

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC 27 of 2016

IN THE MATTER of sections 109 and 114 of the
Land Transfer Act, Cap 131.

AND

IN THE MATTER of an application to remove
Caveat No. 820306 lodged by Simone Valenitabua
as agent for Ratu Joseva Vatunitu and placed on
iTaukei Lease No. 13796, the property of Barton
Limited and for compensation related thereto.

BETWEEN : **DUBBO LIMITED** a company incorporated in Fiji and having its
registered office at c/-Pricewaterhouse Coopers, 52 Narara Parade,
Lautoka.

PLAINTIFF

AND : **RATU JOSEVA VATUNITU** aka **RATU JOSEVA SAMUDUNATUA**
VATUNITU, whose stated address for service is c/-Toganivalu &
Valenitabua, 30 High Street, Toorak, Suva.

DEFENDANT

Counsel : Mr. J. Apted, Mr. R. Naidu and Ms. Chang W. for the Plaintiff
Mr. J. Moti for the Defendant
Date of Hearing : 11th May, 2016
Date of Judgment : 20th November, 2017

JUDGMENT

INTRODUCTION

1. The Plaintiff filed this action seeking removal of the caveat lodged by the Defendant. The Plaintiff is the lessee of iTaukei Lease No 13796 (NL 13796). There were certain clauses that provided some benefits for the (Native Owners) land holding units. Defendant is one member of land owning unit of the land comprised in NL 13796. The Defendant through

their solicitors had lodged the caveat No 820306, claiming 4 specific interests in the said caveat. They are, under trustee beneficiary relationship, being a Native Owner, Participant Native Owner under clause 15 of the Lease NL 13796 for shares in Plaintiff, and as beneficial shareholder. The Plaintiff in this action being the lessee is seeking removal of the said caveat No. 820306. The Defendant did not file any affidavit in opposition. In the absence of any explanation of alleged caveatable interests for NL 13796, by way of affidavit the court is left with the contents of the caveats for determination relating to removal of caveat. It is imperative for the caveator to state the caveatable interests precisely and how he had derived it under law. The caveat is filed by Defendant's solicitor on behalf of the Defendant in his personal capacity.

FACTS

2. The Plaintiff is the lessee of NL 13796 and the lessor is iTaukei Land Trust Board (TLTB). The Plaintiff became lessee after NL 13796 was assigned in 1996, in its favour.
3. NL 13796 contained clauses 15 and 16 that granted certain rights to iTaukei Owners as Participation of Native (iTaukei) Owners. In terms of the said clause 15, some shares were issued as participating shares to TLTB and there was an option to purchase additional 5% of the shares within 10 years. There was also a right of first refusal in favour of existing shareholders in proportionate number of shares on offer. The said lease was granted in 1974 to Fujikan Fiji Limited and this was assigned subsequently to other entities and presently Plaintiff is the lessee. These old Clauses 15 and 16 were fully repealed and substituted by present provisions in 2015 and till then they remained unchanged.
4. After assignment of the lease NL 13796 to the Plaintiff in 1996, no shares were allocated to the lessor as 'premium' and no claim was made in that regard by any party including Defendant.

5. In 2015 clause 15 and 16 of NI. 13796 were fully repealed and new provisions were introduced. This variation was registered on 23rd September, 2015. Accordingly provisions relating to participating native owners were altered. Clause 15(b) deals with only the redeemable preference shares and right to 10% of such shares when such redeemable shares issued. Clause 16 of the previous lease was also deleted and substituted by a new clause that guaranteed employment to 'Native Owners'.
6. The lease NI. 13796 is an asset of Plaintiff. The Plaintiff is a subsidiary of another entity Farleigh. Shares in Farleigh were offered for sale by the shareholder and a third party was selected in 2016 as winning bidder for the said shares in Farleigh.
7. The Defendant had lodged Caveat No 820306 on 3rd November, 2015 indicating 4 interests as the basis of that. The caveat is lodged by a solicitor on behalf of Defendant in his personal capacity.
8. The share transaction of Farleigh by the shareholder is not affected by lodgment of caveat as it relate to only an asset of a subsidiary (Plaintiff). Nevertheless, the timing of the lodgment of caveat by the Defendant, and impending share sale are factors that can be considered in the balance of convenience.

ANALYSIS

9. The Plaintiff issued summons under s.109(2) of the Land Transfer Act (LTA), which states

"Any such applicant or registered proprietor, or any other person having any registered estate or interest in the estate or interest protected by the caveat, may, by summons, call upon the caveator to attend before the court to show cause why the caveat should not be removed, and the court on proof of service of the summons on the caveator or upon the person on whose behalf the caveat has been lodged and upon such evidence as the court may require, may make such order in the premises, either ex parte or otherwise as to the court seems just, and, where any question of right or title requires to be determined, the proceedings shall be followed as

nearly as may be in conformity with the rules of court in relation to civil causes." (emphasis added)

10. So, what the caveatee needs to do in terms of Section 109(2) of LTA is to notify caveator by summons to attend the court and 'show cause why the caveat should not be removed'. So the burden is shifted to the Defendant to justify the caveat and if not it should be removed.
11. **Though the Defendant was granted time to file any affidavits in opposition to the Plaintiff's application for the removal of caveat he had not done so.**
12. Once a caveat is removed by the court there is no room for lodgement of another caveat by the same person 'affecting **the same land, estate or interest**', or by any other person '**in the same right and for the same cause**' unless there is an order of the court.
13. So specific interests stated in the content are important and they should be stated with sufficient certainty as to identity of the land and the nature of the estate or interest claimed.
14. It is mandatory to state the nature of the interest or estate and how it is derived with certainty. (See Section 107 of LTA)
15. If the interest of the caveator is not stated clearly, and stated in ambiguous or vague manner, the caveator can abuse the process. So there should be sufficient certainty as to the alleged interest of the caveator and vague and ambiguous caveats should be removed for non-compliance of mandatory provisions contained in Section 107 of LTA.
16. ***Ball v Fawcett*** (1997) 1 NZLR 743 at page 747 it was stated
*In Re Peyachers Caveat [1954] NZLR 285 at pa 286 Archer J said that:
'Section 138 of the Land Transfer Act, 1952, provides that the caveat shall state with sufficient certainty the nature of the estate*

or interest claimed by the caveator, and that would appear to prevent a caveator from claiming to retain the caveat on some ground other than that set out in the caveat itself. It would accordingly seem that in order to justify the retention of his caveat, the caveator is entitled to rely only upon his claim to have an interest in the property by virtue of a trust. Provided, however, that the nature of the interest claimed is described with reasonable certainty. I do not think the caveator is necessary to be bound by the precise form of words used. (emphasis added)

17. So what is paramount is unambiguous interest stated in the caveat, so that the caveator would be prevented from claiming a different interest at the hearing when an application for removal of the caveat is dealt. The Plaintiff had claimed the alleged interests for NI. 13796 in his personal capacity by lodgement of the caveat Caveat No. 820306 through his solicitor and he is precluded from changing that position.
18. A caveat is an intrusion to the property rights of the registered proprietor who obtains indefeasible rights under Torrens system. A caveat is also a statutory provision under LTA and a caveator's interests should be stated with sufficient certainty so that he cannot rely on a different interest when required to show cause under Section 109(2) of LTA.
19. Under section 106 of the LTA, the instances under which a caveat can be lodged is stated and it states;
"106. Any person -
 - (a) claiming to be entitled or to be beneficially interested in any land subject to the provisions of this Act, or any estate or interest therein, by virtue of any unregistered agreement or other instrument or transmission, or of any trust expressed or implied, or otherwise howsoever; or*
 - (b) transferring any land subject to the provisions of this Act, or any estate or interest therein, to any other person to be held in trust, may at any time lodge with the Registrar a caveat in the prescribed form, forbidding the registration of any person as transferee or proprietor of, and of any instrument affecting, such estate or interest either absolutely or unless such instrument be expressed to be subject to the claim of the caveator as may be required in such caveat."* (emphasis added)

20. Section 107 of I.TA states the requirements or things that should be contained in the caveat.

Particulars to be stated in and to accompany caveat

107. Every caveat shall state the name, address and description of the person by whom or on whose behalf the same is lodged and, except in the case of a caveat lodged by order of the court or by the Registrar, shall be signed by the caveator or his agent and attested by a qualified witness and shall state with sufficient certainty the nature of the estate or interest claimed and how such estate or interest is derived. (emphasis added)

21. The Defendant had lodged the Caveat claiming four distinct interests, but whether they had complied with mandatory provisions contained in Sections 106 and 107 needs to be ascertained.
22. The Defendant had lodged the caveat in relation to the property comprised in NI. 14619 through his solicitors and caveatable interests are stated therein as follow:

'1. Ratu Joseva Vatunitu aka Ratu Joseva Samudunatua Vatunitu is a member of Yavusa Nabati [Yakuilau] being the iTaukei Land Owning Unit of Native Lease No. 13796 being Denarau Island Lot No 1 Nadi. Ba, which land is now vested in iTLTB as Trustee and Ratu Joseva Vatunitu aka Ratu Joseva Samudunatua Vatunitu being beneficiary under the iTaukei Land Trust Act, Cap 134. This trustee/beneficiary relationship is the 1st caveatable interest.

The 2nd caveatable interest is as Native Owner being a member of Yavusa Nabati [Yakuilau], such ownership is acknowledged and accepted by all stakeholders including but not limited to the Trustee iTLTB, the current registered lessee or tenant of NL 13796, DURBO Limited by itself, its predecessors through history in all dealings.

The 3rd caveatable interest is as Participant Native Owner through iTLTB under Clause 15 of the Memorandum of Lease duly registered at the office of the Registrar of Titles on 11th April 1974. Members of Yavusa Nabati [Yakuilau] including Ratu Joseva Vatunitu aka Ratu Joseva Samudunatua Vatunitu through iTLTB are entitled to be issued and hold shares in Commercial Investments Properties Limited (the 1st lessee or tenant), Nadi Beach Hotel Limited (the 2nd lessee or tenant) and the current lessee DUBBO Limited (the 3rd lessee or tenant).

The 4th caveatable interest is beneficial shareholder. All the above companies were to have made iTLTB as lessor the shareholders in trust for the native land owners including members of Yavusa-e-tolu being Yavusa Navatalevu, Yavusa Sila and Yavusa Nabati [Yakuilau] of which Ratu Joseva Vatunitu aka Ratu Joseva Samudunatua Vatunitu is the member currently holding the title of Tui Nabati, the Turaga ni Yavusa Nabati [Yakuilau]"

23. At the outset it should be noted that alleged caveatable interest were **not** claimed by the Plaintiff **in representative capacity** but as an individual of a one land owning unit. This cannot be done in terms of the Fiji Court of Appeal decision *Narawa v Native Land Trust Board* [2002] FJCA 9: ABU0012.99S (decided on 31 May 2002). In that decision it was held that all the members of land owning units have common interest as regard to the proper administration of such lands by the trustee. Since unanimity among the members of the land owning unit is rare a member could institute a representative action, even without majority approval. There is no recognition of individual right relating to iTaukei Land recognized in law.
24. The Court of Appeal in *Narawa v Native Land Trust Board* [2002] FJCA 9: ABU0012.99S (decided on 31 May 2002) held,

"First, all the members of the mataqalis have a common interest in ensuring that the agreements are being properly administered by the Trust Board, and that they receive whatever is due to them from the agreements. If, as the appellants allege, the agreements have not been properly administered and Timber Fiji is guilty of breaches for which damages are payable but have not been claimed, the members will also have a common grievance. Whether in fact that is so can only be determined at the trial. Similarly, if the causes of action are made out, the relief obtained is likely to be beneficial to the members or at least most of them.

Secondly, it is apparent from the affidavits filed that a substantial number of the members of the mataqalis support the appellants in their action. It is also apparent that a substantial number do not. But they appear not to be advocating a different course of action, rather they favour taking no action at all. If the action succeeds, they will share in the fruits of it. If it does not, they will not be liable for costs.

Thirdly, as we have pointed out, the appellants have no other course open to them. They cannot sue personally. They cannot bring an action as an

unincorporated association because they would not obtain unanimity. As Megarry J pointed out in John v Rees (above) the representative action is a procedure the purpose of which should be to achieve justice. In the absence of any other remedy available to the appellants, the interests of justice will be served by allowing the action to proceed.....'

25. If an i'faukei owner cannot sue personally, that person cannot lodge a caveat in personal capacity. A caveat is an interim measure and cannot sustain on its own. In my judgment, a member of the land owning unit has no individual caveatable interest to the land belonging to the land owning unit.
26. It is in the representative capacity that such person could lodge a caveat. Perusing through alleged caveatable interests indicate that his solicitors had lodged the caveat on behalf of Defendant as an individual member and not in representative capacity, though there are two annexed documents to the caveat that indicate that some authority was granted to the Plaintiff and to another person for some specific actions. These specific actions that are authorized in the said letter, did not specify lodgment of caveats. In any event in the absence of any explanation as to the said documents that is contrary to the interests claimed in the caveat, they cannot form part of the interest or claim stated in the caveat for consideration in this matter for removal of the caveat.
27. Since there is no affidavit in opposition these documents remain unexplained by the Defendants. The Caveat No. 820306 is lodged by his solicitors against NL 13796 in his personal capacity. What needs to be considered is the Caveat and it had not indicated that lodgment was in representative manner.
28. So, the caveat should be removed *in limine* without considering any merits as the Defendant could not lodge a caveat for interests stated therein in personal capacity through his solicitors in terms of Court of Appeal decision in Narawa v Native Land Trust Board [2002] FJCA 9; ABU0012.99S (decided on 31 May 2002)
29. Without prejudice to the above, I would venture to consider caveatable interests claimed by the Defendant in the said Caveat No 820306, for removal of the same.

30. Though the Plaintiff had filed this action for removal of the caveat, the burden of proof is with the Defendant to establish caveatable interest. In Ball v Fawcett (1997) 1 NZLR 743 at page 746 it was held:

'The onus is on the caveator to show he had an arguable case in claiming an interest in land Castle Hill Run Ltd v NZI Finance Ltd [1985] 2 NZLR 104, 106'

Further at p 747

'In Guardian Trust and Executors Co of New Zealand Ltd v Hall [1938] NZLR 1020 at p 1025 Callan J said,

"A caveat is the creature of statute and may be lodged only by a person upon whom a right to lodge it has been conferred by the statute. It is not enough to show that the lodging and continued existence of the caveat would be in some way advantageous to the caveator. He must bring himself within s. 146 of the Land Transfer Act."

31. So, Defendant should be able to establish a caveatable interest as stated in Section 106 of LTA. He needs to state a claim that can be included in Section 106(a) or Section 106(b) of LTA. The lands that are subject to LTA is contained in Section 5 of LTA and accordingly lands of *'all leases of iTaukei land granted pursuant to the provisions of the iTaukei Land Trust Act 1940...'* are included. It should be noted that though no caveat could be lodged for all iTaukei land, when such land is leased under iTaukei Land Trust Act 1940 a caveat can be lodged against the said land. When a caveat is lodged against such a lease, caveator should establish an interest in the land as the prohibition is in relation to land.
32. The Plaintiffs in its submission state that the Caveator has not met the burden of proving:
- (a) that he has any form of caveatable interest in the two Leases on which he has lodged the Caveats (the Plaintiffs' Main Submissions set out a number of separate alternative arguments on why his claims fail) or
 - (b) that the balance of convenience is best served by maintaining the Caveats.

33. There are 4 separate interests stated in the caveat and they are dealt separately below.

1st Caveatable Interest

34. The Plaintiff cannot lodge a caveat as a beneficiary under iTauaki Land Trust Act, personally as stated previously in this judgment. Even if the caveat is lodged in representative capacity, the Plaintiff needs to explain precisely as to how the interest had accrued to lodge a caveat for land described in NL 13796. Being an iTauaki owner does not derive an interest for a caveat over a leased land.

35. It is established that a "beneficial interest" for the purposes of section 106 means an equitable interest. In Philpott v NZI Bank (1989) 1 NZ ConvC 190,246 at 190,248 Cooke P of the New Zealand Court of Appeal stated,

"Counsel for the respondent [caveator] sought to maintain the caveats by various arguments, all of which come to substantially the same. It was said for instance that in sec 137(a) the words "beneficial interest" have a wider scope than equitable interest; that a caveat is supportable if the caveator has some "potentially" enforceable right; and again that, although the respondent [caveator] had to accept that this was not an equitable charge, nevertheless it was an equitable interest. No authority was cited supporting any of these interpretations of sec 137(a). In my opinion, for all purposes material to the present case the words "beneficial interest" refer to equitable interest and the section cannot be stretched to include mere potentialities which have not ripened into interest in any particular properties."

36. A caveatable interest for NL 13796 means an interest in the land. It is not disputed that Defendant is one of the beneficiary as a member of 'iTauaki Owners' but that alone would not suffice to lodge a caveat over any land leased by TLTB.

37. The specific interests claimed by the Caveator are important. Section 107 of the Land Transfer Act requires the Caveator to state with "sufficient certainty the nature of the estate of interest claimed and how such estate or interest is derived". The caveator failed to comply with the statutory requirements and did not state accurately the nature of interest claimed. (See New Zealand Mortgage Guarantee Co Ltd v Pye [1979] 2 NZLR 188 at 195)

38. So 1st caveatable interest cannot sustain as it had failed to comply with Section 107 of LTA being imprecise and vague and had not sufficiently described how he had derived any interest relation to land comprised in NL 13796. It is also not possible to claim individually by the Defendant as stated earlier.

2nd Caveatable interest – as Native Owners

39. It is trite law that *iTaukei* land is held by land owning units (also known as “proprietary units”) and not their individual members. In the lease agreement between TLTB and lessee, there is no definition of word ‘Native Owner’ so the term needs to be understood in terms of the law. In terms of Section.2 of both the *iTaukei* Lands Act and the *iTaukei* Land Trust Act the term “*iTaukei* owners” (previously “Native Owners”) is defined as “the *mutaqali* or other subdivision of the natives having the customary right to occupy and use any *iTaukei* land”. The Register kept under the *iTaukei* Lands Act records the unit which has been found to own the relevant parcels of customary land.
40. There is no recognition of individual members of land owning unit in NL 13796 and there was no evidence of such recognition by Plaintiff and or its predecessors as claimed by the Defendant at any point. Even the old Clause 15 of NL 13796 recognised TLTB (lessor) and Native Owners.
41. The words of the Caveats do not assert the existence of any such collective beneficial interest. They are expressed in personal terms hence fails to establish an interest recognized under law.
42. Not every land in Fiji is subject to the provisions of LTA. Unalienated State and *iTaukei* land are not subject to LTA. Only leases *iTaukei* land are subject to its provisions in terms of Section 5 of the LTA.

43. *iTaukei* land, is not held by way of fee simple. They are vested with TLTB. They can be leased by TLTB. It derives its right of control and the statutory trust arises under s. 4(1) of the *iTaukei* Land Trust Act which reads as follows

"4.-(1) The control of all iTaukei land shall be vested in the Board and all such land shall be administered by the Board for the benefit of the iTaukei"

44. The interests asserted by the Caveator, are in respect of land controlled by TLTB. By definition, therefore, the interests claimed cannot derive to Defendant personally.
45. The Caveator asserts that he has an interest in the reversion of the two leases. But he cannot protect that interest by way of a caveat. A caveat is a creature of LTA. It can apply only to land subject to LTA. The reversion of an *iTaukei* lease is not recognized under LTA for registration under LTA, and such right cannot be secured by way of caveat. If lodgement of caveats are allowed for rights other than what is recognized under LTA, any *iTaukei* land owner may file a caveat against any right over a land leased by TLTB including customary rights.
46. Alternatively, reversionary rights in *iTaukei* lease is a different kind of reversionary right to a reversionary right to a freehold land which can be protected by a caveat.
47. So if the land over which the Caveator claims he has an interest is **not** subject to LTA this is not an interest capable of being protected by way of a caveat.

3rd Caveatable interest

48. The Defendant is claiming shares for TLTB under that. This is clearly not an interest that the Defendant can claim without concurrence of TLTB. At the same time this is a claim for shares in Plaintiff. Such a share claim is not recognised under Sections 106 and 107 of LTA as it is not an interest in land. A corporate entity and ownership of its shares are distinct from the assets of such entity.

49. The meaning and the scope of application of section 106(a) was comprehensively explored by the Fiji Court of Appeal in Cambridge Credit (Fiji) Limited v W.F.G. Limited (1975) 21 F.I.R 182 at 184H-185A, where it was held that –
- "The [Caveator] must however, bring itself within the provisions of Section 106 and in order to do this must satisfy the court that the following are fulfilled.*
- (1) *That it is a person claiming to be entitled to or to be beneficially interested in any land estate or interest under the act; and*
 - (2) *That it is so claiming by virtue of any unregistered agreement or other instrument or transmission or any trust expressed or implied or otherwise howsoever.*
- ...
50. In Staples & Co v Corby and District Land Registrar (1900) 19 N.Z.I.R.517 where Stout C.J. at page 536 said:
- "Before a person can caveat under this section he must be a person who claims to be entitled to the land, or any estate or interest in the land, or to be "beneficially interested" in the land, or in any estate or interest in the land, and the person in either event must claim "by virtue of any unregistered agreement, or other instrument or transmission" (transmission meaning acquirement by title or estate consequent on death, will, intestacy, bankruptcy, &c) or of any trust expressed or implied, or otherwise howsoever".*
51. Section 106 of the Fiji Act is designed to protect unregistered instruments in land. For instance an agreement for sale and purchase, an unregistered mortgage, an agreement to give a mortgage, or an option to purchase land are just a few examples of unregistered instruments which are capable of being protected by the lodging of a caveat.
52. Strangely 3rd caveatable interest is relation to alleged right of TLTB to claim shares in Plaintiff, in terms of old clause 15 of the lease agreement between TLTB and lessee. There are two flaws in this alleged caveatable interest. First the present Clause 15 does not contain such right for ordinary shares, except in a case of issuance of redeemable shares, which had not arisen. Second, even if such a share claim is recognized it cannot be the basis for a caveat on an asset belonging to the Plaintiff. At maximum the claim

will end with allocation of shares and or damages to 'Native Owners'. Even then such 'Native Owners' will become minority share holder through TLTB and their right of first refusal will limit to the proportionate number of shares in Plaintiff. Such allocation of shares will not be a basis for caveat of the land leased to the Plaintiff. So a claim for shares in Plaintiff cannot be a caveatable interest.

4th Caveatable Interest

53. Fourth caveatable interest also rights to shares pursuant to old clause 15 of NL 13796. This provision is no longer applicable as substituted provision is now registered through a variation. The Defendant's interest is based on beneficial rights under existed provision that is no longer applicable.
54. These clauses were removed by Deeds of Amendment to both Leases dated 22 September 2015. These Deeds preceded the lodgement of the Caveats (which occurred on or about 3 November 2015).
55. Even if the above had not occurred, these clauses conferred specific rights under the Leases on TLTB to shares in the lessee, and other related shareholding rights (some time-limited) under each of the Leases.
56. The Caveator claims, in support of the Caveats, that he has beneficial interest in shares in the Plaintiffs. The Plaintiffs deny that any such interest exists. However, more fundamentally, a claimed interest in shares is not a claim to "any land...or an estate or interest therein" in terms of s.106 of the Land Transfer Act. Shares of an entity would not grant shareholder to caveat property of such entity.
57. Even if the Caveats can be treated as asserting a representative right the "trust" does not give a right to a caveatable interest.

58. What is the nature of the "trust" from which the interest is claimed? It is a specific statutory trust created by the *iTaukei* Land Trust Act, arising out of the vesting of control of all *iTaukei* land in TLTB (refer s.4(1) of the *iTaukei* Land Trust Act).
59. An *iTaukei* land owner has an interest in good administration of the trust property. That may give the landowner the right to sue TLTB for any claimed breach of trust. However it does **not give to the Caveator the right to lodge the Caveats over the Leases** based on claim for shares in an entity that is the lessee. The Lease is a contract between the TLTB and the Plaintiff. It is not a contract between the Caveator and the Plaintiff.

CONCLUSION

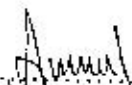
60. There are no caveatable interest recognized in law to support the extension of the caveat. In any event fundamentally, the Plaintiff cannot personally lodge a caveat against NL 13796 as claimed in the said Caveat No 820306. Hence it is removed forthwith and cost of this application is summarily assessed at \$2,000.

FINAL ORDERS

- a. The Caveat No 820306 is removed forthwith.
- b. Cost of this action is summarily assessed at \$2,000.

Dated at Suva this 20th day of November, 2017




Justice Deepthi Amaratunga
High Court, Suva