CASE COMMENTS AND NOTES

TORRENS LAND SYSTEM—CAVEATS—TRANSFER OF LESSOR'S INTEREST—*Hughes* v. *Gidosh*

The case of *Hughes* v. *Gidosh*[1] suggests two principles of law which, if correct, can have considerable practical significance to conveyancers in this province. The first proposition is that a caveat filed under our Torrens land titles system will protect not only the interest of the caveator, but also the interests of other parties fortuitously mentioned in the document that is the subject of the caveat. The second proposition is that the transferee of land does not acquire the transferor's interest as lessor under any registered or caveated lease existing in respect to the lands, unless the transferee takes an express assignment of the lessor's interest.

If the propositions are correct, then conveyancers will hereafter have to take the utmost care to examine caveats for any reference to possible interests of parties other than the caveator, its successors and assigns, and in some fashion assign or deal with them; and further will have to complete assignments of lessor's interests in any and all leases pertaining to lands being transferred or sold. The writer believes that neither of the propositions is correct, for reasons hereinafter stated; but as long as the case remains unconsidered by other judicial authority,[2] it should stand as a caution to conveyancers to follow both of the above-suggested practices.

The material facts of the case are briefly as follows. Hughes owned two quarter sections of land which were subject to orders filed by a grantee-operator under the Right of Entry Arbitration Act and a caveat protecting a surface lease filed by and for the lessee. Those instruments all issued during the time of Hughes' ownership, and, of course, all referred to payments of rentals and annual compensation to Hughes. Hughes sold the lands to one Biever reserving the right to receive rentals and payments under the Orders and lease unto himself. He took from Biever an absolute assignment of those rentals and payments, but neglected to file any caveat against the lands protecting such assignment or rights. Biever in turn subsequently sold the lands to Gidosh,[3] who took title subject to the Board of Arbitration orders and the lessee's caveat. Gidosh knew of the assignment of rentals and payments to Hughes before purchasing, but, upon considering his position as transferee, decided to seek entitlement to the rents and payments. Hughes then sued for a declaration that he was entitled to the rents and payments, and succeeded before the Honorable Mr. Justice Greschuk.

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[1] [1971] 1 W.W.R. 641.

[2] The case was appealed to the Appellate Division but settled before heard.

[3] Actually, there were two brothers involved, each purchasing one quarter of land and subsequently a further sale by one brother to the other as to one quarter section; but these facts do not materially enter into the case.

The learned justice referred to Sections 136, 152, 36, 56 and 137 of the Land Titles Act[4] and concluded as follows:[5]

> The conclusion therefore that I draw from these sections is that the registration of the orders and caveats by the Corporation gave notice to all the world, including the co-defendants, of the rights of the Corporation and the plaintiff under the orders and of the beneficial interests of the Corporation and of the plaintiff in the leasehold interest. The registration of the orders and the caveats prevented the acquisition or the bettering or increasing of an interest in the said lands, legal or equitable, in derogation of the claim of the Corporation and, by implication, of the rights of the plaintiff under the orders and in the leasehold interest as lessor. As soon as the orders and caveats were registered by the Corporation it charged the certificate of title of the co-defendants to the said lands, with the rights of the Corporation and the plaintiff set out in the orders and with the leasehold interest mentioned in the lease, and made the land subject to the covenants, conditions and contingencies set forth and specified in the caveat. The co-defendants therefore could not acquire the rentals payable under the orders or under the lease without some instrument such as an assignment from the plaintiff. On the facts and the circumstances of the present case and the provisions of the Act, registration of the orders and the caveats by the Corporation constituted notice to all the world of all of the terms contained therein, including the right of the plaintiff to receive the rents and payments stipulated in the orders and the lease. To conclude otherwise would defeat the true purpose of the filing of a caveat under an unregistered lease. The plaintiff in the present case therefore had an interest in the leasehold interest filed by way of caveat and can claim protection of it even though he was not the caveator.

It is suggested that the propositions stated above do not represent a correct interpretation of the Land Titles Act or indeed the system of land titles it creates. To begin with, Section 136 of the Act provides only that filing protects the claim of the caveator:[6]

> *Any person* claiming to be interested under any will, settlement or trust deed, or any instrument of transfer or transmission or under an unregistered instrument, or under an execution where the execution creditor seeks to affect land in which the execution debtor is interested beneficially but the title to which is registered in the name of some other person, or otherwise howsoever in any land, mortgage or encumbrance, *may cause to be filed on his behalf with the Registrar a caveat* in Form 33 in the Schedule against the registration of any person as transferee or owner of, or of any instrument affecting, the estate or interest, unless the instrument or certificate of title is expressed to be subject to *the claim of the caveator.*

Nowhere is there any suggestion in the section that any interests other than the interests of the caveator are protected. Section 142, dealing with the effect of a caveat, also refers only to the claim of the caveator:[7]

> So long as any caveat remains in force the Registrar shall not register an instrument purporting to affect the land, mortgage or encumbrance in respect of which the caveat is lodged, unless the instrument is expressed to be subject *to the claim of the caveator.*

The same is true of the form of the caveat prescribed by the Act itself (Form 33):[8]

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[4] R.S.A. 1955, c. 170. He referred also to passages dealing with the effect of a caveat taken from the judgment of Anglin J., in *McKillop and Benjafield* v. *Alexander* (1912) 45 S.C.R. 551 at 583 and the judgment of Stuart J., in *Re Royal Bank of Canada and La Banque d'Hochelaga* (1914) 7 W.W.R. 817 at 820. These passages are dealt with *infra*.

[5] At 652 - 653. The "Corporation" referred to in this passage was the caveator.

[6] Italics mine.

[7] Italics mine.

[8] Italics mine.

CAVEAT FORBIDDING REGISTRATION

To the registrar of the... Land Registration District.

Take notice that *I (insert name and addition of caveator) claim (specify the estate or interest claimed)* in *(describe land and refer to certificate of title)*, standing in the register in the name of.....and I forbid the registrtion of any person as transferee or owner of, or of any instrument affecting the said estate or interest, unless the instrument or certificate of title, as the case may be, is expressed *to be subject to my claim.* I appoint ..... as the place at which notices and proceedings relating hereto may be served.

Dated this.....day of....., 19....

Signature of Caveator or his Agent.

If the words of the above provisions are ambiguous on the point, then they should be interpreted in a fashion that will be consistent with the smooth working of the system which the statute establishes.[9] That must result in the words being so interpreted as to provide that a caveat protects only the caveator and his assigns; for otherwise there can be no certainty of title in any situation in which a caveat is filed, interests other than the caveator's own will depend entirely upon the acts or omissions (as to registration and form of the caveat) of the caveator, and interests would not be clearly ascertainable from the title and documents registered against the title. Any other interpretation of the legislation must be inconsistent with the aim of the Torrens system of simplifying ownership and conveyancing of land.

The entire scheme or function of our Torrens system is to permit a purchaser to rely on the certificate of title of his vendor and fixes such purchaser only with such encumbrances and interests as are plainly notified on the vendor's title.[10] Thom[11] describes the origin and purpose as follows:[12]

> The history of land title reform largely represents efforts to cut loose the legal technicalities restricting transfers of land and to assimilate these to the transfer of personalty. These efforts appear to have found their best expression in the twin principles of security of title and facility of transfer as embodied in the Torrens System. The objects of the system are the creation of an indefeasible title in the registered owner, simplification of the transfer of land, certainty and facility in the proof of title by reference to a certificate issued by a government official made conclusive by law and finally the saving to the community of the cost of a new examination of title in connection with each transfer or transaction affecting the land. In a large measure these objects are achieved by the Acts incorporating *Demogue's* dynamic security theory and, subject to certain exceptions, placing the stamp of sterility on the unregistered instrument and abolishing the doctrine of notice.

and later:[13]

> Ideally, the register or its equivalent the certificate of title as in Saskatchewan 'is everything'. This is to ensure the fulfillment of the main purpose of the Act

[9] *Shannon Realties Ltd.* v. *St. Michel (Ville de)* (1924) A.C. 185, 192-3.

[10] Except for fraud in which the purchaser participates, misdescription (*see* Section 65 of the Act) and the other exceptions set out in Section 64 of the Act.

[11] *Canadian Torrens System* (2d. ed. 1962).

[12] *Id.* at 16.

[13] *Id.* at 40 - 41.

> that the registered owner's title is to be indefeasible except in those cases specifically provided for in the relevant Act. If a certificate of title is shown to fall within any of the stipulated exceptions it ceases to be conclusive evidence of the owner's title; unless it does fall within one of the statutory exceptions the certificate is conclusive evidence of the rights of the person to whom it is issued. Nevertheless, an invalid certificate may form the root of a valid, indefeasible title in the hands of a *bona fide* purchaser for value; in the original Torrens Act the only qualifications on indefeasibility were fraud and error.

and further:[14]

> The existence under the general law of concurrent legal and equitable estates was one of the mischiefs which the Torrens System was designed to remedy. Apart from statute, to obtain full ownership in land a person was required to 'get in' both the legal and equitable estates, both of which were surrounded by rules and precedents. Priority depended upon the possession of the legal estate and the order in which estates or interests were created: *Que prior est tempore potior est jure.*
>
> Torrens' intention was to establish one estate only in land, to have this estate registered in a public register, and to provide that subject to a few specified exceptions any person who *bona fide* acquired that registered estate should upon its registration in his own name obtain an indefeasible title representing the totality of ownership; no other estates or interests were to exist. What would formerly have been an equitable estate was to be relegated to a 'right' assertable and enforceable against the registered owner *in personam.* Under the provisions of the Acts the registered owner was not to be considered in any case as defeating an equitable estate in the sense understood under the rules of equity touching such an estate; he would simply be taking land free from certain personal rights enforceable in equity against the last owner and which in certain circumstances a court of equity would consider it inequitable for the new owner to ignore and acting on him *in personam* would compel him to honor.

To permit a lessee's caveat to secure against all subsequent purchasers an interest of a party entirely different from the caveator and arising out of an instrument[15] executed entirely separate from (though relating to) the lease caveated is clearly not consistent with the above principles and aims.[16]

Turning, then, to the second proposition stated in Mr. Justice Greschuk's judgment, it too, it is respectfully submitted, is not consistent with the intent and operation of the Land Titles Act and the Torrens system it creates. Each of the respective vendors of land (Hughes and Biever) transferred land in the form required by the Act, that is, transferred all of his estate and interest in the lands.[17] In each case the existing certificate of title was cancelled pursuant to Section 72 of the Act, and a new title issued in the name of the purchaser showing fee simple ownership of the lands. That being done, the Land Titles Office register disclosed no interests in the land whatever excepting for the title of the purchaser and the Board Orders and caveat endorsed thereon. Under a Torrens system, a transfer of land transfers all of the estate of the transferor in the lands unto the transferee,[18] and, indeed, even more if the transferor has given up to third parties unregistered

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[14] *Id.* at 137.

[15] Hughes' rights must derive from the assignment and not the lease itself. Without the assignment or reservation, all of his lessor's interest in the lease would have gone to Biever with his transfer of land.

[16] One might well ask, if the principle stated by Mr. Justice Greschuk is correct, what interest of Hughes in land is shown in the lessee's caveat? Does Hughes even have an interest in land, or merely a right to receive income? Can Hughes' interest be found to be adequately expressed in the caveat or Board Orders?

[17] Except that Hughes took an express reservation of entitlement to income from the Board Orders and the lease but failed to protect the reservation by any caveat or registered instrument.

[18] *Supra*, n. 11 at 352.

interests as to which the transferee is not fixed with knowledge and fraud.[19] That must include all of the transferor's interests under registered instruments (including owner's interests in Right of Entry Arbitration Board Orders and Lessor's interests in leases). The prescribed form of transfer itself provides for this:[20]

TRANSFER

I, A.B., being registered owner of an estate (state the nature of the estate) subject, however, to such encumbrances, liens and interests as are notified by memorandum underwritten (or endorsed hereon) in all that certain tract of land containing ... acres, more or less, and being (part of) section ... range ... in the (or as the case may be). (Here state privileges, if any, intended to be conveyed along with the land and if the land dealt with contains all included in the original grant refer thereto for descriptions of parcels and diagrams; otherwise set forth the boundaries and accompany the description by a diagram) do hereby, in consideration of the sum of ..... dollars paid to me by E.F., the receipt of which sum I hereby acknowldege, transfer to the said E.F., *all my estate and interest in the said piece of land. (When a lesser estate describe such lesser estate).*

IN WITNESS WHEREOF I have hereunto subscribed my name this ..... day of ..... 19...

SIGNED by the said A.B., in the presence of ..... _____ Signature

Further, Section 57 of the Act states that:

So soon as registered every instrument becomes operative according to the tenor and intent thereof, and thereupon creates, transfers, surrenders, charges or discharges, as the case may be, the land or the estate or interest therein mentioned in the instrument.

In result, the conclusion that Gidosh could not obtain the lessor's interest in the lease without an express assignment thereof cannot be supported from the provisions in the Act. On the contrary, only an express reservation will preserve them for the transferor. That is presumably why Hughes took an express assignment of income from the Orders and lease although he failed to take the matter to a proper conclusion when he failed to either express that reservation in the transfer or to file a caveat protecting his assignment.

Turning next to the judicial authorities cited by the learned trial judge, it will be found that they do not go as far as do the two propositions of law that are the subject of this comment. The first case cited is that of *McKillop and Benjafield* v. *Alexander*.[21] It was a case involving a contest between a purchaser who had caveated his interest and subsequent purchasers. The caveator, Alexander, had purchased the land from one Gesman on November 2, 1909 by assignment of Gesman's purchaser's interest in an agreement for sale of the land. On November 4, 1909 Gesman purported to sell the same land to McKillop and Benjafield. Alexander filed a caveat on November 10, 1909 and subsequently McKillop and Benjafield completed the

[19] *E.g.*, if the transferor has given a third party some right such as a right of first refusal, or whatever other right, which the person to whom that right has been given has failed to have recorded on the title, and of which the transferee has no knowledge.

[20] Form 11 prescribed by Section 68(1) of The Land Titles Act. Italics mine.

[21] (1912) 45 S.C.R. 551.

assignment of Gesman's interest to them. It was in this context that Mr. Justice Anglin said at page 586:

> ...a caveat when properly lodged prevents the acquisition or the bettering or increasing of any interest in the land, legal or equitable, adverse to or in derogation of the claim of the caveator—at all events, as it exists at the time when the caveat is lodged.

He was dealing with the caveator's interest, not any interest of a third party referred to in the caveat.

Similarly, the case of *Re Royal Bank and La Banque d'Hochelaga*[22] was a case involving a contest between the caveator himself and the other parties who registered instruments subsequent in time to the caveat. The case deals at length with the question of the effect of a caveat in terms of priority, involving questions of interpretation of sections similar to our present sections 56, 57 and 152; but those questions do not bear on the facts of *Hughes* v. *Gidosh*. Hughes never did register a caveat until after Gidosh had become registered as owner of the land. In *Banque d'Hochelaga* the caveat preceded registration of the opposing party's instrument. If, as is suggested above, the caveat of the lessee on Hughes' land was not a document protecting Hughes' interest, then the facts and law in *Banque d'Hochelaga* do not bear at all on Hughes' position. Certainly there is nothing in the case that detracts from the writer's suggestion that a caveat protects only the interest of the caveator, his successors and assigns and not the interests of unrelated persons who might be mentioned in the caveat.

The third case referred to by Mr. Justice Greschuk, *Gas Exploration Co. of Alberta Ltd.* v. *Cugnet*,[23] presents a rather different situation. There the caveat protected a valid interest of the caveator, but the caveator had assigned those interests to a third party. The third party, however, had not filed a caveat showing the assignment. The court held that the caveat of the original grantee protected not only the interest of such grantee caveator but also the interests of his assigns. This is quite a different proposition from that stated in the *Hughes* case, where the party claiming protection claimed, not through the caveator, but through the fortuitous mention of the party's position as lessor in the caveat. The *Cugnet* case is fully consistent with Torrens principles—the notice by caveat of an interest fixes the title with that interest to the extent it is valid. To whom that interest is assigned is only material if the interest itself is dealt with—for example, if the oil and gas lessee had attempted to assign his interest to another party who purchased without notice of the earlier assignment and filed a caveat before the earlier assignee did. Other parties who deal with the general land deal with it subject to the interest shown in the caveat, that is to say, excepting that interest, regardless of who the equitable owner of that interest may be.

If the principle suggested in the *Hughes* case were added to that in the Cugnet case, then an assignee of Hughes' interest and indeed an assignee of such assignee would be protected by the lessee's caveat, and anyone purchasing the lands would be subject to such interests

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[22] (1914) 7 W.W.R. 817.

[23] (1954) 12 W.W.R. (N.S.) 177.

notwithstanding that they are not the subject of a caveat by the original grantee of the interest (Hughes). The principle that such rights and priorities can derive from the fortuitous mention of Hughes in the lessee's caveat is one that could severely shake the structure of our Torrens system.

One must certainly sympathize with Hughes' position, at least against Gidosh, for the latter knew at all times what the former's claims were. However, the smooth operation of the Land Titles system must sometimes prevail in the face of individual hardship,[24] and such operation will be greatly impaired if the *Hughes* v. *Gidosh* case stands. Nonetheless, for the moment the case should have some effect on the practices followed in conveyancing in this jurisdiction.

—E. MIRTH*

[24] This is evidently intended by the legislators who enacted Section 203 of the Act. Perhaps there is enough of a case to support a finding of fraud within the intent of the Land Titles Act: *see* cases discussed in Thom's *Canadian Torrens System*, *supra*, n. 11 at 219.

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SOME RANDOM REFLECTIONS ON THE NO-FAULT CONCEPT

Mr. J. H. Laycraft's scholarly article on *Reforming the Automobile Tort System*[1] seems to have done nothing for Geoffrey W. R. Palmer, B.A., LL.B. (Victoria University of Wellington), J.D. (Chicago), Assistant Professor of Law, University of Iowa, Iowa City, Iowa, U.S.A., except to arouse his ire, judging by the piece he wrote in response,[2] wherein he deals with Mr. Laycraft, as well as the latter's views and advocates the very radical proposal made by a New Zealand Royal Commission in 1967. In addition to accusing Mr. Laycraft of making a "timid response to the demands for change" and being "somewhat misleading on the subject of delay in the common law," the irate Professor refers to the recent Report of the Legislative Committee on Automobile Insurance presented to the Legislative Assembly of Alberta, which made recommendations similar to those advanced by Mr. Laycraft, as "uninformative, uninspired, unconvincing and poorly researched." Presumably, in the Palmer philosophy, only those who espouse radical causes possess courage, and the documents of the democratic process, even in sunny Alberta, should conform to academic standards.

The Assistant Professor chides Laycraft, the advocate, for not mentioning some of the pertinent published literature. The fact is the volume of that literature has reached such formidable proportions that few practitioners could find the time to peruse and digest it all. Apart from referring to the Laycraft article, the Professor does not seem to have cited any literature adverse to his own point of view, unless it be buried in some footnote.

It would be difficult to go further afield for a precedent than New Zealand whose Royal Commission is said to have made a trip to

[1] (1970) 9 Alta. Law Rev. 22.

[2] *Abolishing the Personal Injury Tort System: The New Zealand Experience*, (1971) 2 Alta. Law Rev. 169.