

THE CONCEPT OF NOTICE AND THE ONTARIO LAND TITLES ACT

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It is axiomatic that the fundamental feature of the Torrens system is the principle of indefeasibility of title. The State guarantees that the Torrens register is accurate, and that a person who appears on the register has the title shown, subject only to the encumbrances notified thereon, and to enumerated statutory exceptions. Countless commentators have referred to "the mirror principle" under which the register is a mirror of the state of title, "the curtain principle" under which a purchaser need not search behind the register, and "the insurance principle" under which compensation is provided for a person who suffers loss because the register is inaccurate.¹

In most jurisdictions the statutory provisions achieving indefeasibility resemble each other, and in general they are alike in the treatment they give to the concept of "notice". At common law the purchaser of a legal estate takes subject to prior equitable interests of which he has notice. The concept of notice includes not only the case of actual knowledge of the prior equitable interest, but also the case where the purchaser has failed to discover the existence of a prior interest because he has not investigated the title thoroughly.² In contrast, the concept of notice is generally irrelevant under the Torrens system. Except in the case of actual fraud, a purchaser who becomes registered takes subject only to the interests shown on the face of the register, even in the case where he has actual notice of the prior unregistered interest. This is typically achieved by a provision in the following (or substantially similar) terms:³

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¹ The phrases seem to have originated from Ruoff, *An Englishman Looks at the Torrens System* (1957), p. 8.

² *Pilcher v. Rawlins* (1872), 7 Ch. App. 259. It also includes "imputed notice", the case where an agent of the purchaser, for example, the purchaser's solicitor, knew or should have known of the prior equitable interest.

³ The Land Titles Act, R.S.A., 1970, c. 208, s. 203; *cf.* Land Registry Act, R.S.B.C., 1960, s. 44; The Real Property Act, R.S.M., 1970, c. R-30, s. 77; The Land Titles Act, R.S.S., 1965, c. 115, s. 237.

Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer, mortgage, encumbrance or lease from the owner of any land in whose name a certificate of title has been granted shall be bound or concerned to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the land is or was registered or to see to the application of the purchase money or of any part thereof, nor is he affected by notice direct, implied or constructive, of any trust or unregistered interest in the land any rule of law or equity to the contrary notwithstanding, and the knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud.

Sir Robert Torrens the founder of the Torrens system, believed that many of the defects of the common law conveyancing system arose from the dichotomy between legal and equitable interests, and from the subjection of a legal estate to a prior equitable interest of which the purchaser of the legal estate had notice. For this reason Torrens legislation prohibits the entry of trusts upon the register.⁴ The interest of a registered proprietor is subjected only to encumbrances appearing on the register, even where he has notice of unregistered interests.⁵

This frees him from onerous searches by ensuring that he does not have to go outside the register when he searches title. At the same time the legislation provides a procedure by which the holder of an unregistered interest can protect the interest from defeat by lodging a caveat.⁶ The purpose of the caveat is *not* to give notice of the unregistered interest, for as already stated notice is irrelevant. Rather, the caveat prohibits the registration of an opposing dealing without notification to the caveator, who then has an opportunity to object. Since it is registration which defeats the unregistered interest, the prevention of registration protects

The equivalent Australian legislation is contained in Real Property Act 1900-1973 (N.S.W.), s. 43; Transfer of Land Act 1958 (Vic.), s. 43; Real Property Acts 1861-1974 (Qld), s. 109; Real Property Act 1886-1972 (S.A.), ss 72, 186, 187; Transfer of Land Act 1893-1972 (W.A.), s. 134; Real Property Act 1862 (Tas.) as am., s. 114. Hereinafter this legislation is cited by the initial letters of the province or Australian state enacting it.

⁴ Alta, s. 51; B.C., s. 149 (The British Columbia provisions differ from those of the other provinces); Man., s. 78; Sask., s. 75; *cf.* N.S.W., s. 82(1); Vic., s. 37; Qld, s. 79; S.A., s. 162; W.A., s. 55; Tas., s. 66.

⁵ See *supra*, footnote 3.

⁶ This may be described in various ways. "Caveat" is the most usual name given to the document.

that interest.⁷ Thus it can be seen that the protection against notice, whether actual imputed or constructive serves to preserve the integrity of the register, to simplify searches, and to provide a purchaser who becomes registered without fraud, with security of title.

The model for the Ontario Land Titles Act was not the Australian scheme originated by Sir Robert Torrens, but rather the English Land Transfer Act of 1875.⁸

In contrast the provinces of Alberta, Manitoba, and Saskatchewan followed the Australian model much more closely.⁹ Despite these differences however, the purpose of the Ontario Land Titles Act, is generally described in similar terms to the purposes of pure Torrens legislation. Like the Torrens legislation, the Land Titles Act prohibits the entry of trusts upon the register.¹⁰ It attempts to limit the concept of notice by providing:

No person, other than the parties thereto, shall be deemed to have any notice of the contents of any instruments, other than those mentioned in the existing register of title of the parcel of land or that have been duly entered in the books of the office kept for the entry of instruments received or are in the course of registration.¹¹

It provides a means for the person interested in an unregistered estate to enter on the register "such notices, conditions, inhibitions or other restrictions as are authorized by this Act or the Director of Titles".¹² At this point, however, the role of the notice or caution is different from the role of the caveat under the Torrens system. The registration of a notice, caution, inhibition or

⁷ This is a very general description of the caveat. Its detailed working differs from province to province. See, Alta, ss 136-155; B.C., ss 209-220; Man., ss 137-151; Sask., ss 150-163. There is more divergence between the Canadian provisions than the Australian ones. Cf. N.S.W., ss 72-74; Vic., ss 89-91; Qld, ss 98-102; S.A., s. 191; W.A., ss 137-142; Tas., ss 82-84. See also Sackville and Neave, *Property Law—Cases and Materials* (2nd ed., 1974), pp. 362-363.

⁸ Repealed by Land Registration Act 1925, 15 Geo. 5, c. 21 (Eng.). For a discussion of the history of the Ontario Land Titles Act see Di Castri, *Thoms Canadian Torrens System* (2nd ed., 1961), pp. 23-27.

⁹ For a discussion of the similarities between the "pure" Torrens system and the English system see Ruoff and Roper, *Registered Conveyancing* (3rd ed., 1972), p. 11.

¹⁰ Land Titles Act, R.S.O., 1970, c. 234, s. 69(1), but see s. 69(2).

¹¹ *Ibid.*, s. 79(1).

¹² *Ibid.*, s. 78(1).

restriction confers notice on subsequent registrants of the estate claimed therein.¹³

The Land Titles Act contains no provision clearly excluding the doctrine of notice.¹⁴ The sections quoted above, and those discussed below illustrate that some confusion exists as to the precise role which notice plays under the Act. This has left a hiatus to be filled by the courts. It is true that the Act deviates from a pure Torrens system in many respects, and that decisions on Torrens system statutes must be approached with caution in Ontario. However, it is argued that wherever possible the Act should be interpreted so as to fulfil the goal of providing a State guarantee of the title shown on the register.

The purpose of this article is to discuss two recent Ontario cases dealing with the concept of notice under the Land Titles Act. It is argued that the effect of these cases is to limit severely the indefeasibility principle and to undermine the purposes the Act was ostensibly designed to achieve.

Section 91 of the Land Titles Act sets out the effect of registration of a transfer for valuable consideration. It provides as follows:

A transfer for valuable consideration of land registered with an absolute title, when registered, confers on the transferee an estate in fee simple in the land transferred, together with all rights, privileges and appurtenances, subject to,

- (a) the encumbrances, if any, entered or noted on the register; and
- (b) the liabilities, rights and interests, if any, as are declared for the purposes of this Act not to be encumbrances, unless the contrary is expressed on the register,

and as to such rights, privileges and appurtenances, subject also to any qualification, limitation or encumbrance to which the same are expressed to be subject in the register, or where such rights, privileges and appurtenances are not registered, then subject to any qualification, limitation or encumbrance to which the same are subject at the time of the transfer, but free from all estates and interests whatsoever, including estates and interests of Her Majesty, that are within the legislative jurisdiction of Ontario.

The section does not deal specifically with notice but since it makes no exception for the case of actual notice, it is clearly arguable that even a transferee with such notice takes subject only to the matters enumerated, in (a) and (b).

¹³ *Ibid.*, s. 78(2). See, however, ss 143-150 dealing with cautions which play a part closely resembling that of the caveat.

¹⁴ See, however, Land Titles Act, *ibid.*, s. 85(5). This is discussed below.

In *Re Jung and Montgomery*¹⁵ a transferee for valuable consideration argued that he took free from a right of renewal for three years, contained in an unregistered lease for five years. The lessee purported to exercise this right of renewal after the transfer of the freehold was registered. Duranceau D.C.J. held that the lessees' interest arising from his right of renewal was not,

a lease or an agreement for a lease for a period yet to run that does not exceed three years, where there is actual occupation under it.¹⁶

Clearly if the tenant could have brought himself within this section his interest would be "deemed not to be an encumbrance", and the registered transferee would take subject to it. However, Duranceau D.C.J. held that the transferee took subject to the lessees' right for renewal, because he had actual notice of the lease, and the covenant for renewal contained within it. In the course of his judgment he said:¹⁷

Section 75 of the Registry Act, R.S.O., 1950, c. 336, reads as follows: "Priority of registration shall prevail unless before the prior registration there has been actual notice of the prior instrument by the person claiming under the prior registration." It was argued that this specifically provided for the doctrine of actual notice and that inasmuch as there was no corresponding provision in the Land Titles Act the Legislature must have intended that there should be no doctrine of actual notice under the Land Titles Act.

The argument that actual notice does not apply under the Land Titles Act is not supported by the decisions on the matter, and although Magee on Land Titles, 1940, says at pp. 45, 93 and 104 that this doctrine "is foreign to the Land Titles Act", he does not quote any authorities to back up his text.

I find that the doctrine of actual notice does exist under the Land Titles Act, and in this connection reference may be made to the judgment of Mulock C.J. Ex. in *John Macdonald & Co. v. Tew* (1914), 32 O.L.R. 262, at p. 265, where he said: "The Land Titles Act deals simply with the question of registration. It does not interfere with any common law or other rights of an owner of land to mortgage the same by instrument not capable of registration under the Land Titles Act." I refer further to the following language of Meredith J.A. in *Re Skill & Thompson* (1908), 17 O.L.R. 186, at pp. 194-5:

"The Land Titles Act is not an Act to abolish the law of real property; it is an Act far more harmless in that respect than in some quarters seems to be imagined, at times, at all events, when the wish is father to the imagination. It is an Act to simplify titles and facilitate the

¹⁵ [1955] 5 D.L.R. 287 (Ont. D.C. and C.A.).

¹⁶ *Ibid.* Land Titles Act, *supra*, footnote 10, s. 51. The interests set out in s. 51, which are "deemed not to be encumbrances" prevail despite registration. In other words they are exceptions to the indefeasibility principle.

¹⁷ *Ibid.*, at p. 289.

transfer of land; and, doubtless, greater familiarity with it will tend to remove a good many false notions regarding its revolutionary character.

Its main purpose is to assure the title to a purchaser from a registered owner; but, surely, it is not one of its purposes to protect a registered owner against his own obligations, much less against his own fraud."

It is interesting to note the assimilation of "fraud" and "actual notice" in the judgment of Duranceau D.C.J. In the jurisdictions where actual notice has been regarded as irrelevant a clear distinction has been drawn between notice and fraud.¹⁸

The Ontario Court of Appeal dismissed an appeal from this decision and expressed its agreement with the reasons of the trial judge.¹⁹

Subsequently the Land Titles Act was amended²⁰ by the insertion of section 85(5) which provides as follows:

Subject to any entry to the contrary in the register, and subject to this Act, instruments registered in respect of or affecting the same estate or interest in the same parcel of registered land as between themselves rank according to the order in which they are entered in the register and not according to the order in which they were created, and, notwithstanding any express, implied or constructive notice are entitled to priority according to the time of registration.

In *Pitcher v. Shoebottom*²¹ the defendant company, which had purchased from a vendor, land already contracted to be sold to the plaintiff, relied upon section 85(5) in order to assert that the plaintiff's interest had been defeated. However, the events which

¹⁸ See, for example, *Assets Co. v. Mere Roihi*, [1905] A.C. 176; *Stuart v. Kingston* (1923), 32 C.L.R. 309, at p. 329; *Wicks v. Bennett* (1921), 30 C.L.R. 80. In *Wicks v. Bennett*, Bennett was one of several partners who had an unregistered agreement for a lease over certain land. Disagreement arose between the partners and without their knowledge, Bennett acquired the fee simple in the land. Bennett then sold the land to Diplock, who became registered proprietor. Before Diplock purchased the land, one of Bennett's partners had told him in casual conversation that he could not purchase the land because the partners had an interest in it under an unregistered agreement. It was held that Diplock was not guilty of fraud. He was not shown to be aware of the names of the partners or their respective interests. He could have believed that Bennett was acting with their authority, or that only a short term lease was in question. Fraud meant "something more than mere disregard of rights of which the person sought to be affected had notice. It reports something in the nature of 'personal dishonesty or moral turpitude'". At p. 91, per Knox C.J. and Rich J.

¹⁹ *Ibid.*, at p. 292.

²⁰ S.O., 1960, c. 56, s. 11.

²¹ (1970), 14 D.L.R. (3d) 22 (Ont. H.C.).

arguably gave the defendant actual notice of the plaintiff's prior interest had occurred before the enactment of section 85(5). Lief J. held that the section could not be given retroactive effect. Accordingly he declined to consider whether the effect of section 85(5) was to protect a transferee for valuable consideration against interests of which he had actual notice. He went on to consider the effect on the defendant's interest of constructive notice, and this aspect of the case is discussed below.

In 1973, the question as to the effect of actual notice was directly raised in *Re Dominion Stores Ltd and United Trust Co. et al.*²²

Dominion Stores Ltd took a lease of premises in 1935 and remained in occupation under the original lease and various renewals. In October 1970, Dominion exercised its option to renew the lease until November 30th, 1975. Subsequently, Dominion wished to make repairs and improvements to the premises and negotiated with the landlord to secure a longer lease. It was found on the facts that the landlord agreed to grant an option to the tenant permitting the tenant to renew the lease for a further period, commencing on December 1st, 1975 and expiring on June 30th, 1982. The landlord then sold the premises to the United Trust Co., which had actual notice of the existing lease and of the option to renew. Neither the lease nor the option to renew were registered against the land under the Land Titles Act. In May 1972, United Trust Co. took possession of the premises and excluded Dominion Stores Ltd. Dominion applied for an order granting relief from forfeiture (if appropriate) and for reinstatement in the demised premises.

Dominion could not rely upon the argument that its lease was deemed not to be an encumbrance. The existing lease had an unexpired period exceeding five years, and did not fall within the exception for short-term leases in section 51(4).²³ However, Dominion argued that United Trust Co. took subject to the lease, and the option to renew, since it took with actual notice. The trial judge, Grant J. acceded to this argument, despite the fact

²² (1973), 42 D.L.R. (3d) 523 (Ont. H.C.). Compare with this case the Australian approach: see *Munro v. Stuart* (1924), 41 S.R. (N.S.W.) 203 and *Oertel v. Hordern* (1902), 2 S.R. (N.S.W.) (Eq.) 37, which contain facts very similar to those in the *Dominion* case.

²³ Any lease or agreement for a lease, for a period yet to run that does not exceed three years, where there is actual occupation under it.

that section 85(5) contained the words: "notwithstanding any express, implied or constructive notice." He said:²⁴

Section 85(5) pertains to instruments registered in respect of or affecting the same estate or interest. In the present case the interest of the respondent is that of a tenant and I therefore have doubts as to whether such sub-section has application to the facts of this case. It would require clearer language to eliminate the doctrine of actual notice which has been entrenched in our common law for so many years.

With respect, this reasoning is unconvincing. What clearer language could be used than the words "notwithstanding any express, implied or constructive notice"? Surely the lease and the transfer of the fee simple do affect the same estate. If the lease is enforceable against United Trust Co., it takes only a fee simple reversion; if it is unenforceable it takes a full fee simple. Did Grant J. mean that the operation of section 85(5) is confined to the case where the two interests are totally inconsistent, for example two transfers of the same land? Grant J. did not deal with another difficulty in the interpretation of section 85(5). At least on one view the section appears appropriate only to a conflict between two registered instruments, and not a conflict between an unregistered instrument and one which is registered. This would be a stronger argument for a refusal to apply section 85(5) to the facts of the case.

In 1974 the Ontario Court of Appeal dismissed an appeal by United Trust Co. from the above decision.²⁵ The appellant relied upon two cases arising in Saskatchewan²⁶ and Alberta,²⁷ but Jessup J.A. pointed out that the Torrens statutes in these jurisdictions specifically provided that actual notice should not prevail against the register. Moreover Jessup J.A. took the view that section 85(5) confirmed the decision in *Re Jung and Montgomery*,²⁸ rather than reversing it. He said:²⁹

²⁴ *Supra*, footnote 22, at p. 535.

²⁵ (1974), 52 D.L.R. (3d) 327.

²⁶ *Union Bank of Canada v. Phillips and Boulter-Waugh Ltd* (1919), 58 S.C.R. 385, 46 D.L.R. 41.

²⁷ *Canadian Construction Co. Ltd v. Beaver (Alberta) Lumber Ltd*, [1955] S.C.R. 682, [1955] 3 D.L.R. 502.

²⁸ *Supra*, footnote 15.

²⁹ *Supra*, footnote 25, at p. 329. Curiously, however, Jessup J.A. expressed doubts about whether *Re Jung and Montgomery*, *ibid.*, was correctly decided, on the then existing state of the statute. He took this view particularly upon the basis of s. 91.

If the intent was that the register is absolute the words in the subsection "notwithstanding any express, implied or constructive notice" would be quite unnecessary.

This is a difficult view to grasp. On the reasoning of Grant J., these words are insufficient to accomplish the repeal of the doctrine of actual notice. On the view of Jessup J.A. the section might repeal the doctrine if the words were omitted entirely and their inclusion shows that the doctrine is retained.

However, Jessup J.A. made more explicit the view that the section concerned a conflict between registered instruments.³⁰ Like Grant J. he took the view that the words "in respect of or affecting the same estate or interest" were crucial and that the section dealt with priority conflicts between registered instruments affecting the same estate or interest.

Arnup J.A. agreed in the decision of Jessup and Brooke J.J.A., but his reasoning was slightly different. Whilst not deciding the question, he took the view that an instrument granting a lease "affected" the interest of the appellant. However, the words of section 85(5) were insufficiently strong to abolish the doctrine of notice, particularly when read in the context of the other subsections of section 85. Moreover, section 85(5) dealt with a conflict between two registered instruments.

Thus there were three reasons given for the conclusion that a registered transferee takes subject to an unregistered instrument of which he has actual notice.

1. Section 85(5) deals with instruments which purport to deal with the same estate in the land, for example, two transfers. This view is espoused by the trial judge Grant J., and by Jessup and Brooke J.J.A. on appeal. With respect it appears to ignore the words "or affecting".
2. Section 85(5) deals with a conflict between *registered* instruments only. This is the strongest argument in support of the decision. It is supported by the words "instruments registered in respect of or affecting the same estate or interest in the same parcel of registered land". But even this argument is not unassailable. It can be argued that the word "or" should be read disjunctively. On this view the section covers either the case of a conflict between registered instruments, *or* the case of a conflict between a registered instrument and an instrument (whether or not registered) which affects the

³⁰ Brooke J.A. concurred with Jessup J.A.

same estate or interest. The interpretation adopted by the court achieves the extraordinary result that as against a registered transferee with actual notice, a person who registers his interest is worse off than a person who fails to register. One must sympathize with the *cri du coeur* of Arnup J.A. who said:³¹

That result would be unusual and perhaps illogical, but it is not absurd. If the result follows from what the legislature has done we must give effect to it.

The absurdity of this conclusion suggests that perhaps the alternative argument is correct.

3. The words of section 85(5) are insufficiently strong to abolish the doctrine of actual notice. Taken by itself there is no support whatsoever for this proposition. No words could be stronger than "notwithstanding any express, implied or constructive notice". It is only in conjunction with argument 2 that the proposition has any weight.

While the reasoning in *Re Dominion Stores Ltd and United Trust Co.* presents some difficulties it may be argued that the result is not a serious inroad on the principle of indefeasibility of title. A registered transferee who takes with actual notice, is not an object for sympathy, and the exception for actual notice does not increase the burden of title searchers. It is true that in most jurisdictions with Torrens legislation, actual notice is not a bar to the priority conferred by registration.³² Still, it is the proud boast of many Ontario practitioners that the Land Titles Act is an amalgamation of the better elements of the Torrens system, and some homegrown Ontario values. One is still left with the anomaly between the position of the holder of an unregistered instrument and the holder of a registered instrument, and with a query as to the effect (if any) of the words relating to notice in section 85(5).

If the decision in the *Dominion Stores* case is correct, that leads us to yet another question. To what extent is the doctrine of constructive notice relevant to the Land Titles Act? If the words of section 85(5) are insufficiently strong to repeal the doctrine of actual notice, they must also be insufficiently strong to deal

³¹ *Supra*, footnote 25, at p. 331.

³² For the English position see Land Registration Act 1925, *supra*, footnote 8, s. 74.

with the doctrine of constructive notice.³³ While the exception for actual notice may not be a substantial inroad on the indefeasibility principle, an exception for constructive notice would be a great detraction from it. A recent decision of the Supreme Court of Canada on appeal from the Ontario Court of Appeal comes dangerously close to achieving this result, although it did not concern the interpretation of section 85(5).

In *Russo v. Field and Menat Constructions Ltd.*,³⁴ the second defendant Menat Constructions Limited built a shopping plaza containing a supermarket and nine stores. One of the stores was leased to the plaintiffs. Under the lease the Russos covenanted that the premises would not be used for any purpose other than a hairdressing and beauty salon. Clause 11 of the lease provided as follows:

It being the intention of the Landlord and the Tenant that the stores in the Shopping Centre of which the demised premises form part shall be non-competitive, the Landlord hereby covenants and agrees that it will not at any time during the term of this lease or any renewal thereof suffer or permit any of the other stores in the Shopping Centre to carry on the business of a hairdresser and Beauty Salon.

Except for the lease made to the first defendants, the Fields, the leases of all the other stores contained a clause in similar terms to clause 11. The shopping plaza was registered in the name of Menat Constructions Limited in the Land Titles Office, and the Russos registered a notice of their lease on March 2nd, 1967. The notice on the abstract of title was in the following terms:

A211416 — Notice of a lease dated the 30th September 1966 between Menat Constructions Limited, as lessor, and Mario Russo and Aldo Russo, as lessees.

Subsequently Menat Constructions Limited leased the premises adjoining the Russos to the first defendants, the Fields. The Fields covenanted that the premises would not be used for any other purpose than the manufacture, retail and service of wigs. Clause 11 of this lease was in different terms to the clause 11 contained in the lease made to the plaintiffs and to all the other tenants. It provided:

³³ S. 79(1) does, however, place some limitations on the application of the doctrine of constructive notice. See *Pitcher v. Shoebottom*, *supra*, footnote 21, at p. 532. In that case it was held that s. 79(1) was sufficient to prevent the defendants from taking subject to a prior verbal contract of which they arguably had constructive notice.

³⁴ (1973), 34 D.L.R. (3d) 704 (S.C.C.).

The landlord hereby covenants and agrees that it will not at any time during the term of this lease or any renewal thereof suffer or permit any of the other stores in the shopping centre to carry on the principal business of manufacturing and selling wigs.

The Fields did not register notice of this lease, although nothing turns on that fact. Nor did the Fields retain a solicitor in the transaction or make any searches in the Land Titles Office.

The plaintiffs claimed an injunction restraining the Fields from carrying on the business of manufacturing, styling and selling wigs or any other business competitive with the plaintiff's business together with damages against the Fields and against Menat.

The trial judge held in favour of the plaintiffs and the defendants, the Fields, appealed to the Ontario Court of Appeal.³⁵ The Ontario Court of Appeal (MacKay, Evans and Laskin JJ.A.) held that the covenants in the plaintiffs' lease were not mere personal covenants, but were restrictive covenants which were intended to run with the land. MacKay J.A. (who dissented as to the final result) also took the view that a building scheme existed. Thus the liability of the Fields depended upon whether or not they had notice of the covenant. Here the opinion of the judges was divided. Both MacKay and Evans JJ.A. held that registration of notice of the lease conferred notice of its contents upon the Fields. MacKay J.A. held that the Fields were in breach of the covenant. The majority, Evans and Laskin JJ.A., held that no breach of covenant had occurred. Laskin J.A. reserved his opinion on whether registration of notice of the lease conferred notice of the contents upon the Fields.

The plaintiffs then appealed to the Supreme Court of Canada.³⁶ The Supreme Court accepted the view of the trial judge and of the Ontario Court of Appeal that the covenants were restrictive in character.

The trial judge found that the Fields did not have actual knowledge of the terms of the lease between the plaintiffs and Menat. This finding was not disturbed by the Supreme Court, although the Supreme Court took the view that the Fields probably deliberately abstained from enquiring and accordingly had constructive notice.³⁷ However, in view of the statutory provisions dealing with the problem, this fact was not material. The court

³⁵ (1970), 12 D.L.R. (3d) 665.

³⁶*Supra*, footnote 34.

³⁷ The judgment of the court was delivered by Spence J.

then proceeded to consider the effect of sections 79 and 115,³⁸ of the Land Titles Act.³⁹ The sections provide as follows:

S.79(1) — No person, other than the parties thereto, shall be deemed to have any notice of the contents of any instruments, other than those mentioned in the existing register of title of the parcel of land or that have been duly entered in the books of the office kept for the entry of instruments received or are in course of entry. . . .

S.115(1) — A lessee or other person entitled to or interested in a lease or agreement for a lease of registered land may apply to the proper master of titles to register notice of the lease or agreement in the prescribed manner. . . .

S.115(6) — Where notice of a lease or agreement for a lease is registered, every registered owner of the land and every person deriving title through him, excepting owners of encumbrances registered prior to the registration of such notice, shall be deemed to be affected with notice of the lease or agreement as being an encumbrance on the land in respect of which the notice is entered.

Thus the issue was whether the fact that notice of the Russos' lease appeared on the abstract of title of the whole parcel of land gave the Fields notice of the terms of clause 11. It was argued that this was the effect of section 115(6). Counsel for the Fields argued that this was not its effect because:

- (1) The notice of the lease related to adjoining premises and not to the premises being leased to the Fields.
- (2) The notice simply disclosed the existence of the lease. This would not concern the Fields, since they were leasing adjoining premises. The notice of the lease should not be regarded as giving notice of its contents including clause 11.

The Supreme Court⁴⁰ concurred with the view expressed by the trial judge, and by MacKay and Evans J.J.A. in their reasons in the Court of Appeal, and held that the Fields had notice of the restrictive covenant by virtue of registration of the notice of lease. Spence J. said:⁴¹

Since I have come to the conclusion that there has been a breach of the restrictive covenant, I am required to determine whether or not the defendant Ann Field did have notice of such restrictive covenant by the registration of the notice of lease in the manner which I have outlined.

With respect, I have no difficulty in concurring with the view expressed by the learned trial Judge and by MacKay, J.A., and Evans, J.A., in their reasons in the Court of Appeal.

³⁸ Then ss 77 and 109.

³⁹ *Supra*, footnote 10.

⁴⁰ *Supra*, footnote 34.

⁴¹ *Ibid.*, at p. 715.

Certainly, the Land Titles Act should be interpreted so as to carry out the very evident intention that a tenant could protect his interest by registering a notice of the lease upon the abstract and as Laskin, J.A., commented practical considerations would suggest that a provision for registering a notice of a lease should be construed to embrace notice of its contents.

As MacKay, J.A., pointed out, to hold otherwise would make the requirement as to filing a copy of the lease with the master of titles meaningless. In my opinion, it would defeat the whole purpose of s. 109 of the Land Titles Act. Section 122 [am. 1961-62, c. 70, s. 32] is, in my view, quite relevant dealing as it does with conditions and restrictions running with the land.

I have, therefore, concluded that the defendant Ann Field had, by virtue of the registration of the notice upon the abstract of title for parcel B.2 notice of the contents of the lease to the plaintiffs.

He went on to hold that a breach of covenant had occurred and awarded damages against the first and second defendants.⁴²

One must sympathize with the view that the intention of section 115(6) was to permit a tenant to protect his lease by registering the notice. As Laskin J.A. pointed out in the Ontario Court of Appeal,⁴³ "there is no provision in the Act for registering leases as such on the register of freehold land; and practical considerations would suggest that a provision for registering a notice of a lease (failing any limitation of its scope) to embrace notice of its contents". This, of course, leaves open a question as to the effect of section 79 standing alone, for section 79 may have the effect that where instruments are mentioned in the register, persons dealing with the land are fixed not only with notice of the instruments, but also with notice of what is in the instruments. If section 79 is interpreted in such a way, it is coming perilously close to the concept of constructive notice.

The decision in *Russo v. Field and Menat Construction Ltd* places a serious burden on prospective lessees. For example, a person who takes a lease of an apartment will be fixed with notice of the contents of the leases of all the other apartments in the building, where the lessees have registered a notice under section 115. To protect himself against such an eventuality, the lessee must examine each lease in turn (and there could be fifty or a hundred of them). In the case of a shopping development, covenants relating to non-competition are common, and may be expected, but the unusual nature of a covenant will not alter the analysis. The decision extends the searches that must be made by

⁴² An injunction was unnecessary since the Fields had discontinued their business.

⁴³ *Supra*, footnote 35, at p. 684.

a prospective purchaser or lessee and fixes him with notice of interests that "he should have discovered". It is interesting to contrast the position of a purchaser under the Land Titles Act,⁴⁴ which ostensibly is designed to provide a State guarantee of title, with that of a purchaser under the Registry Act.⁴⁵ It is quite clear that a purchaser under the Registry Act must have actual notice of a prior unregistered interest, before he takes subject to it. In this context, actual notice is very strictly construed. Thus if there is upon the register an earlier instrument which states that the land is held "on trust" a subsequent registrant does not have actual notice of the interest of the beneficiaries of that trust. This appears to be the case even where the trust is named.⁴⁶ The registration of an assignment of a purchaser's interest under a contract of sale does not give actual notice of the contract of sale.⁴⁷ It is curious that a system of deeds registration achieves greater protection for a purchaser than a quasi-Torrens system.

It is also interesting to note that the Land Titles Act does provide a procedure for the registration of restrictive covenants, although it applies to owners of land and not to lessees.⁴⁸ It could be argued that if this procedure is not used, the restrictive covenant should be unenforceable against later purchasers. Incidentally, the recent trend in Australia is to limit the application of the building scheme doctrine to land under the Torrens system, in the case where the purchaser must make enquiries behind the register to discover whether a building scheme exists.⁴⁹

The precise role which the concept of notice plays under the Land Titles Act is not yet clear. Unlike the case with most Torrens style legislation it is untrue to say that notice is irrelevant. However, the following statements seem to have been accepted by the courts.

1. The sections dealing with the effect of first registration (section 52), and with the effect of the registration of a transfer for valuable consideration (section 91) are insufficient by themselves to abolish notice. The same view would probably

⁴⁴ *Supra*, footnote 10.

⁴⁵ R.S.O., 1970, c. 409, as am.

⁴⁶ *Re McKinley and McCullough* (1919), 51 D.L.R. 659 (Ont. C.A.); *Re Seperich and Madill*, [1947] 1 D.L.R. 901 (Ont. H.C.); *Elevated Construction Ltd v. Nixon* (1970), 9 D.L.R. (3d) 232 (Ont. H.C.).

⁴⁷ *Orsi et al. v. Morning* (1971), 20 D.L.R. (3d) 25 (Ont. C.A.).

⁴⁸ *Supra*, footnote 10, s. 129.

⁴⁹ *Re Dennerstein*, [1963] V.R. 688.

be taken of section 98(3) dealing with the effect of a registered charge.

2. A transferee for valuable consideration who registers is subject to unregistered interests of which he had actual notice at the time he took his transfer.
3. It is not clear whether this would be extended to include constructive notice. Presumably it would not, in view of the provisions of section 79(1).⁵⁰ This probably also covers imputed notice.
4. In a contest between the holders of registered interests, notice may be irrelevant, at least where each person is asserting a right to the same estate in the land. The contest will be determined by the time of registration.
5. A lessee who has registered a notice of his lease will nevertheless take subject to a prior lease, even where no notice has been registered to protect it, if he had notice of that prior lease. In this context, notice means actual notice. (Section 115(8)).
6. If a lessee registers notice of his lease, persons claiming title through his landlord will be deemed to have notice of the contents of the lease, as well as of its existence.

This summary illustrates the confusion and inconsistencies concerning the role of notice under the Land Titles Act. The confusion derives in part from poor drafting, but also from the reluctance of the courts to abandon concepts with which they are familiar. If the Act is to accomplish any worthwhile effect the role of notice must be re-examined. A simple amendment to section 91 would go a long way toward accomplishing this result.

⁵⁰ *Pitcher v. Shoebottom*, *supra*, footnote 21.