

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**

**CIVIL JURISDICTION**

**CIVIL ACTION NO. HBC 338/05**

**BETWEEN** : **COLONIAL FIJI LIFE LIMITED** a limited liability company having its registered office at Suva

**PLAINTIFF**

**A N D** : **ROSHANARA ALI** f/n Mohammed Ali of Suva in the Republic of Fiji

**1<sup>ST</sup> DEFENDANT**

**REGISTRAR OF TITLES** of Suva in the Republic of Fiji

**2<sup>ND</sup> DEFENDANT**

**Counsel for the Plaintiff** : C Lateef : Lateef & Lateef

**Counsel for 1<sup>st</sup> Defendant** : S Inoke : Sesefo Inoke

**Counsel for 2<sup>nd</sup> Defendant** : N/A

**Date of Decision** : 13 March, 2008

**Time of Judgment** : 9.30a.m.

**DECISION**

On 1 September 2005 the 1<sup>st</sup> defendant, by ex parte application, obtained an interim injunction restraining the Registrar of Titles, the 2<sup>nd</sup> defendant, from registering any dealings on the land title described as Lease No. 503776 being

Lot 9 D.P. 8091 Suva. This is its application for the continuation of the said injunction.

### **FACTUAL BACKGROUND**

Lease No. 503776 is all that land being C.T. 31046 described as Lot 9 DP 8091, Rokobili sub-division in Suva. It is owned by the Maritime and Ports Authority of Fiji, a body corporate established under the Maritime and Ports Authority of Fiji Act. The land was leased to Saheb Holdings Limited, a limited liability company with its registered office at Lot 2 Leonidas Street, Walu Bay, Suva. The term of the lease was for 75 years commencing on 19 April, 2000. The land was in turn mortgaged to the Plaintiff (Mortgage No. 527355) registered on 27 June, 2003. Saheb Holdings appeared to have defaulted in its payments of loan to the plaintiff. This led to the re-organisation of its loan repayments with the plaintiff and reflected in the Terms of Settlement filed into Court before Singh J on 8 April, 2005. According to Clause 2 of the Terms of Settlement, should Saheb Holdings fail to pay its debt by 400 pm on 6 May, 2005, the plaintiff is free to dispose by mortgagee sale Lease No. 503776. Saheb Holdings failed to pay on the due date. On 19 May, 2005, the plaintiff entered into an agreement for the sale and transfer of the lease to a third party, Hangton Pacific Company Limited. Consent from the lessor for the transfer was obtained on 6 July 2005.

Meanwhile on 12 May 2005, the 1<sup>st</sup> defendant lodged her caveat on Lease 503776 claiming an "interest or estate as a beneficiary by virtue of a contribution made towards the development of the property." According to her affidavit, the caveatable interest in the property represents funds of approximately F\$464,000.00 she advanced as loan to the Company over the period between September 2000 and September 2002. The purpose of the loan was, according to the 1<sup>st</sup> defendant, to acquire the said property and to fund the construction of a fish canning factory and support facilities. The Company resolution of 3 January 2001 and a Personal Loan Agreement dated 20 December 2002 are annexed to the 1<sup>st</sup> defendant's affidavit to lend credence to the said purpose. The 1<sup>st</sup>

defendant is neither a Director nor an official of Saheb Holdings, but as far as the Court can ascertain, she is the wife of one of the directors.

On 22 June, 2005 the Registrar of Titles, upon the plaintiff's application, and acting pursuant to section 116 (1) of the Land Transfer Act (Cap. 131) ("the Act") registered the removal of caveat application. On 11 July 2005, the Registrar notified the 1<sup>st</sup> defendant (the Caveator) of the plaintiff's application, purportedly relying on the provisions of Section 116 (1) of the Act which like Section 110 (1), would allow the Registrar to remove the caveat after 21 days from the date of the notice. This notice was served on the caveator's previous solicitors, Messrs Devan Prasad Esq. P.O. Box 17302, Suva.

While the Registrar of Titles was invoking his powers under Section 116, the plaintiff's solicitors had simultaneously proceeded by Summons filed on 7 July, 2005, calling upon the caveator, pursuant to section 109 (2) of the Act, to attend before the Court to show cause why the caveat should not be removed. The plaintiff's summons came before the Court on 20 July, when the 1<sup>st</sup> defendant was given 14 days to file her affidavit in reply with liberty to the plaintiff to respond, and the matter adjourned to 16 August for arguments. At the hearing on 16 August, the Court was informed by the Registrar that the caveat had been removed after the expiry of 21 days from his section 116 (1) notice. The Court then directed that the plaintiff withdraw its section 109 (2) application in view of the fact that the Registrar has already removed the caveat pursuant to his statutory powers. Liberty was given to restore it on 7 days notice.

On 17 August, Counsel for the 1<sup>st</sup> defendant filed an ex parte application for injunction restraining the Registrar from registering any dealings on the property and that the withdrawn Originating Summons application by the plaintiff be restored. In her affidavit in support, the 1<sup>st</sup> defendant argued that both the plaintiff and the 2<sup>nd</sup> defendant had not fully disclosed to the Court the true basis on which the caveat was removed, and which threw considerable doubt on the lawfulness of the purported removal of the caveat by the Registrar. The 1<sup>st</sup> defendant also informed that the settlement on the property was to take place

soon. This application was to be heard on 1 September, which information was relayed to the Registrar on 24 August. The settlement took place on the same day.

On 1 September, the 1<sup>st</sup> defendant's application was granted and the injunction restraining the Registrar from registering any dealing on the property was served on him on the same day. The matter was adjourned to 29 September for arguments on whether the injunction should continue.

### **REGISTRATION AND REMOVAL OF CAVEAT**

The law on registration and removal of caveat is set out fully in Part XVII of the Act. Authorities on what requirements to be fulfilled and procedures to be followed are abundant, both in the decisions of our Courts and as well as in jurisdictions that have the Torrens land registration system.

Section 106 of the Act prescribes the legal requirements before any person is permitted to lodge a caveat in any land. Upon registration of the caveat by the Registrar, it remains on the land, until it is removed by either of four (4) ways, namely:

- (i) under section 109 summons, or
- (ii) through the Registrar's notice under section 110; or
- (iii) by voluntary withdrawal under section 111; or
- (iv) under section 116 procedure.

### **REMOVAL OF CAVEAT UNDER SECTION 109**

Under this section the Registrar is required, after receiving and registering any caveat, to notify the registered proprietor or any person with any registered interest in the land, that a caveat has been lodged. The registered proprietor or any of the interested parties may, upon the receipt of the Registrar's notice, by Summons apply to the Court for the caveator to show cause why the caveat should not be removed.

It is important to note that the section 109 procedure firstly requires the Registrar to notify not only the registered proprietor, but also all those who have registered interests in the land. These would include registered mortgagees and other charge holders. Any one of these class of persons may under section 109 (2), by Summons, apply to the Court for the caveator to show cause. The Court upon hearing of evidence it requires, may make orders accordingly.

### **REMOVAL OF CAVEAT UNDER SECTION 110**

The procedure under this section requires the caveatee, upon receipt of the Registrar's notice of the caveat, to apply to the Registrar for its removal. The Registrar thereafter notifies the caveator of the application and requiring the caveat be withdrawn and warning that he will remove the caveat "after the lapse of twenty-one days from the date of the service of such notice at the address mentioned in the caveat."

Under section 110, it is the caveator who goes to the Court by way of Summons, seeking an order for extension of the life of the caveat beyond the 21 days in the notice. The Court may, on the evidence before it, make such order as it thinks it.

### **REMOVAL OF CAVEAT UNDER SECTION 111**

Under this section, a caveat may be voluntarily removed, in whole or part, or the caveator consents to the registration of a dealing subject to the caveat.

### **REMOVAL OF CAVEAT UNDER SECTION 116**

This section deals with the removal of a caveat "where it appears to the Registrar the estate or interest of the caveator has ceased to exist". The requirement is that the Registrar must be satisfied that there no longer is any interest, recognised under section 106, of the caveator to support the caveat remaining. Once he is satisfied, the Registrar may, by his own motion or by the application

of an interest party to the land, serve notice on the caveator requiring the caveator to, within the next 21 days from the date of the notice, either withdraw the caveat or commence court proceedings to substantiate his claim. The Registrar has the power to remove the caveat and notify the caveator thereafter, should the caveator fail to act in accordance with the notice, after the 21 days.

### **COURT'S CONSIDERATION**

I have gone into some length detailing the different procedures for the removal of a caveat as provided under the Act, to emphasise the fact that each procedure is adequate of its own and self-sustaining. They are not inter-dependent but exist to cover different situations and/or circumstances. In my view, it is enough that a registered proprietor or a registered interested party, or even the Registrar preferred one procedure over the other in situations where there is a choice of remedies available.

It is quite apparent in this case, that the parties had probably unintentionally invoked their rights reflecting their interests in Lease No. 503776 by attempting to avail themselves multiple reliefs under the Act, all at the same time. For example, the plaintiff, upon receipt of the Registrar's notice of the 1<sup>st</sup> defendant's caveat, applied to the Registrar, under section 116 (1) for the removal of the caveat. The application was registered on 22 June 2005 but the notice to the caveator is dated 11 July, 2005. While the Registrar was still notifying the caveator of the plaintiff's application, the plaintiff began his section 109 (2) application by filing its originating Summons on 7 July 2005.

The plaintiff's action in using both sections 109 (2) and 116 (1) procedures under the Act and at the same time, is not only duplicative but undesirable and ill-advised. The plaintiff in the circumstances of this case, should have either allowed section 116 proceedings to take its course or alternatively proceed with its S109 (2) summons while notifying both the defendants of the same. The undesirability and in the end the legality or otherwise of both the plaintiff's and the Registrar's actions, brought about by the plaintiff's decision to pursue both

sections 109 and 116 reliefs simultaneously is well illustrated in this instance. First the Registrar notified the plaintiff as caveatee, of the caveat. The plaintiff applied for its removal under section 116. This was registered on 22 June 2005. Notice under section 116 dated 11 July 2005 was sent by the Registrar to the caveator. The 21 day notice, after which the caveat would be removed if no action is taken would have expired on 1 August 2005. Yet before the expiry of 21 days, the caveatee begun its S109 (2) summons. It was served on the caveator and both the parties including the Registrar appeared before the Court under the Summons on 20 July when the Court directed that the caveator filed affidavits in response to the caveatee.

What effect does the caveatee's summons have on the Registrar's S116 (1) notice? In my view, the summons and the appearance of the caveator pursuant to it, followed by the Court's direction for the caveator to file affidavits in response, effectively estops the Registrar from proceeding further under S116 (1). The Registrar's notice is in effect rendered legally ineffective by the plaintiff's summons and consequential Court's directions. The actions required of the caveator by the Registrar under S116 (1) notice had been pre-empted and as a consequence superseded by the section 109 (2) summons and proceedings.

In this case the plaintiff's originating Summons should have been allowed to run its course. The Registrar should have desisted from removing the caveat under section 116; his decision overtaken by the Court's directions of 20 July 2005. This means that the purported removal by the Registrar of the 1<sup>st</sup> defendant's caveat after the expiry of 21 days notice is legally ineffective and therefore the caveat remains on the land.

There is a further very important factor in the Court's consideration, that this case raises on the relevant forms and procedures to be followed by the Registrar in dealing with removal of caveats. Firstly, the Court notes that whilst both the plaintiff's application for removal and the Registrar's Notice to the caveator of the same, are headed "Removal of Caveat Under Section 110 – Land Transfer Act", the contents state that they in fact deal with section 116. This is totally

inappropriate and may have contributed to the confusion of the parties. Proper Section 116 form should have been used or the reference to Section 110 obliterated from the other. Secondly, the plaintiff's application for removal is based on Section 116 (1). Unlike the application under S110 which does not require the Registrar to decide the merits of retaining a caveat, Section 116 gives the Registrar the discretion to ascertain whether the caveator's interest to sustain a caveat, still exists. The fact that, as in this case, there is a prior existing registered mortgage, is not of itself sufficient, I suggest, to satisfy the requirement under the section.

Counsel for the caveator argued that before the Registrar acts under section 116, there must be a proper basis for his decision. He cannot act arbitrarily or in bad faith. This Court agrees with the argument. The Registrar must be satisfied beyond doubt that the interest has ceased. For example, where the Registrar has documentary proof that the Caveator's interest in the land has passed to another or a third party. He cannot surely assume that the interest has ceased to exist on the submission or application of one side alone unless of course it is the caveator himself who is applying. It is the duty of the Registrar at all times to ensure that the interests of the caveator is protected. So unless he is able to establish a proper legal basis for his decision to remove a caveat under section 116, his only option is to leave the caveat alone. It is the pre-requisite to Section 116 that the Registrar is satisfied that the interest of the caveator has ceased to exist.

In this case, the Registrar's action in purporting to remove the caveat pursuant to his powers under S.116 is untenable. He firstly, is not privy to all the information that is necessary both from the caveator and the applicant party that may be said is necessary to provide the proper basis for his action. All he has is the application from the plaintiff as the registered mortgagee. This clearly is not enough to support the exercise of his discretion in favour of the removal. Second and more importantly, he is already a party to the plaintiff's summons under S109 (2) and had attended Court on 20 July. This is well before the expiry of his 21 days notice on 1 August. He is already on notice and is well aware of the Court's directions that should have prevented him from removing the caveat. To all



intents and purposes his notice had lapsed and deemed ineffectual and without adverse legal consequences to the caveator.

There is finally the question of whether the plaintiff's application of removal of the caveat under S116 should have been accepted by the Registrar. The facts of this case, it is clear to the Court, may only support a section 110 (1) application. This is because the requirements of S116, that the Registrar to be first satisfied that the caveator's interest has ceased, cannot, the Court suggests, be met by the application of a registered mortgagee alone. Given this conclusion, the Registrar should have informed the plaintiff that it must apply for the removal under section 110 (1) and not S116 (1).

In the end, I am satisfied that the action by the Registrar in removing the caveat pursuant to S116 is improper and therefore unlawful.

Order is made for Caveat No. 564787 to be re-instated forthwith.

The plaintiff's originating Summons seeking the removal of the caveat had been withdrawn after the Registrar informed the Court that he has removed it pursuant to the exercise of his powers under Section 116. The Court has now found that the removal was unlawful. It is left for the Court to decide on whether the caveat should continue. To do so, Order is made for the plaintiff's summons to be restored for hearing on a date to be fixed.

Costs in the cause.



**F Jitoko**  
**JUDGE**

**At Suva**

**Thursday 13 March 2008**

