

COMMENT

DILEMMAS FOR TORRENS SYSTEM MORTGAGEES

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The Transfer of Land Act 1958 (Vic.) sets out the courses of action which can be taken by a registered mortgagee if the mortgagor defaults in repayment of the loan secured by the mortgage.¹ *Inter alia*, the registered mortgagee has the power to sell the property and recover the amount of the loan from the proceeds of sale.² If the power of sale is to be an effective instrument in the hands of the registered mortgagee it should be exercisable simply, without interference from the mortgagor or any subsequent mortgagee. Several recent Supreme Court decisions have demonstrated that there may be difficulties, hitherto undetected, for a registered mortgagee in the exercise of the power of sale.³ The problem arises where there is a subsequent equitable mortgage protected by caveat existing over the property. The nature and extent of the problem was highlighted by the decision in *Forster v. Finance Corporation of Australia Limited*.⁴

1. *Forster's Case and the Anomaly Revealed*

Pursuant to its power of sale, Finance Corporation of Australia Limited, the registered mortgagee of the property in question, entered into a contract of sale with the Forsters. Subsequently, the purchasers discovered that three caveats, lodged pursuant to equitable mortgages, were noted on the title.⁵ They sought to rescind the contract claiming that the vendor would be unable to provide good title at settlement. The purchasers took the view that the Registrar of Titles would not register a transfer to them while the caveats remained in force. The vendor purported to rely upon s. 77(4) of the Transfer of Land Act 1958 (Vic.). Section 77(4), as it then stood,⁶ stated:

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¹ Transfer of Land Act 1958 (Vic.), ss. 77, 78 and 79.

² Transfer of Land Act 1958 (Vic.), s. 77.

³ *Kerabee Park Pty Ltd v. Daley* [1978] 2 N.S.W.L.R. 222; *Lewenberg v. Direct Acceptance Corporation Ltd* [1981] V.R. 344; *Commercial Bank of Australia Ltd v. Schierholter* unreported decision of Starke J. of the Supreme Court of Victoria; on appeal [1981] V.R. 292.

⁴ [1980] V.R. 63.

⁵ The search also disclosed a Writ of Fieri Facias but for the purposes of this comment that matter will not be pursued.

⁶ See *infra* for a discussion of the amendment to s. 77(4).

Upon registration of any transfer under this section all the estate and interest of the mortgagor or grantor of the annuity as registered proprietor of the land mortgaged or charged shall vest in the purchaser as proprietor by transfer freed and discharged from all liability on account of such mortgage or charge and (except where such a mortgagor or grantor is the purchaser) of any mortgage charge or encumbrance registered subsequent thereto excepting a lease or easement to which the mortgagee or annuitant has consented in writing. . . .

The vendor argued that a caveat was an encumbrance and would thus automatically lapse on registration of the transfer. The purchasers contended that the definition of 'encumbrance' did not include caveat and that therefore on general principles there could be no registration of a transfer until the caveats had been removed.

Crockett J. accepted the contention of the purchasers and held that the purchasers had effected a valid rescission of the contract by instituting the proceedings. His Honour stated:

The Registrar of Titles cannot register a transfer to the purchasers whilst there are outstanding caveats subsequent to the vendor's mortgage: see s.91(1). It is quite impossible for the Registrar to register in the belief that by effecting such registration the caveats will thereby be removed, because 'encumbrance' in s.77(4) does not include caveats such as those in this case. The definition of 'encumbrance' in s.4(1) of the Act does not include caveats. The whole scheme of the caveat provisions, and of s.77 in particular, indicates clearly that 'encumbrance' does not include a caveat. . . .⁷

It is respectfully submitted that the interpretation of s.77(4) by Crockett J. is correct.⁸ However, the decision reveals a serious anomaly in the system. A caveat lodged pursuant to a subsequent equitable mortgage can prevent the registration of a transfer from the registered mortgagee to a purchaser and yet, it is submitted that the subsequent equitable mortgagee does not have an interest in the land which is enforceable against the equitable interest of the purchaser. (The equitable interest of the purchaser is acquired under the contract of sale).⁹

When a mortgagor grants a registered mortgage he retains legal title to the land. This legal title is not destroyed when the registered mortgagee enters into a contract of sale pursuant to the exercise of the statutory power of sale. The legal title of the mortgagor remains on foot until a transfer from the mortgagee to the purchaser is actually registered.¹⁰ However, it is clear that the interest in the land retained by the mortgagor is, from the outset, subject to the covenants made by him in the mortgage instrument and to the Torrens legislation itself. Most importantly in this context, the interest of the mortgagor is always subject to the right of the registered mortgagee to sell in good faith if there is a default. Thus, the mortgagor is unable to enforce his legal title against the subsequent equitable interest of a purchaser from the registered mortgagee.¹¹ The rights of subsequent legal

⁷ [1980] V.R. 63, 65.

⁸ See *infra* for a discussion of the amendment to s.77(4), and see *Godfrey Constructions Pty Ltd v. Kanagra Park Pty Ltd* (1972) 46 A.L.J.R. 421.

⁹ *Lysaght v. Edwards* [1876] 2 Ch.D. 499.

¹⁰ Transfer of Land Act 1958 (Vic.), s.77(4).

¹¹ *Forsyth v. Blundell* (1973) 129 C.L.R. 477, 499 *per* Walsh J.

or equitable mortgagees are similarly subject to any action taken in good faith by the registered mortgagee.¹² The subsequent encumbrances' interests are carved out of the estate retained by the mortgagee. The mortgagor is incapable of granting the mortgagees any greater right than he has himself.

Of course, the situation is different if the contract of sale is affected by impropriety.¹³ If the purchaser is apprised of the impropriety at the date of the contract, or arguably at any time before completion,¹⁴ the mortgagee will be able to enforce his interest in the land against the purchaser. The dispute is one which is settled by an application of the relevant priority rule. The interest of the mortgagee is legal in nature and prior in time to the purchaser's equitable interest. Thus, according to the principle enunciated in *Barry v. Heider*,¹⁵ the interest of the mortgagee will prevail over the purchaser's interest unless the mortgagee's conduct is such that he should be estopped from asserting his interest. Even if the conflict is viewed as being one between equitable interests,¹⁶ the mortgagee's interest will prevail unless the purchaser can demonstrate that some conduct of the mortgagee would make it inequitable for the mortgagee's prior interest to prevail.¹⁷ Similarly an equitable mortgagee may be able to enforce his interest against the purchaser if there is evidence of a lack of good faith.

Nevertheless, in the absence of bad faith the authorities indicate that a second or subsequent mortgagee does not have an enforceable interest in the land as against the equitable interest of a purchaser from the registered

¹² The case law seems to suggest that in relation to land not under the Torrens system a sale, properly exercised by a mortgagee under a power of sale, defeats the interests in the land of all subsequent mortgagees. This is said to be because the sale 'destroys' or at least 'suspends' the equity of redemption, and consequently the interests of all subsequent encumbrances. See *Directors of South Eastern Railway Co. v. Jortin* (1857) 6 H.L. Cas. 425; *Property and Bloodstock Ltd v. Emerton* [1968] Ch. 94, 114 and 120; *Lord Waring v. London & Manchester Assurance Co.* [1935] Ch. 310. The use of terms such as 'defeats' and 'destroys' are perhaps too strong; for on strict legal principles the equity of redemption cannot be 'destroyed' or 'defeated' until an actual conveyance of the legal estate to the purchaser occurs. However, a mortgagee who enters into a mortgage makes his own rights subject to its provisions, including those provisions which confer the power of sale. Thus, his equity of redemption and the rights of subsequent encumbrances cannot be asserted against a purchaser from the legal mortgagee where the sale was performed in *good faith*. In *Bell v. Custom Credit Corporation Ltd* [1976] Qd. R. 57, 60 Kelly J. took the view that a similar principle should apply to an equitable mortgagee under the Torrens system: there is no reason why such a mortgagee should be in a stronger position than an equitable mortgagee of general law land.

¹³ See n. 12.

¹⁴ See *Forsyth v. Blundell* (1973) 129 C.L.R. 477. Even when the purchaser has become the registered proprietor, the mortgagee may be able to enforce an equity to have the sale set aside if it can be proved the purchaser was fraudulent: *Latec Investments Ltd v. Hotel Terrigal Pty Ltd (in liq.)* (1965) 113 C.L.R. 265.

¹⁵ (1914) 19 C.L.R. 197; (1915) 21 A.L.R. 93.

¹⁶ This possibility was suggested by Walsh J. in *Forsyth v. Blundell* (1973) 129 C.L.R. 477.

¹⁷ Where there is a conflict between equitable interests, the first in time, all other things being equal, will prevail: *Abigail v. Lapin* [1934] A.C. 491; (1934) 51 C.L.R. 58; [1934] All E.R. Rep. 720.

mortgagee.¹⁸ Thus, it is certainly a strange anomaly in the system, that a caveat lodged pursuant to a subsequent equitable mortgage can affect the successful completion of a sale to the purchaser. The reason for this anomaly lies in the actual mechanical operation of the caveat system. By s. 89(1) of the Transfer of Land Act 1958 (Vic.), a caveat may be lodged by a person who has an interest or estate in the land. The caveat prevents the registration of any dealing in the land. Generally, it is the holder of an unregistered (or equitable) interest who lodges a caveat to protect the interest.¹⁹ The caveat provisions are designed to give some measure of protection to holders of all unregistered interests, not just persons holding equitable interests pursuant to unregistered mortgages. The Act establishes the means by which a caveat can be removed or withdrawn or can lapse;²⁰ unless the caveat is removed, or withdrawn or lapses in accordance with the provisions of the Act, the caveat remains on the title. This is so despite the fact that the caveator may have no enforceable interest in the land.

It might be thought that a simple answer to the problem lies in the use of the provisions relating to the lapsing of caveats.²¹ By s. 90(1) when a dealing is lodged for registration, the Registrar gives the caveator notice of that fact and allows the caveator thirty days in which to establish the validity of his interest as against the interest of the proposed registrant. If the caveator fails to obtain a court order delaying registration, the caveat lapses at the expiration of the thirty days. In the context of the problem under discussion, the use of s. 90(1) and (2) depends upon the willingness of the purchaser to settle the purchase and lodge the transfer for registration. Although it is clear that the purchaser's interest in the land has priority over the interest of an equitable mortgagee, most purchasers will not be prepared to settle and then 'fight it out' with the caveator. This was the attitude of the purchasers in *Forster's* case and it is clearly a justifiable approach. If the vendor is unable to provide good title, there is no reason why the purchaser should complete the purchase.

2. Power of the Registered Mortgagee to Obtain Removal of the Caveat

In the light of the foregoing discussion, it seems clear that a registered mortgagee, who wishes to exercise the power of sale on default, should endeavour to have any caveats removed from the register before attempting a sale. At least he must obtain removal of any caveats after the sale and before completion, for otherwise he will be unable to make good title. The

¹⁸ This is so whether the mortgage is registered or unregistered. The legal or equitable interest of the subsequent mortgage is subject to the right of the prior registered mortgagee to exercise the power of sale on default.

¹⁹ There appears to be no reason why a registered interest holder cannot also lodge a caveat. However, except in unusual circumstances, it would be unnecessary. See *Breskvar v. Wall* (1971) 126 C.L.R. 376; [1972] A.L.R. 205.

²⁰ Transfer of Land Act 1958 (Vic.), ss. 89-91.

²¹ Transfer of Land Act 1958 (Vic.), s. 90(1) and (2).

obvious practical option is to request a subsequent encumbrancee to *withdraw* his caveat.²² By s. 77(3)(c), the mortgagee will be entitled to share in the proceeds of sale after the registered mortgagee has recouped the money owed to him. Further, the caveator's equitable interest in the land will be unenforceable against a purchaser from the registered mortgagee. In view of these factors, why might the caveator refuse to accede to a request to withdraw the caveat? The practical consequences of the fact that no transfer from the registered mortgagee to the purchaser can be registered while there is a caveat outstanding provide the answer. For instance, a registered mortgagee may consider it simpler and cheaper to enter into some 'arrangement' with the equitable mortgagee, whereby the latter is paid an amount of money he would not otherwise be entitled to in consideration for withdrawing the caveat. The registered mortgagee could then proceed with the mortgagee's sale without the 'blot' of an outstanding caveat.²³ The equitable mortgagee because he was in a position to place an obstacle in the way of the sale is enabled to salvage 'something out of nothing'.

If the caveator fails to comply with the request to withdraw the caveat, another apparently obvious option open to the registered mortgagee is to apply to the court under s. 90(3) for the removal of the caveat. Section 90(3) provides:

Any person who is adversely affected by any such caveat may bring proceedings in the Court against the caveator for the removal of the caveat and the Court may make such order as the Court thinks fit.

Will the registered mortgagee necessarily be successful in persuading the court to exercise its jurisdiction favourably and order the removal of the caveat lodged pursuant to a subsequent equitable mortgage? This issue has been considered in several recent decisions. In *Kerabee Park Pty Ltd v. Daley*,²⁴ Holland J. of the Supreme Court of New South Wales considered the effect of s. 97 of the Real Property Act 1900 (N.S.W.).²⁵ Section 97(1) is in substantially the same form as s. 90(3) of the Victorian Act. It was held that a registered first mortgagee is entitled to an order for the removal of such a caveat for the purpose of pursuing a successful sale. Holland J. stated:

It would seem to me to follow that a caveator should have no right to prohibit registration of a dealing to which his alleged interest in the land would not entitle him to object, if he were to invoke the assistance of the court. A subsequent encumbrancer, registered or unregistered, has no right whatever to interfere in, or object to, a proper exercise by a mortgagee of the mortgagee's powers of sale . . . I see nothing in the section to preclude the proprietor of a registered interest, who is proposing to embark upon a particular dealing which the caveat would prohibit,

²² Transfer of Land Act 1958 (Vic.), s. 89(1).

²³ Gowans J. in *Osmanoski v. Rose* [1974] V.R. 523, 528 took the view that a caveat is a 'blot' on the title.

²⁴ [1978] 2 N.S.W.L.R. 222.

²⁵ Note that s. 97 was amended by s. 5 of the Real Property (Amendment) Act 1976 (N.S.W.). It is unnecessary to discuss the amendment for the purpose of this comment.

and which was detrimentally affected by its presence on the title, approaching the court for an order that the caveat be removed, unless the caveator could show grounds on which the court would, at the suit of the caveator, restrain the dealing.²⁶

The reasoning of Holland J. was accepted and applied by O'Bryan J. in the Supreme Court of Victoria in *Lewenberg v. Direct Acceptance Corporation Limited*.²⁷ In that case O'Bryan J. took the view that the caveator carries the onus of proof: he must justify the maintenance of the caveat as against the registered mortgagee. If the evidence discloses possible improper dealings by the registered mortgagee so that the caveator may be placed in a less favourable position, there may be some reason for maintaining the caveat. The facts in *Lewenberg's* case disclosed no such possibility.

The issue arose again before the Supreme Court of Victoria in *Commercial Bank of Australia v. Schierholter*.²⁸ In *Schierholter's* case, a contract of sale between the registered mortgagee and the purchaser had actually been executed. The caveators relied upon a nineteenth century Full Court decision *In Re the Caveats of Talbot and Kelly*²⁹ to support the argument that the caveat should remain on the title. *Talbot and Kelly's* case differed from the cases mentioned above in that it did not involve a consideration of caveats lodged pursuant to equitable mortgages.

A partnership purchased a mining lease. Two members became the registered proprietors of the lease and they held the lease on trust for all the partners. Two of the beneficiaries, Talbot and Kelly, lodged caveats. Subsequently, a partnership dispute arose — a majority of the members wished to transfer the mining lease to a company. Talbot and Kelly objected. The registered lessees applied for removal of the caveats stating that the caveats would prevent registration of the transfer desired by a majority of the partners.³⁰

The Full Court refused to order the removal of the caveats. It took the view that the real object of the application was to obtain settlement of a partnership dispute. Registered proprietors should not be able to obtain the removal of caveats lodged pursuant to valid equitable interests simply because those caveats would interfere with some future intended dealing with the land. The proper course of action to secure removal was for an actual dealing to be lodged and then the relevant provision of the Act would come into operation to ensure the resolution of the dispute. The Registrar would give notice of the proposed dealing to the caveator. If the caveator failed to establish the validity of his claim as against the prospective transferee within thirty days, the caveat would lapse.³¹

²⁶ [1978] 2 N.S.W.L.R. 222, 228-9. See also *Re Stewart Fitzsimmons Projects Pty Limited's Caveats* [1976] Qd. R. 187 for a similar view.

²⁷ [1981] V.R. 344.

²⁸ Unreported decision of Starke J. of the Supreme Court of Victoria May 22, 1980; on appeal [1981] V.R. 292.

²⁹ (1892) 13 A.L.T. 270.

³⁰ The registered lessees applied for removal under s. 145 of the Transfer of Land Act 1890 (Vic.). Section 90(3) is the modern equivalent of s. 145.

³¹ (1892) 13 A.L.T. 270, 271.

Starke J., at first instance, in *Shierholter's* case took the view that he was bound by the principle enunciated in the Full Court decision and he refused to order the removal of the caveats.³² The application of the principle expressed by the Full Court to the mortgagee situation has unfortunate consequences as was demonstrated by the decision of Starke J. in *Shierholter's* case. A registered mortgagee who wishes to exercise the power of sale and who is confronted with caveats on the title pursuant to equitable mortgages, cannot provide good title to the purchaser if the caveats remain on the title, and yet, according to *Talbot and Kelly's* case and Starke J. in *Shierholter's* case, he is unable to secure their removal before, or even after, exercising the power of sale. In view of these serious consequences, it was not surprising that the registered mortgagee in *Shierholter's* case appealed to the Full Court.

The Full Court allowed the appeal.³³ It was of the opinion that the earlier Full Court judgment did not purport to lay down a general principle by which every application under s. 90(3) should be decided.³⁴ Young C.J. stated that the decision should be read with reference to the subject matter of the case.

(W)hat the Court was saying (in *Talbot and Kelly*) was that the object of the summons was to use the procedure (under section 90(3)) to determine a partnership dispute and the Court would not allow the procedure to be used for that purpose.³⁵

Thus, it was clear that the Full Court did not consider the exercise of its discretion under s. 90(3) to be fettered by precedent. It stated that the discretion given to the court was a wide one. On the facts before it there was no reason why the court should not exercise its discretion to order removal of the caveat.³⁶ An equitable mortgagee should not be able to interfere with the *proper* exercise of the power of sale of the registered mortgagee.

The effect of the decision of the Full Court is that registered mortgagees will not be placed in the wholly untenable position which would have

³² The registered mortgagee attempted to distinguish the Full Court decision by arguing that there was no future intended dealing with the land. In fact it maintained that this was a situation of a past dealing with the land in that the contract of sale from mortgagee to purchaser had already taken place. Starke J. failed to appreciate any merit in this purported distinction. In fact, he concluded that there was 'at best' a future intended dealing, for the purchasers may or may not have proceeded with the purchase. On a strict analysis, it is submitted the reasoning of his Honour is correct. A contract of sale is not a dealing which can be lodged for registration. The transfer is the dealing.

³³ [1981] V.R. 292.

³⁴ A similar view was taken by the Supreme Court of New South Wales in *Re Little* (1929) 29 S.R. (N.S.W.) 401.

³⁵ [1981] V.R. 292, 295.

³⁶ The caveators had a mortgage in registerable form in their hands. The Court ordered that they lodge the mortgage for registration within seven days in substitution for the caveat. If they did not, the caveat should be removed. This form of order acknowledges the mortgage interest of the respondents. However, any such registered mortgage interest would fall under the operation of s. 77(4) and be defeated on registration of a transfer to the purchaser.

prevailed had the court rejected the appeal in *Schierholter's* case. The registered mortgagee will be able to use the procedure set out in s. 90(3) to obtain the removal of caveats lodged pursuant to subsequent mortgages. This means that a registered mortgagee will be able to conduct a sale without the 'blot' of other outstanding encumbrances. If he has already contracted to sell, he will be able to provide good title to the purchaser by obtaining a court order for removal of any caveats lodged pursuant to equitable mortgages.

The assumption that the Full Court in *Talbot and Kelly's* case did not intend to lay down a general principle with respect to s. 90(3) is a reasonable one. It does appear that an important concern of the Full Court was not to effect a resolution of a partnership dispute by the use of s. 90(3). Even if one takes the view that the Full Court in the nineteenth century case did intend to lay down a general principle (and this is a possible view on a reading of the judgments), it is submitted that the principle as stated would not have been applicable to the *Schierholter* fact situation.

The Full Court in *Talbot and Kelly's* case held that if the caveators were persons entitled to lodge the caveat and if the caveat was lodged in accordance with the Act³⁷ the caveat should not be removed at the behest of the registered proprietors merely because of a future intended dealing. Thus, it may be argued that where there is a doubt as to the existence of an equitable interest in the caveator, or more importantly in this context, where the caveat is in an improper form, *Talbot and Kelly's* case would be inapplicable anyway. It is submitted that a caveat lodged pursuant to an equitable mortgage where there is already in existence a prior registered mortgage, may be defective or improper in form if the forbidding clause is too widely expressed.³⁸ For instance, if the caveat purports to prohibit the registration of *all* dealings in the land, it may well be considered to be too wide for it would prevent the successful completion of a sale by the registered mortgagee. As a subsequent encumbrancee has no right to prevent a sale by the registered mortgagee, such a caveat extends beyond the proper protection of the interest claimed.³⁹

Apart from an application to the court under s. 90(3), a person with an interest in the relevant land desiring the removal of a caveat may be able to procure the removal by an application to the Registrar under s. 89A. At first glance it seems that this procedure could be used by the registered mortgagee to procure the removal of caveats before a sale is attempted. An application under s. 89A is a simpler, less tedious procedure than that involved under s. 90(3). By s. 89A(2)(b), an application for removal must be supported by a certificate signed by a barrister and

³⁷ (1892) 13 A.L.T. 270, 271.

³⁸ *Vandyke v. Vandyke* (1976) 12 A.L.R. 621, 644 per Mahoney J.A.; *Kerabee Park Pty Ltd v. Daley* [1978] 2 N.S.W.L.R. 222; *Easton v. Ardizzone* noted at [1978] 2 N.S.W.L.R. 233, 234.

³⁹ *Ibid.*

solicitor of the Supreme Court of Victoria stating that in his opinion the caveator does not have the estate or interest claimed by him. It is submitted that this provision could not be satisfied. Both before and after the registered mortgagee enters into a contract of sale pursuant to his power of sale, a subsequent encumbrancee does retain an interest in the land, even though the interest may not be enforceable against either the registered mortgagee or the purchaser.

Thus it seems that apart from persuading a caveator to withdraw the caveat, the only course of action available to a registered mortgagee who wishes to conduct a sale without outstanding caveats on the title is to go to court and seek removal of the caveats under s. 90(3). The Court will order removal where the caveat protects an equitable mortgage. Although the registered mortgagee is in a better position than he would have been had the reasoning of the judge at first instance in *Schierholter's* case prevailed, his situation is still unsatisfactory. In the case of a 'determined' caveator, the registered mortgagee must institute court proceedings to obtain removal of the caveat and thus provide good title to a purchaser. As stated earlier, the registered mortgagee should not be impeded at all in the proper exercise of the power of sale when there is a default by the mortgagor. When a person lends money on the security of land over which there is already in existence a registered mortgage, he does so in the knowledge that the registered security will take precedence over his own security. It should not be possible for the subsequent encumbrance to hinder the registered mortgagee. Subsequent mortgagees are given sufficient protection. By s. 77(3) of the Transfer of Land Act 1958 (Vic.) they share in the proceeds of sale if there is a surplus after the payment to the registered mortgagee.

3. Suggested Reform

Clearly the law in this area is in need of reform. A question arises as to whether an amendment to s. 77(4) in 1979 has achieved the desired effect and resulted in a caveat lodged pursuant to an equitable mortgage being automatically expunged on the registration of a transfer from the registered mortgagee. Section 7(2) of the Transfer of Land (Amendment) Act 1979 (Vic.) altered s. 77(4) by providing, *inter alia*, that the purchaser is to take free of 'any mortgage charge or encumbrance registered *or notified* in the Register Book subsequent thereto'.⁴⁰ It may be argued that a caveat is 'noted' in the Register Book and that therefore a caveat lodged pursuant to an equitable mortgage automatically lapses on registration of a transfer. However, it appears to be clear that the inclusion of the word 'notified' is directed to restrictive covenants, not caveats. Prior to this amendment, the general rule was that upon registration the purchaser took free of any

⁴⁰ Emphasis added.

mortgage, charge or encumbrance registered on the title. The anomaly was that an encumbrance which was in the form of a restrictive covenant, remained enforceable against the purchaser because a restrictive covenant is noted on the title, not registered. Section 77(4) was amended to rectify this anomaly.⁴¹ Further, it is the *caveat* which is noted on the register, not the actual mortgage. It has been held in *Forster's* case that a caveat itself is not an encumbrance. The amendment to s. 77(4) did not alter the definition of encumbrance so as to include 'caveat'.

It is submitted that the desired result could be achieved by an amendment to s. 91 of the Transfer of Land Act 1958 (Vic.).⁴² Section 91 should be amended by the addition of a further sub-section.

- (5) No transfer executed by a mortgagee pursuant to his power of sale shall be in any way affected by any caveat lodged by a person claiming an estate or interest in the land as security for the payment of a loan or annuity or a sum of money and which is lodged at the time later than the registration of the mortgage and every such caveat shall lapse on the registration of the transfer provided that this sub-section shall not apply to a caveat claiming an interest under an unregistered mortgage to which the mortgagee has consented in writing or to which he is a party; or to a caveat claiming an estate or interest which is for a reason described in the caveat binding upon the mortgagee or annuitant.⁴³

4. *The Dilemma for Second and Subsequent Mortgagees*

Until the Transfer of Land Act 1958 (Vic.) is amended as suggested, second and subsequent mortgagees who are in a position to register their mortgages face a dilemma.⁴⁴ Should they register the mortgage or merely lodge a caveat to protect the mortgage? The apparent effect of s. 77(4), and the interpretation given to this provision by Crockett J. in *Forster's* case, is to place the holder of the subsequent mortgage who has lodged a caveat in a more favourable position than the holder of a subsequent

⁴¹ Restrictive covenants are equitable interests (see *Tulk v. Moxhay* [1848] 2 Ph. 774). It would seem that they should thus be protected by caveat. However, the practice of actually noting the restrictive covenant on the title of the burdened land grew up and was eventually given legislative sanction: T.L.A. 1958 (Vic.), s. 88(1). Restrictive covenants are an anomaly in a system which otherwise recognizes only registered and unregistered interests.

⁴² The Law Institute Council has suggested an amendment to s. 91: Submission by Law Institute Council to the Attorney-General for Victoria re Amendment of the Transfer of Land Act 1958. It is interesting to note that the suggested amendment by the Law Institute included all caveats. That is, the suggestion was that no transfer by a mortgagee under his power of sale should be affected by *any* caveat (not just those lodged pursuant to equitable mortgages) and that every such caveat should lapse on registration of the transfer. It is submitted that only caveats lodged pursuant to equitable mortgages should be included. Although it may be argued that an equitable mortgagee's interest in the land is an unenforceable one on a sale by a prior registered mortgagee, the same may not necessarily be the case where the subsequent interest is, for instance, a equitable fee simple under a contract of sale.

⁴³ This suggested amendment is based upon that suggested in the submission of the Law Institute Council. However, see n. 42. A similar amendment has been made in Queensland: see Real Property Acts Amendment Act 1979 (Qld), s. 5 which amended s. 101 of the Real Property Act 1861-1978.

⁴⁴ Many equitable mortgagees may have no option as they do not hold a mortgage in registrable form.

registered mortgage. As the caveat prevents the successful completion of a sale by the mortgagee, the caveator is in a position to place 'obstacles' in the way of a sale by a registered mortgagee. In some cases, a registered mortgagee may find it less expensive and less time-consuming to pay out, at least in part, the unregistered mortgage rather than institute proceedings for the removal of the caveat.⁴⁵ It should be noted that since the decision in *Schierholter's* case, the unregistered mortgagee is unlikely to be able to defend successfully an action for removal of the caveat and thus his bargaining position has been weakened. Nevertheless, it can be argued that where there is a first registered mortgagee, a subsequent mortgagee should lodge a caveat to protect his interest rather than register a mortgage.

However, it may be that the subsequent mortgagee can be prejudiced in other ways by a failure to register. First, registered mortgagees are paid out before unregistered mortgagees.⁴⁶ Therefore, a second unregistered mortgagee would lose priority to a third mortgagee whose mortgage was registered. Secondly, the remedies of the equitable mortgagee in case of a default do not include the statutory remedies available to the registered mortgagee.⁴⁷ More specifically the equitable mortgagee cannot exercise the extra-judicial power of sale on default, such power being exercisable only by a registered mortgagee under s. 77(1) of the Transfer of Land Act 1958 (Vic.).⁴⁸ In view of these factors and the present state of the law, the wisest course of action for a mortgagee to adopt is to register a mortgage and to lodge a caveat. Although an unusual procedure there appears to be nothing in the Torrens legislation to prevent such a procedure.

⁴⁵ See Robinson S., *Transfer of Land Act* (1979) 366-7.

⁴⁶ See s. 77(3) of Transfer of Land Act 1958 (Vic.).

⁴⁷ See generally Sykes E. I., *The Law of Securities* (3rd ed. 1978) 262.

⁴⁸ If the equitable mortgage is made by deed, the extra judicial power of sale could be included in the deed. See Sykes, *op. cit.* 263.