

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC331 of 2020

BETWEEN : **CONSTRUCTION EQUIPMENT HIRE PTE LIMITED** a limited liability company having its registered office at Lot 4, Wailada Industrial Subdivision, Lami in the Republic of Fiji.

PLAINTIFF

AND : **ORCHID FLAT INVESTMENT PTE LIMITED** a limited liability company having its registered office at Level 1, Nina House, Robertson Road in Fiji.

DEFENDANT

Counsel : Plaintiff: Ms. Prasad L.

Defendant: Mr. Savou J.

Date of Hearing : 05.11.2020 (9.00 am)

Date of Judgment : 05.11.2020 (3.30 pm)

JUDGMENT

INTRODUCTION

1. Plaintiff filed *ex parte* summons seeking extension of Caveat No 893722 over CT 42542. Plaintiff claims equitable mortgage over CT 42542, on the basis that it had advanced a loan facility to Defendant, for the purchase of CT 25233. Said land was transferred to the Defendant by a third party, on or about **4.8.2006** and the property was simultaneously, mortgaged to a commercial bank. According to Plaintiff the loan was granted to the Plaintiff to purchase the land comprised in CT 25233. Plaintiff had not filed the loan document, but filed an alleged letter of offer by bank, which was addressed to 'Construction Equipment Group'. According to the said offer dated **22.11.2006**, Defendant was offered an advance of \$422,889 by the said commercial bank, whereas Plaintiff was offered an overdraft, temporary overdraft and presumably another credit facility 'Visa Business' collectively amounting to \$170,000. The loan offer was addressed to 'Construction Equipment Group' and two loan facilities to Plaintiff and Defendant were stated separately as two distinct customers of the bank, and Securities were also stated separately for the Plaintiff and Defendant (on their

respective accounts). It is clear that bank considered two entities distinctly irrespective of both entities belonging to one Group of Company. There is no evidence that said advance of \$422,880 was advanced to Plaintiff and or channeled through them as an advance to Plaintiff, in order for Defendant to purchase land Comprised in CT 25233. Plaintiff had lodged a caveat over CT 42542 on the basis that it was a subdivision of earlier CT 25233 , and it was claiming and ‘*interest as equitable mortgagees in respect of having made advances for subdivision of the Head Title being CT No 25233 on the land described*’. It is mandatory for the caveator to state the nature of the interest and how it had derived (see Section 107 of Land Transfer Act 1971). The claim stated in the caveat is contrary to the claim stated in the statement of claim and affidavit in support of summons. So this application for extension of caveat is struck off *in limine*. Without prejudice to that, there is no caveatable interest in terms of the claims contained in the caveat. At the same time there is no caveatable interest to be tried as equitable mortgagee in relating to CT 42542 on the basis of that it had made advances from advance of \$422,880 by bank as it was a direct advance to the Defendant by the bank. There was no equitable mortgage interest arising from advances stated in financial accounts of Plaintiff, for the purchase of the said land (CT 42542) and or its head title CT No 25233. This application for extension of caveat lacks merits to grant interim measure for extension of caveat and struck off.

FACTS

2. Plaintiff filed writ of summons seeking Defendant to execute a mortgage over CT 42542, and also seeking extension of Caveat No 893722 lodged by Plaintiff over the said land be extended until final determination of this action.
3. Plaintiff had lodged a Caveat No 893722 registered on 4.8.2020 over CT 42542 and the claim for said caveat reads;

‘an interest as equitable Mortgagee in respect of having made advances for the subdivision of the head title being CT no 25233 on the land described..’
4. Land comprised in CT 42542 is a subdivision of land comprised in CT 25233, which was transformed to Plaintiff by third party 4.8.2006.
5. Plaintiff and Defendants belong to ‘Construction Equipment Group’ and they are related entities.
6. A commercial bank had addressed Letter of Offer to the ‘Construction Equipment Group’ on or around 22.11.2006. Both Plaintiff and Defendants were specific credit facilitation under said letter.
7. Plaintiff allege said advance of \$422,880 contained in Letter of Offer was a loan to Plaintiff for Defendant to purchase CT25233, and Plaintiff had advanced \$476,000 including said amount.

ANALYSIS

8. This is an application made *ex parte* for extension of caveat No 893722 in terms of Section 109 of Land Transfer Act 1971. Section 109 of Land Transfer Act 1971 **makes it mandatory for the party making an application for extension of caveat to serve the said summons** to the caveatee, and proof of that service of the summons to caveatee, needs to be before the court as preliminary requirement. This is irrespective of nature of applications is *ex parte*.

Section 109 of the Land Transfer Act 1971 reads,

“Notice and opposition to caveat

109.-(1) Upon the receipt of any caveat, the Registrar shall give notice thereof to the person against whose application to be registered as proprietor of, or, as the case may be, to the registered proprietor against whose title to deal with, the land, estate or interest, the caveat has been lodged.

(2) 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”.

9. Plaintiff had served the summons to the Defendant and filed affidavit of service. Counsel for the Defendant admitted that summons was served to them yesterday. He said that he would object to this application for extension on preliminary legal grounds. He also said if the *ex parte* application is allowed, he will be filing documents, in opposition of the application.
10. Plaintiff had not attached the evidence of the date of receipt of the Notice of Removal of Caveat presumably posted by the Registrar. It is at customary to file the envelope of the registered letter which will contain the dates of dispatch/receipt of the said letter to Plaintiff.
11. According to the Plaintiff said letter was dispatched on 14.10.2020 by Registrar, and they had received it on 20.10.2020. i
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12. There is an urgency regarding dealing with the application, as the Defendant did not consent to extension of Caveat 893722. So Plaintiff was heard and Defendant was granted opportunity to object to this application, on *ex parte* basis as stated in *Pickwick International Inc (GB) Ltd v Multiple Sound Distributors Ltd and another* [1972]3 All ER 384.

13. Since the service of summons for extension of caveat, to the caveatee is mandatory the application was heard on *ex parte* basis while giving an opportunity for the caveatee to be heard irrespective of their inability to file documents. There is a discretion granted to the court under Section 109 of Land Transfer Act 1971 for conduct of hearing.
14. There is a utility in such a scenario for hearing stipulated in UK decision in Pickwick International Inc (GB) Ltd v Multiple Sound Distributors Ltd and another [1972]3 All ER 384 and also accepted in commonwealth jurisdictions including Fiji. This is pertinent in application for extension of caveats. Caveatee had already made an application to the Registrar to remove the caveat and that was the reason for Notice of Removal of Caveat by Registrar in terms of Section 110(1) of Land Transfer Act 1971, hence caveatee must be notified of the application of caveator to extend the caveat, and that this is made mandatory by statute.
15. Defendant's position is that application for extension needs to be struck off in *limine* as there was no caveatable interest for equitable mortgage to Plaintiff. I need to consider this on the material before me. So refusal to extend caveat is when there is no caveatable interest on the material submitted to court.
16. It should be borne in mind any *ex parte* application for extension of caveat is not a rubber stamp for the court to extend it unless a caveatable interest is shown on the material before court.
17. In Butler v Fairclough (1917) 23 CLR 78, Griffith CJ said that the effect of the provisions relating to caveats is,

“not to enlarge or add to the existing proprietary rights of the caveator upon which the caveat is founded, but to protect those rights if he has any”.

18. So, a caveat can remain on the title if there is an existing right to be protected by way of the Caveat No 893722.
19. Who can register a caveat is contained in Section 106 of Land Transfer Act 1971. It states,
“Caveat may be lodged

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.”

20. In the text *Hinde McMorland & Sim Land Law in New Zealand* under CAVEATS AGAINST DEALINGS stated ;

“in reliance on the opinions expressed by the Court of Appeal in *Staples & Co Ltd v Corby*¹ and by the Privy Council in *Miller v Minister of Mines*², that there were only three situations in which a person could have an interest in land sufficient to support a caveat:³

(1)Where the claim is made under an unregistered instrument that is in registrable form;

(2)Where the claim arises out of a transaction that gives the caveator the right to have a registrable instrument executed and registered;⁴

(3)Where the caveator is a settlor or a beneficiary of a trust. (case references added)

21. Plaintiff neither had unregistered instrument that was in registrable form nor its claim arose from a transaction that allowed them a right to have registrable instrument regarding CT 25233. Plaintiff’s claim is a debt from related company advance. It cannot support a caveat.

22. A person having a caveatable interest in terms of Section 106 of Land Transfer Act 1971, in a property is required by law⁵ to state the interest or estate with sufficient clarity. This is important for the caveatee to understand the alleged interest and take appropriate action.

23. It also gives notice to any other who is interested in the said property such as prospective purchasers, mortgagees, investors etc. Under Torrens System registration confers title, hence caveat is a warning to caveatee as well as other interested parties, hence it obliged the caveator to state the interest with sufficient particulars. If not the caveat process can be abused, hence the value of title can be eroded easily, by any person without any caveatable interest on the property.

24. In *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:

¹ *Staples & Co Ltd v Corby* (1900) 19 NZLR 517

² *Miller v Minister of Mines* [1963] AC 484

³ See for example, *Conacher* (1963) 37 ALJ 25. See also *McPhee* (1995) 68 ALJ 484.

⁴ For example, an agreement for sale and purchase or an agreement to mortgage.

⁵ Section 107 of Land Transfer Act 1971

‘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 caveat is necessary to be bound by the precise form of words used.’ (emphasis added)

25. In Fiji Section 107 of the Land Transfer Act 1971 analogous to Section 138 of NZ Land Transfer Act 1952, states

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)

26. So it is paramount in terms of Section 107 of Land Transfer Act 1971, for the caveator to state the interest or estate with sufficient clarity and not to change such position when it seeks for extension of caveat.
27. There are two mandatory requirements in terms of Section 107 of Land Transfer Act 1971 for a caveat and they should state with ‘*certainty*’,
- a. Nature of interest or estate in the property.
 - b. How such an interest derived to the caveator.
28. Words are used in legislation for a purpose and word ‘certainty’ in Section 107 when given the contextual meaning require a Caveator to act diligently not only in stating its interest or estate in the property but also how it had derived such interest or estate. Caveator is bound by that claim stated in caveat.
29. 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.”

30. So it is not possible for Plaintiff to state interest or estate to the property without certainly and then claim an interest or estate contrary to how it derived such interest or estate.

What is the interest or estate claimed by the Plaintiff as the caveator in Caveat No 893722?

31. According to said caveat annexed as to the affidavit in support of ex parte summons as ‘HNP10’ it reads,

“an interest as equitable Mortgagee in respect of having made **advances for the subdivision** of the Head Title being CT No 25233 on the land ‘ described in CT 42542.’
(emphasis is added)

32. So the interest claimed in the Caveat No 893722 is as equitable mortgagee. How it had derived to the caveator was through ‘having *made advances for the subdivision of the Head Title being CT No 25233*’.

33. There is no evidence of any equitable mortgage on the basis advances were made for subdivision of Head Title CT No 25233. So, on the face of the said caveat, where the caveator was required to state the interest and how it derived with certainty, this application for extension fails. Plaintiff’s claim in the summons is based on the alleged advances by Plaintiff to the Defendant through a loan facility amounting \$422,880 granted to them to purchase CT 25233 in the name of Defendant.

34. Without prejudice to above, I have considered whether Plaintiff had shown caveatable interest in relation to CT 42542.

35. There was no claim in caveat that caveator had advanced money for purchase of CT 25233 instead it states that some money was given for subdivision of the said land. In spite of that Plaintiff claimed interest as equitable mortgagee.

36. Section 86 of Property Law Act 1971 states

‘**86.**-(1) A person having an equitable mortgage or charge on land created by writing or by deposit of an instrument of title registered under the provisions of the Land Transfer Act, for securing the payment of money and who has obtained a judgment of the court for the sum due may apply for and obtain an order for sale of the property subject to such terms and conditions as the court may direct.’

37. There is no evidence of equitable mortgage as caveatable interest for Plaintiff, from the documents filed before the court.

38. Head Title (CT 25233) of caveated title CT 89542 was transferred to the Defendant on 4.8.2006 and it was simultaneously mortgaged to the Bank.
39. The loan offer letter of the bank was dated subsequently on 22.11.2006, so there was no basis for the Plaintiff's claim for advance of \$422,880 by the bank, to them in said letter. Their alleged loan of \$476,000 to Defendant not supported by any evidence.
40. Contrary to that Letter of Offer dated 22.11.2006 had offered \$422,880 to the Defendant on their account with the bank. So it is wrong to state that \$422,880 was given to the Plaintiff, and it was on their account this was advanced. Plaintiff states that it gave a loan of \$476,000 to Defendant, including \$422,880 advance by Bank, to be utilized to purchase land comprised in CT 25233.
41. It should also be noted that on account (o/a) of the Defendant separate security was required in terms of Letter of Offer dated 22.11.2006 and this title of CT 25233 was free from encumbrances.
42. Plaintiff without any basis state in the affidavit in support at paragraph 15 that from the alleged debt of Defendant sated in financial accounts "an equitable mortgage has" arisen. This is factually and legally incorrect.
43. Plaintiff also claims that loan given by them for said \$476,000 was not paid and over the years it had accumulated to a sum of \$1,045,460. Alleged debt payable on demand cannot create an equitable mortgage.
44. There is no evidence that said amount of \$476,000 was advanced to Defendant as intercompany loan to purchase CT25233. The documents filed by the Plaintiff is contrary to the said claim contained in the caveat.
45. In the financial report for the year ended 31.12.2018 of the Plaintiff indicate only a sum of \$1,045,460 as related company dues without reference to any loan of a bank and or specific purchase of land.
46. Plaintiff does not have a caveatable interest for the property comprised in CT 42542 as of equitable mortgagee from the documents annexed to summons seeking extension of caveat.

CONCLUSION

47. Plaintiff had failed to establish caveatable right. Alleged loan offered by bank for \$422,880 was an advance offered to Defendant and not to the Plaintiff. Plaintiff was offered some other credit facilities, in the said offer. Application for extension of caveat is struck off. Considering that this was an ex parte application conducted with notice to Defendant, parties are to bear their own cost.

FINAL ORDERS

- a. Application for extension of caveat refused.
- b. No costs.

Dated at Suva this 5th day of November, 2020.



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Justice Deepthi Amaratunga
High Court, Suva