grant or certificate of title, but absolutely free from other encumbrances whatsoever...”

Fairclough,⁵ the registered proprietor of land created an equitable charge in favour of B and before this interest was caveated, executed a transfer in favour of F. After B lodged his caveat, F lodged the transfer for registration. The Registrar duly notified B of the lodging of the transfer pursuant to section 184⁶ of the Transfer of Land Act which is the equivalent of section 108 of the LTA. B and F met to settle their conflict which resulted in an agreement that F would withdraw his transfer and B would not then take the matter to court. F withdrew the transfer but a few months later lodged it again for registration. The practice of the registrar was to regard a caveat as lapsed if the caveator did not secure a court order within fourteen days to injunct the registration of the conflicting instrument, even if the instrument was withdrawn within the fourteen days. Consequently, the Registrar did not notify B of the re-lodgment of F's transfer and registered the transfer. In an action by B claiming a declaration that F procured his registration by fraud the Supreme Court of Victoria gave judgment for F, and B appealed to the High Court of Australia.

The High Court of Australia (Griffith C.J., Barton and Isaac JJ.; Gavan Duffy and Rich JJ. dissenting) dismissed the appeal. The majority judgments held that the registration of F's transfer was valid notwithstanding the existence of B's caveat and the omission of the Registrar to notify B of F's application. In other words, section 72 of the Transfer of Land Act 1915, the equivalent of section 38 of the LTA, gave F the owner of the registered land indefeasibility notwithstanding B's caveat which had not lapsed.⁷

A. *Nature of a caveat*

The use of the phrase "a notification of the caveat in the land register" in section 105(2) may suggest that a caveated interest is an interest notified in the land register within the meaning of section 38 and therefore an exception to indefeasibility. It is submitted however that it is not.

The nature of the caveat must be considered. Under the LTA it appears to have two main functions. First, it is a statutory injunction to keep the property in status quo until the court has had an opportunity of discovering what the rights of the parties are.⁸ Section 107(5)

⁵ (1917) 23 C.L.R. 78.

⁶ Section 184 provides that: "Upon the receipt of such caveat the Registrar shall notify the same to the person against whose application to be registered as proprietor or (as the case may be) to the proprietor against whose title to deal with the estate or interest such caveat has been lodged; . . . Except in the case of a caveat lodged by or on behalf of a beneficiary claiming under any will or settlement or by the Registrar pursuant to the direction of the Commissioner every caveat lodged against a proprietor shall be deemed to have lapsed upon the expiration of fourteen days after notice given to the caveator that such proprietor has applied for the registration of a transfer or other dealing or the issue of a registration abstract . . . but if before the expiration of the said period of fourteen days or such further period as is specified in any order made under this section the caveator or his agent appears before a Judge . . . such Judge may direct the Registrar to delay registering any dealing with the land . . . for a further period to be specified in such order, or may make such other order and in either case such order as to costs as is just."

⁷ (1917) 23 C.L.R. 78, 85-87, *per* Griffith C.J.

⁸ See *Re Hitchcock* (1900) 17 W.N. (N.S.W.) 62, 63, *per* Owen J.

provides that so long as a caveat remains effective the Registrar shall not register any instrument which is inconsistent with the provisions of the caveat. It seems clear from the provisions of the LTA⁹ that the essential purpose of the caveat is to prevent any conflicting instrument from getting on the register. Second, as between equitable interests priority is, to an extent,¹⁰ determined by the order of lodgment of the caveat. Section 41 so provides.¹¹ Further, except for section 20 of the Act which deals with a specific and special class of interests to be caveated, the provisions dealing with caveats generally do not accord the caveated interest functions beyond the two described.

B. *Contrary Implications?*

Against the proposition that the caveated interest is not a notified interest, it may be argued that section 107(4) implies that unless otherwise provided the caveated interest is a qualification on the indefeasibility of an interest registered after lodgment of the caveat. The sub-section states that “a caveat does not operate to prevent the registration of an instrument which was lodged for registration before ___ the time when the caveat becomes effective...”. The necessity to have section 107(4) make clear that the presence of the caveat on the register is to have no effect on the registration of an instrument lodged prior in time to the caveat implies that but for the provision the caveated interest would have been a qualification on indefeasibility of the interest registered. But s. 107(4) does not support such an inference. It deals only with whether the caveat is effective to prevent the registration of a conflicting instrument. It does not concern itself with the effect of a caveat on an interest which is registered despite the caveat’s presence in the register.

Section 109(2) should also be considered because it accommodates the situation where the caveat remains on the register after the registration of a conflicting instrument. Under section 108, the caveator has to secure a court order to prevent the registration of an instrument that has been lodged with the Registry. If he fails to resort to the court within twenty-one days of the notice given to him by the Registrar of the conflicting instrument, section 108(1) empowers the Registrar to register the instrument. Section 105(1) states, *inter alia*, that a caveat lapses and ceases to affect land at the expiration of the period of twenty-one days (or of such further period as the court may direct) from the date of notice given pursuant to section 108. Section 109(2) states: “Where, after notice given as in [section 108], the Registrar registers an instrument which does not exhaust the intended functions of a caveat, the caveat shall be deemed to have lapsed *only to the extent necessary to permit such registration.*” [emphasis added]

Again it may be argued that the implication of section 109 is that the caveat on the register is a qualification on the indefeasibility of a registered interest unless there is specific provision to the contrary. Thus, under section 109 the caveated interest fails to be a qualification

⁹ See in particular Part XI.

¹⁰ To be considered later.

¹¹ The scope of section 41 will be examined later.

on indefeasibility because it is deemed to have lapsed. Such an interpretation may be reinforced by the argument that since it is section 108 that gives the caveator the opportunity to prevent the registration of a conflicting instrument and the caveat is only considered lapsed under section 109 if the procedure under section 108 has been complied with, the caveat should not be defeated by the registration of an interest of which the caveator had no notice. But the weakness in the argument is that section 109(2) plainly shows that the effect of the lapse of a caveat is merely to permit registration of the conflicting instrument. The section does not go so far as to say that the effect of a caveat remaining on the register which has not lapsed is a notified interest within the meaning of section 38. Further, section 108 amplifies the function of a caveat as being a temporary injunction to keep conflicting interests from coming on the register.

Can the implication be drawn from section 104(2) that the caveat is a qualification on indefeasibility? This provision allows for the prohibition by a caveat against registration of instruments to be limited or total. So the caveat may be drafted to forbid the registration of any instrument unless the instrument is expressed to be subject to the interest claimed by the caveator. This is partial prohibition and means that so long as the incoming instrument is expressed to be subject to the caveator's interest, it will be registered without the Registrar giving notice to the caveator in accordance with section 108. Once the instrument is registered the interest to which it relates is accorded indefeasibility. The interest in such circumstances is meant to be subject to the caveator's interest, but how is this accommodated within section 38?

One view would be that it is obviously to be regarded as a notified interest. But section 104 does not expressly state that it is. It is submitted that the rights of the caveator against the proprietor of the registered interest who has expressly subjected his interest to that of the caveator's would be personal against that proprietor. In the event that the proprietor refuses to recognise the interest of the caveator he would be estopped from such denial. The question remains how this assertion of rights is accommodated in section 38 which gives the status of indefeasibility to the registered interest. First, although the draftsman of section 38 has tried to make this section as comprehensive as possible, no claim has been made that it is exhaustive with regard to exceptions to indefeasibility.¹² Second, the owner who denies the caveator's interests may be found, in some circumstances, to be guilty of fraud under section 38(2)(a). Alternatively, he is contractually bound not to deny the caveator's interest under section 38(2)(b). His promise to be subject to the caveator's interests is given in consideration of the caveator allowing the registration of the instrument without the resistance he could have put up by the procedure provided in section 108. Further, the caveator's interest is adequately protected

¹² In his book, *The Singapore Torrens System*, (1961), p. 77, John Baalman in commenting on the exceptions to indefeasibility listed in section 38 (then section 28) wrote: "In the comment immediately following it will be seen that the draftsman of this Ordinance has endeavoured to surmount the controversies which inspired the various sub-titles, and to minimise implied exceptions from, or qualifications on, the measure of indefeasibility. The extent of his success is still to be decided by experience; but the net result of his endeavours will at least be less uncertainty."

against any other incoming instrument by the presence of the caveat which prohibits registration unless that instrument is also stated to be subject to the caveator's interest.

Such an interpretation of the caveated interest's status is consistent with the view that the caveat is notice of a claim only. The agreement to be subject to the caveator's claim is sufficiently protected by disallowing the proprietor from denying such a claim. But such an agreement should not have the effect of establishing the claim against other persons who subsequently lodge instruments. There is no reason why their right to challenge the caveat under the LTA should be adversely affected by the promise of another.

Therefore, not only is there no implication to be drawn from the provisions in Part XI, which contains most of the provisions on caveats, that the caveated interest is a qualification on indefeasibility, but also none of them specifies expressly that a caveated interest is an interest notified on the register within the meaning of section 38. Considering that the effect of a caveat has been expressed by the LTA as preventing registration of conflicting instruments, surely the strong implication can be drawn that upon registration the interest will defeat the caveated interest rather than be subject to it.

C. An Exception Made — Section 17

1. Protection of Pre-conversion Interests

Contrast can be made with the status given to those pre-conversion interests caveated in accordance with section 20 of the LTA. The section deals with qualified titles.¹³ It provides that as long as the caution remains on the folio any person claiming an interest in land which was subsisting at the date of issue of the qualified certificate of title may lodge a caveat to protect his interest.¹⁴ The purpose for so doing is not so much the protection of the interest whilst the caution remains on the register (for the title under the qualified certificate of title is held subject to all interests subsisting at the time the land is converted) but it is for the protection of the interest after the caution has lapsed. After the caution lapses, a person who registers his interest takes free of all interests except those registered or notified in the register and those interests as are otherwise excepted by section 38.

Section 20 protects interests subsisting at the time of conversion of the land by providing for the endorsement on the folio of the land register of a "notification of any caveat or other subsisting encumbrance". Subsection (2) provides that "[a]ny person claiming an interest in land which was subsisting at the date of issue of a qualified

¹³ See also ss. 16, 17, 18 and 19.

¹⁴ Section 19(1) provides: "Upon the issue of a qualified certificate of title the Registrar shall endorse on the relevant folio of the land-register a caution warning persons dealing with the proprietor that the land therein comprised is held subject to any interest which affected it at the date of the issue of the qualified certificate of title, and so long as the caution remains on the folio the land shall be so held." Section 19(3) reads: "When the lapsing of a caution has been notified on the folio of the land-register the certificate of title ceases to be qualified, and the land therein comprised is thenceforth held subject only to such interests as are registered or notified on the folio of the land-register and to such interests as are otherwise excepted by the provisions of section 38."

certificate of title for that land may ... protect that interest by a caveat pursuant to section 104...”, and the Registrar shall enter a notification of such a caveat in the land-register. Subsection (5) states that an interest notified on the folio of the land-register pursuant to this section is a notified interest within the meaning of section 38. Therefore, a registered proprietor of land takes an indefeasible title subject to interests, for what they are worth, notified in accordance with section 20.¹⁵

Are interests which are protected by a caveat pursuant to section 20 interests notified on the register within the meaning of section 38? If they are, a reason has to be found for making a distinction between caveats lodged to protect interests which are created prior to the land being brought under the provisions of the LTA (pre-conversion interests) and those lodged to protect interests created after conversion (post-conversion interests). For the proposition here advanced is that generally caveated interests are not a qualification on indefeasibility. It is submitted that a distinction has to be made between pre-conversion and post-conversion interests which are protected by caveat.

2. Two Types of Endorsements

In considering section 20 there appear to be in practice two types of endorsements that are made pursuant to section 20 to protect pre-conversion interests. The first is the notification of a caveat on the register in accordance with section 104. The second is the notification of an interest itself on the folio. The practice of the Registry of Titles bears this out. Why is and why should a difference be made in notification? It appears from practice that those pre-conversion interests in land which will be notified on the folio are those interests which have been created under the general system of conveyancing and duly registered under the Registration of Deeds Act (RODA).¹⁶ These would include those mortgages, leases and easements which were created in accordance with section 53 of the Conveyancing and Law of Property Act (CLPA)¹⁷ and registered under the RODA. It seems obvious that such interests should be given a less transient status that would be accorded by a caveat.

There does not appear to be any policy to necessitate the re-creation of these interests in accordance with the provisions of the LTA, for re-creation would incur further legal expense and might create undue complications. So quite rightly these interests should be given a continued presence and status after conversion. Short of giving them indefeasibility the LTA does account for them on the register and the registered proprietor is subject to them as clearly stated in section 20(5). But whilst such interests are actually noted on the register, others such as the equitable easement or lease are in practice protected by the notification of a caveat on the register. By and large such interests are, even under the general system of conveyancing,

¹⁵ Section 20(5) also states that notification of such an interest does not give the interest any greater operation or effect than it has under the instrument creating it.

¹⁶ Cap. 269, 1985 (Rev. Ed.)

¹⁷ Cap. 61, 1985 (Rev. Ed.)

never regarded as more than just a transitory state of affairs preceding the formal completion of land dealings in accordance with the provisions of the relevant statutes.

So although no guidelines are found in section 20 itself for the Registrar to determine whether a pre-conversion interest would be notified or caveated, it is suggested for the reasons stated above that all interests granted or created by assurances registered under the RODA will be notified on the Register and all those which are not will be protected by notification of caveat on the Register.

3. As Notified Interests

But pre-conversion interests, whether notified or caveated on the Register, are notified interests within the meaning of section 38. Section 20(5) states that “[a]n interest notified on the folio of the land-register pursuant to this section is an interest within the meaning of section 38.” It may be argued that the words “interest notified on the folio” in section 20(5), strictly interpreted, should not include interests which are protected by a notification of caveat. It is submitted that looking at the provisions and scheme of section 20, such a narrow interpretation of section 20(5) is unwarranted. Whilst section 20 provides that a pre-conversion interest may be caveated or notified, the consequences, if any, of such a difference in notification are not apparent within the section. For instance, subsection (7) states that “[a]ny interest notified on the folio of the land register” pursuant to section 20 does not, by reason of any provision of the LTA, lose any priority which that interest would otherwise have had. This subsection makes clear that those provisions of the LTA, notably sections 40 and 41, which make time of registration or lodgment of caveat the deciding factor for determining priorities between interests, do not apply to pre-conversion interests. In this regard there can be no reason for making a distinction between pre-conversion interests which are notified directly on the folio and those protected by a caveat.

So then, the pre-conversion caveated interest is a notified interest because the language of section 20(5) in stating that “a interest notified on the folio of the land-register pursuant to this section is an interest within the meaning of section 38” does not make a distinction between the pre-conversion interest that is caveated and that which is notified on the folio. But although the pre-conversion caveated interest is a notified interest, it does not appear to function wholly like one. The notified interest does not enjoy the indefeasibility status of a registered interest¹⁸ but it functions as a burden on the land “for what it is worth”.¹⁹ It remains on the register for as long as the interest is effective and remains unchallenged by action in court. Section 20 serves to accommodate the pre-conversion interest in the transition from the general system of conveyancing to the LTA by giving it a place on the register as a notified interest. Thus, the interest formally created under the general law and registered under the RODA is preserved with as little disruption as possible. There is no express provision for the lapse of such interest. It would appear that in the event the interest ceases,

¹⁸ See s. 20(5) and comments of John Baalman in *The Singapore Torrens System* (1961), p. 40.

¹⁹ *Ibid.*

for example, when a pre-conversion mortgage is redeemed, the Registrar has to exercise his power to cancel the notification under section 28(6).²⁰

In contrast, the pre-conversion interest which is protected by caveat is subject to the provisions applicable to caveats unless otherwise specified. Nothing in section 20 points to the contrary. Consequently, it is subject to the procedure for challenge under section 108 and to lapse under section 109. It seems clear that the pre-conversion caveated interest, though considered a notified interest by the technical interpretation of section 20(5), does not function as a qualification on the indefeasibility of a registered interest because it is protected against such indefeasibility by the caveat being a statutory injunction against the registration of the interest.

4. Impression Reinforced

The strong impression that emerges is that unless exceptions are specifically made, the caveat is not a notified interest. Nothing in Part XI states generally that caveated interests are notified interests within the meaning of section 38. The pre-conversion caveated interest is a notified interest because of section 20(5). Further, as shown above, even when an exception is purportedly made, the ramifications are not readily perceived.

D. The Australian Experience

Finally, it is useful to examine the position in Australia since the draftsman of the LTA drew substantially on the Australian experience. There are different types of caveats under the Australian statutes. The views to be considered below have reference to the class of caveats which is substantially similar in nature to the caveat under Part XI of the LTA.²¹ E.A. Francis in his book, *The Law and Practice Relating to Torrens Title in Australasia*, writes:

“[T]he lodgment of a caveat has forthwith the effect of a statutory injunction prohibiting the Registrar, for so long as the caveat remains in force, from entering in the register book any memorandum of transfer or other instrument purporting to transfer or otherwise deal with or affect the land, estate or interest in respect to which the caveat is lodged, except, in some instances, to the extent permitted by the caveat.”²²

Significantly, he goes on to discuss a different type of caveat. He states:

“A somewhat different effect seems to be given to a caveat lodged

²⁰ See Baalman, *op. cit.*, p. 41.

²¹ See R.A. Woodman and Kevin Nettle, *The Torrens System in New South Wales* (1984), pp. 500–524. At p. 500 they note: “The subject of caveats is widely disbursed throughout the [Real Property Act 1900], and [Division 5] deals with the class of instrument known as a private caveat. It provides the machinery whereby persons claiming unregistered estates and interests in land under the provisions of the Act may protect themselves, as the lodgment of a caveat operates as a statutory injunction against the Registrar-General.” See also E.A. Francis, *The Law and Practice relating to Torrens Title in Australasia* (1972) Vol. 1, pp. 313–315 and Douglas J. Whalan, *The Torrens System in Australia* (1982), pp. 223–225.

²² At p. 334.

in Queensland by an equitable mortgagee under the provisions of s.30 of the Qld. Real Property Act of 1877 . . . The section renders a caveat lodged under its provisions operative as an encumbrance notified upon the register, and not as a stay of dealings with the land. It therefore seems that a caveat under this section is an instrument of an entirely different character from the caveat permitted to be lodged by Qld. s.98, and has an entirely different statutory effect."²³

There is however a view expressed with regard to the Transfer of Land Act 1958 of Victoria that the caveat should be regarded as a notified interest within the meaning of section 42 which is the counterpart of section 38. S. Robinson in his book, *Transfer of Land in Victoria* comments that the definition of "encumbrance" in section 4 of the Victorian statute is sufficiently wide to include caveats and a caveat should be considered a notified encumbrance.²⁴ It is interesting to note that *Butler v. Fairclough*, which impliedly came to the contrary conclusion, involved land in Victoria. However, the statute applicable was the Transfer of Land Act 1915 and Robinson's view is based upon the amendments to the law passed since 1917.²⁵ It appears still to be the general view in Australia that a caveat is not a notified encumbrance and that, should the omission by the Registrar to notify the caveator of a conflicting instrument happen again, the remedy available to the caveator is to claim from the Assurance Fund.²⁶

It may be argued that there are essential differences between the functions of the caveat in the Australian statutes and the LTA. Notably, the Australian statutes do not have a provision similar to section 41. This section determines priorities between unregistered interests by providing that the entry of a caveat protecting an unregistered interest in land under the provisions of the LTA gives that interest priority over any other unregistered interest not so protected at the time when the caveat was entered. In Australia a caveat does not of itself affect priorities.²⁷ Priority is determined by general law principles. However, failure to lodge or delay in lodging a caveat may cause the holder of an interest prior in time to lose his priority in favour of a later unregistered interest.²⁸ But such a difference does not assist in any way in the debate on whether the caveat is or should be regarded as a qualification on the indefeasibility of a registered interest. In fact, section 41, when read with section 40, which provides that "interests appearing in the land register have priority according to the order of their registration or notification", strengthens the submission that caveats are not notified interests within the meaning of section 38. This argument will be dealt with in the second part of this article.

²³ See pp. 93 and 190-191.

²⁴ See pp. 93 and 190-191.

²⁵ The Transfer of Land Act 1915 (Vict.) is not available for comparison with the Transfer of Land Act 1954.

²⁶ See Woodman and Nettle, *op. cit.*, p. 524.

²⁷ Douglas J. Whalan, *op. cit.*, p. 241.

²⁸ *Ibid.*, p. 242.

E. What Are Notified Interests?

If notified interests in section 38 do not include caveated interests, what are they? In various parts of the LTA which provide for the grant of certain interests in land the term “notification” of such interests on the register in contradistinction to “registration” is used. Thus, Parts XIII and XIV provide for the notification on the register of restrictive covenants and statutory obligations respectively. The reasons for the difference in use of terminology will not be entered into. The grant of these interests has been provided for in the LTA and it is axiomatic that they have a place on the register. Section 38 in according indefeasibility to an interest upon its registration subjects such an interest to those interests “as may be registered or notified in the land register”. This must surely be a reference to those interests which have been registered or notified in accordance with the various parts of the LTA.²⁹

F. Conclusion

In conclusion, it is submitted that the scheme of the caveat system under the LTA does not accord to the caveated interest the status of a notified interest within the meaning of section 38. Exceptions intended are expressly provided for. In the main, the caveat is intended to serve two functions only, namely, to give limited protection to the unregistered interest by forbidding, for a limited period, the registration of conflicting instruments which would defeat or affect the unregistered interest and to determine priorities between unregistered interests. Therefore, in Singapore, the caveator whose interest is adversely affected by the registration of a conflicting instrument because he was not notified by the Registrar in accordance with the provisions of section 108, would have to seek compensation against the Assurance Fund³⁰ or he may try to secure the rectification of the register by the High Court under section 143(1)(b).³¹ In Victoria such a situation arose because of some ambiguity in the statute,³² as it then stood, as to the caveat’s efficacy in preventing the registration of an instrument which was withdrawn and later relodged. Hopefully, the effort made by the draftsman of the Singapore statute to set up a more comprehensive system³³ will leave very little room for a *Butler v. Fairclough* situation to arise.

²⁹ See also section 40 which determines the priorities as between interests appearing in the land-register according to the order of their registration or notification.

³⁰ Section 138 of the LTA.

³¹ Under section 143(1) the High Court may order rectification of the land-register by directing that any registration be cancelled or amended where it is satisfied that any registration or notification of an instrument has been obtained through omission or mistake. The power of the court to rectify the register is expressed to be an exception to indefeasibility in section 38(1)(e). The wording of section 143(1)(b) appears to be very wide, but how deep an inroad on indefeasibility it will make will depend on the court’s interpretation of the section. This remains to be seen.

³² See *Butler v. Fairclough* (1917) 23 C.L.R. 78, 84–86.

³³ See section 108 (3).

II. THE SECOND QUESTION

The second function of the caveat under the LTA is to determine priorities between unregistered interests. The relevant provision is section 41.³⁴ Suppose the following situation. The proprietor of registered land mortgages the land by way of a deposit of his certificate of title in favour of A and the equitable interest (hereafter referred to as “the first interest”) is protected by a caveat lodged under section 104 on 1st January 1986. The proprietor then enters into a contract for the sale of the land with B and the equitable interest arising therefrom (hereafter referred to as “the second interest”) is protected by a caveat lodged on 1 January 1989. In accordance with section 109,³⁵ the caveat protecting the first interest lapses on 31st December 1990. When a fresh caveat³⁶ is lodged with regard to the first interest, which of the two equitable interests takes priority as at 1st January 1991?

One view is that since it is the objective of the LTA to provide a complete register of title in land, the provisions of the LTA must be comprehensive in determining the validity of all interests and the priorities of such interests. If this is the true view, then the above conflict situation will have to be determined by the provisions of the LTA and in particular section 41 to the exclusion of the general rules on priorities as between equitable interests. However, if the provisions of the LTA do not resolve the conflict then there may be room³⁷ for the Court to apply the general law on priorities.³⁸ To what extent then does the LTA exclude the application of general law principles in determining the priorities between unregistered interests? This is the second question.

A. *Is there a lacuna?*

There is little doubt that the draftsman of the LTA has tried to adhere to the principle that “the register is everything”.³⁹ At least with regard to the registered interest much effort has been made to provide a comprehensive set of rules as to its creation,⁴⁰ validity and indefeas-

³⁴ S. 41 states:

“(1) Except in the case of fraud, the entry of a caveat protecting an unregistered interest in land under the provisions of this Act gives that interest priority over any other unregistered interest not so protected at the time when the caveat was entered.

(2)

(3)

(4) Any priority conferred by this section is lost if the caveat or other instrument in respect of which it is claimed lapses, or is withdrawn, or is otherwise disposed of.”

³⁵ S.109(1) provides *inter alia* that a caveat lapses and ceases to affect land at the expiration of five years from the date of lodgment of the caveat.

³⁶ S.109(4) states that: “The lapsing of a caveat upon the expiration of five years as aforesaid does not prevent the lodgment of a fresh caveat in the same manner either during the currency of an existing caveat or otherwise.”

³⁷ S.3(1) states: “Except as hereinafter provided, all Acts, regulations, rules, and other laws, and all practices, relating to estates and interests in land and operative at the commencement of this Act, so far as they are inconsistent with the provisions of this Act in their application to registered land are hereby repealed.”

³⁸ Notably, the maxim “where equities are equal, the first in time prevails”.

³⁹ One has only to read John Baalman’s comments in *The Singapore Torrens System* to see that this is so. See, for example, his comments at pp. 77 and 78.

⁴⁰ Sections 28 and 37.

ibility,⁴¹ and position⁴² in relation to other registered interests on the register. Whether there are substantial lacunae, only time and experience will tell.

With regard to the equitable interest, it has been given a place within the scheme of a register of title in land by the caveat. The LTA does not provide rules for its creation but in adherence to the principle that the register is everything, the LTA provides for its protection and preservation by way of an endorsement on the register. The function of a caveat as a statutory injunction has already been considered. The registered interest defeats all interests which are not registered. The caveat protects the equitable interest by preventing the registration of instruments which would accord to the interests to which they relate indefeasibility against the equitable interest. In relation to other equitable interests the caveat does not prohibit the lodgment of other caveats to protect them. But its function here is to give the equitable interest to which it relates a ranking in relation to other equitable interests. This function again underscores the principle that the register is everything.

However, it appears that whilst it might have been the aim of the LTA to make the effectiveness of such an equitable interest dependent on the register, it cannot be said that the provisions of the LTA have given it as full a treatment as has been given to the registered interest. As noted above the creation or validity of the equitable interest is not determined by the provisions of the LTA. It will be shown that the provisions of the LTA for determining priorities between equitable interests do not seem to be comprehensive. Amendment is of course the best solution. Until then, to insist in those conflict situations on which the LTA is silent, that the general law is inapplicable, may lead in some situations to regrettable results.

In the situation above, A has done everything he can to protect the first interest. It was first in time. A was not negligent, he cavedated promptly. The caveat mechanism does not afford A coverage for a stretch of more than five years at any one time. He has to lodge a fresh caveat to prevent the first interest from being defeated by the registration of a conflicting interest. But when he lodges the fresh caveat what is his position vis-a-vis the second interest which is protected by a caveat lodged subsequently to A's first caveat and before his second?

B, One View

1. Basis Therefor

It has been suggested that when the first caveat lapses the first interest becomes subordinated to the second interest.⁴³ Such a view is based primarily on the supposed effect of sections 41(4), 109(4) and 107(2). Section 41 (4) states that “[a]ny priority conferred by this section is lost if the caveat... lapses”. This is interpreted to have the effect that the

⁴¹ Section 38.

⁴² Section 40.

⁴³ See W. J.M. Ricquier, *Land Law* (1985), p. 134.

priority position secured for the first interest by A's first caveat in the above situation is lost. Under section 109(4) A can lodge a fresh caveat. Section 107(2) states that a caveat takes effect from the date of lodgment. The second caveat is second to B's caveat which has outlived A's first caveat. Therefore, it is concluded, the first interest becomes subordinated to the second interest. A possible policy argument for such an interpretation is that the limited life span of a caveat serves to prevent the register from being cluttered and claimants have to complete their dealings with the land by way of registration of the appropriate instruments to secure a more permanent position on the register. Certainly, it is unusual and undesirable for the completion of a contract for sale of land protected by a caveat to be delayed for more than five years. Also mortgagees who are prepared to grant long term loans should have their interests registered and not secure such loans by way of equitable mortgages protected by a caveat. But how does such a policy accommodate the case of a contract of sale the completion of which is unavoidably delayed? Also what about the trust? Is the answer to be "too bad"? It is difficult to find a convincing policy argument for such a result.

The obvious illogical consequences that could result from such an interpretation of the caveat mechanism may have been the reason for the introduction into the practice of the Land Registry of Form 29A for the extension of an existing caveat. Whatever the desired effect of the lodgment of such a form in the Registry, it is doubtful if it has any legal validity. The LTA does not provide for the extension or renewal of a caveat and consistent with this, the Land Titles Rules do not prescribe a form for extension or renewal.

Another weakness in the above interpretation is that there is no provision that expressly states that when A lodges a fresh caveat, the second interest will have a superior priority position. Section 41 is generally regarded as the provision for determining priorities.⁴⁴ Section 41(1) gives priority to an interest which is caveated over all those unregistered interests *not so protected at the time when the caveat was entered*. At the time the second interest was caveated, the first interest was already "so protected". Therefore, if the second interest is to have a superior position to the first interest when A lodges a fresh caveat, it would not be on account of section 41(1).

2. Support in Section 40(1)?

If not section 41(1), what about section 40? Section 40(1) states: "Except as provided in section 20(7), interests appearing in the land-register have priority according to the order of their registration or notification, irrespective of the dates of the instruments by which those interests were created or are evidenced." The question recurs. Is a caveated interest an interest notified within the meaning of section 40? In his book, *The Singapore Torrens System*, Baalman when commenting on section 40 (then section 30) wrote:

"Any interest in land subsisting at the date when a qualified certificate of title issues, may be protected by caveat within five

⁴⁴ See W.J.M. Ricquier, *op. cit.*, p. 132. Also N Khublall, *Law of Real Property and Conveyancing in Singapore* (1986), p. 282.

years of that date, without losing priority to interests which have been protected by earlier caveats; [section 20(7)]. *In all other cases*, [emphasis added] priority is determined by the order of time in which the Registrar enters a memorial of registration, or a notification, in the land register".⁴⁵

By his reference to caveats protecting pre-conversion interests, Baalman's comment could be interpreted to mean that, at least in his view, section 40 determines priorities between registered and caveated interests alike.

It is submitted that section 40 does not deal with caveats. Baalman himself regards section 41 (then section 31) as the provision for determining priorities between caveats.⁴⁶ The pre-conversion interest which is caveated or notified pursuant to section 20 is a notified interest: section 20(5). It maintains the priority position it had before the land was converted. This is so provided in section 20(7). Section 40 provides generally that registered and notified interests have priority according to the order of their registration or notification. Thus it has been necessary expressly to exclude caveats protecting pre-conversion interests which are notified interests from section 40. (The distinction between pre-conversion and post-conversion interests which are protected by caveat in regard to the question whether caveated interests are notified interests has been made earlier.)

3. Implied in Section 41 (4)?

If there is no express provision that states that when A lodges a fresh caveat, the second interest will have a superior priority position, could it be so implied in section 41(4)? It may be argued that the phrase "priority... is lost" in the subsection can only be understood in relation to another interest. If the priority of the interest is lost in relation to another interest, it must mean that that other interest has gained priority. Even if this is in general a tenable interpretation, it is suggested that section 41 (4) should not be read to have the effect that if an interest loses the priority conferred by the section over another interest because the caveat protecting it expires after five years, that other interest *ipso facto* gains priority over it. The reasons for this are as follows.

First, there is no clear policy reflected in the LTA that an interest for which a second caveat is lodged upon the expiration of the first should suffer any adverse effect and, in particular, should be subordinated to another interest, the caveat of which, though lodged subsequent to the first caveat, has outlived it. It is Baalman's view that the purpose of automatic lapsing after five years is to prevent the land register from becoming cluttered up with stale or defunct claims. He said that "[t]his section will prove helpful where the caveatee is not disposed to force a withdrawal, or where the caveator has placed himself out of reach of proceedings". He continued to say "[a]uto-matic lapsing is based on the principle that a caveat is intended to be only a temporary form of relief, and that in the normal case the

⁴⁵ At p. 94.

⁴⁶ *Op.cit.*, p.96.

caveator's equity will have become a registered interest long before the five-year period has expired. *Where that is not the case, a fresh caveat can be entered.* In fact only an order of the Court could restrain the entry of an unlimited number of caveats"⁴⁷ [emphasis added]. If this is the correct view of automatic lapsing, then it seems clear that the unregistered interest that requires protection for a period exceeding five years is expressly accommodated for in the LTA by the provision for the lodgment of a fresh caveat. The life of a caveat is limited to five years to underscore the intention that by and large it is to be a temporary form of relief. This is adequate protection for the vast majority of dealings. But the exception, where protection exceeding five years is required, cannot be said to be a rarity. Significantly, further protection by way of the lodgment of a fresh caveat is easily secured.⁴⁸ Such facility gives continued protection to the unregistered interest against registration of a conflicting interest which would otherwise defeat it. No reason can be found for detracting from such facility continued protection (in terms of priorities) against other unregistered interests.

Secondly, section 41(4) is ambiguous with regard to the ramifications of limiting the life of a caveat to five years. As worded this subsection would have sufficed if it were only applicable to cases where the caveat lapses for reasons other than the expiration of five years,⁴⁹ or is withdrawn,⁵⁰ or is otherwise disposed of⁵¹. In such cases in the disposal of the caveat there would or should be finality in the disposal of the claim of the caveator itself. When the claim is so disposed of, then no question of priorities remains (whether in accordance with section 41 or under general law principles) and it matters little that section 41(4) merely states that the priority "conferred by this section is lost". For example, if pursuant to section 111(2), a caveat is cancelled by the Registrar on the ground that the caveat had been lodged vexatiously, then the claim of the caveator has been disposed of and there should be no question that whatever priority it purported to have whether by lodgment of caveat or otherwise will be lost. But clearly section 41(4) is inadequate to deal with the consequences of the lapse of caveat upon the expiration of five years. When the caveat lapses after five years, the interest which it protected is not extinguished. Indeed the LTA accommodates the interest by expressly providing that a fresh caveat may be lodged.

B. *Alternative View*

Reasons can be found therefore for restricting the meaning of loss of priority in section 41(4) to loss of the "priority conferred by this section". When A's first caveat lapses, the first interest loses the priority "conferred by this section". It is suggested that when this statutory priority is lost, the courts are not precluded from employing general law principles to determine if the first interest still retains priority over the second interest on the ground that the former has the

⁴⁷ *Op. cit.*, p. 206.

⁴⁸ See s. 109(4).

⁴⁹ See s. 109(1).

⁵⁰ See s. 110.

⁵¹ See s. 111.

better equity over the latter. Since there appears to be a lacuna, a fall back on general law principles should be allowed to determine the priority status of an interest when statutory priority has been secured but lost. This suggested interpretation of section 41(4) does not detract from the principle that the register is everything. A's first caveat gave notice of his claim to the holder of the second interest. A's second caveat will continue to give notice of the first interest to all other persons who wish to deal with the land. Allowing A to keep his priority position over the second interest will not encourage him to neglect lodging a fresh caveat. If he fails to do so, the registration of a conflicting instrument will defeat his interest.

In his commentary, Baalman does not appear to have addressed this problem of priorities.⁵² Also, little assistance can be drawn from the Australian or Canadian experience. With very few exceptions, caveats under the Australian and Canadian Torrens statutes are not limited to a life of five years. The lapsing provisions in most of these statutes are similar in nature to section 109(1)(a) of the LTA in that the caveator has to establish his claim in court within a specified period failing which the caveat shall lapse.⁵³ Where the caveat is allowed so to lapse, the caveator is deemed to have abandoned the claim to which the caveat relates.⁵⁴ Further, under many of these statutes, the lodging of a second caveat is prohibited except with the sanction of the court.⁵⁵

But the Australian cases do illustrate how general law principles of priorities are to be applied in the context of a system of registration of title. For example, in *Butler v. Fairclough* Griffith C.J. said:

"It must now be taken to be well settled that, under the Australian system of registration of titles to land, the Courts will recognise equitable estates and rights, except so far as they are precluded from doing so by the Statutes. This recognition is, indeed, the foundation of the scheme of caveats which enables such rights to be temporarily protected in anticipation of legal proceedings. In dealing with such equitable rights, the Courts in general act upon the principles which are applicable to equitable interests in land which is not subject to the Acts. In the case of a contest between two equitable claimants, the first in time, all other things being equal, is entitled to priority."⁵⁶

In this case, the plaintiff Butler whose interest was first in time did not promptly lodge a caveat. He did so only after the defendant Fairclough made a search of the register and found it to be clear. In weighing the equities, the Court ruled that the claimant who does not act promptly to protect his interest by caveat loses the advantage which he would have gained by promptitude. On this ground, *inter*

⁵² See in particular pp. 203 and 206.

⁵³ With regard to Australia, see Douglas J. Whalan, *op. cit.*, pp. 256–261 and also Woodman and Nettle, *op. cit.*, p. 518. Concerning Canada, see Victor DiCasteri, *Thorn's Canadian Torrens System*, (2d. ed. 1962), pp. 638–641.

⁵⁴ See Douglas J. Whalan, *op. cit.*, pp. 261 and 263–264. See also Victor DiCasteri, *op. cit.*, p. 652.

⁵⁵ See notes 23 and 24 above.

⁵⁶ (1917)23 C.L.R. 78, 91.

alia,⁵⁷ Butler's interest was postponed to that of Fairclough's. The Privy Council in *Abigail v. Lapin*⁵⁸ affirmed this principle.

It must be noted that the Torrens statutes⁵⁹ relevant in the two Australian cases do not contain a provision similar to section 41 of the LTA. Section 41 determines priorities as between two unregistered interests by providing that the entry of a caveat protecting an unregistered interest gives that interest priority over other unregistered interests not so protected at the time the caveat was entered. To this extent, priority of unregistered interests is determined by the lodgment of caveat under the LTA to the exclusion of general law principles. In this regard the LTA is more akin to some of the Canadian Torrens statutes⁶⁰ than those of Australia. On the issue as to how equitable principles are affected by caveats, Baalman commented that in Australia the result of the Privy Council's decision in *Abigail v. Lapin* was that priorities between unregistered interests are determined by the time of lodgment of caveats. If this were so, the Australian position would be similar to that of Singapore under section 41.⁶¹ But this may have been an overstatement. From the judgments in both *Butler v. Fairclough* and *Abigail v. Lapin* it seems clear that in determining priorities between unregistered interests Australian courts apply general law principles and failure to caveat promptly is a factor that the courts will take into account in deciding which interest has the better equity.⁶² In the former case, Butler caveated first but his interest was held to be subordinated to Fairclough's because he failed to caveat promptly. In contrast, in Singapore, a person in Butler's position would have priority over a person in Fairclough's position simply because he caveated first even though he had been negligent in not caveating promptly.⁶³

C. Conclusion

So then from all this, notwithstanding the clarity of intent found in section 41 to give priority to the first to caveat, the application of general law principles on priorities to registered land under the LTA has been found necessary at least in one instance. The need to lodge a fresh caveat for further protection is not uncommon. But the effect of the lapse of caveat on the priority of the unregistered interest over those which were initially subordinated to it under section 41(1) is not obvious under the LTA. It would be incongruous for section 41 to have

⁵⁷ It has been noted earlier that the majority judgments held that the registration of Fairclough's transfer gave his interest indefeasibility against Butler's caveated interest. But the Court went further to consider whether Butler's interest would have had the better equity as against Fairclough's interest had the latter not registered his interest.

⁵⁸ [1934] A.C. 491.

⁵⁹ Transfer of Land Act 1915 (Vict.) in *Butler v. Fairclough* and Real Property Act 1900 (N.S.W.) in *Abigail v. Lapin*.

⁶⁰ The Land Titles Act, Alberta, s. 152. The Real Property Act, Manitoba, s. 148. Even though the Saskatchewan Torrens statute does not contain a similar section, the courts have held that priority is determined by the time of lodgment of caveat. Also see Victor DiCasti, *op. cit.*, pp. 653–670, on this aspect of caveats.

⁶¹ See W.J.M. Ricquier, *op. cit.*, note 94 at p. 132.

⁶² For the developments of the law in this area see Woodman and Nettle, *op. cit.*, pp. 513–516.

⁶³ See note 61 above.

the effect that the first interest in the above situation is subordinated to the second interest upon the lapse of caveat after five years. If it did, then in a sense, the section would subordinate the first interest to the second interest for the same reason that it accorded priority initially to it over the second interest. For, in this situation, the caveat protecting the second interest would be able to outlast the caveat protecting the first interest because the latter was lodged first.

It remains to be seen how the courts in Singapore will apply general law principles in the event of the loss of statutory priority. It will be very interesting to see what regard the courts will give when weighing the equities to the fact that the LTA gives statutory priority not so much to the prompt but to the quick (for section 37(1) gives priority to the first to caveat even though he be negligent). A person who had been negligent in not caveating promptly but nevertheless has gained statutory priority over another interest by caveating first may find that when his caveat lapses after five years, his interest is postponed to that other interest. But the application of general principles will surely help the caveator whose interest was first in time, who was first to caveat and did so without undue delay. As between his interest and an interest created subsequently in time, all other things being equal, the first in time should prevail.

As conceded earlier, amendment of the Act would be the better solution to the problem of priorities above considered. Provision could be made for the extension of caveat so that the statutory priority initially accorded to an interest which is caveated first would be maintained. But until then the application of the general law seems justifiable and nothing in the provisions of the LTA appears to prohibit it.

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