

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Civil Action No: HBC 22 of 2011S.

IN THE MATTER of land Transfer Act
Section 109

AND

IN THE MATTER of an application to
remove Caveat No. 735229 lodged by
Raajeshwaran Nair against Certificate of
Title No. 10153, the property of
Rameshwaran Nair and Raajeshwaran
Nair.

BETWEEN : **AUSTRALIAN AND NEW ZEALAND BANKING GROUP LIMITED** a
duly constituted banking corporation having its registered office in
Melbourne, Australia and carrying on business in Suva and having
branches throughout Fiji.

APPLICANT

AND : **RAAJESHWARAN NAIR** of 105 Laucala Bay Road, Suva.

RESPONDENT

BEFORE : **Justice Deepthi Amaratunga**

COUNSEL : **Ms. B. Narayan** for the Applicant
Mr. V. Sharma for the Respondent

Date of Hearing : **3rd June, 2011**

Date of Decision : **9th May, 2013**

DECISION

A. INTRODUCTION

1. This is an applications filed by the mortgagee of the property in order to remove caveat filed by the owner-mortgagor. The mortgagor is alleging fraud and deception against the Applicant-mortgagee. At the time of hearing of the

application the mortgagee sale was completed and an agreement between the Applicant-mortgagee and the prospective buyer was entered and the said buyer had also lodged a caveat on the property upon said agreement to sell. After hearing of this application, parties were granted time to file written submission and on this day I was informed that parties would need further time to settle all the issues between all the parties including the prospective buyer who had also lodged a separate caveat on the basis of the sale and purchase agreement, and there were other caveats lodged by the wife and the father in law of the Respondent- mortgagor, and considering the number of caveats lodged in respect of this property, the court allowed the parties to settle. The prospective buyer also filed a separate application for the extension of the caveat that he lodged based on the sale and purchase agreement, and after the hearing of the said application, the said caveat was extended, and the determination of this hearing was adjourned till the determination of the said application for extension of caveat filed by the prospective buyer, by the request of the parties to present action. The said buyer had also filed an action for specific performance of the said sale and purchase agreement. The parties to this action sought the determination of this action be postponed till a determination of extension of caveat filed by the prospective buyer. After conclusion of the said action filed by the prospective buyer, the Applicant –mortgagee sought further time to inform the court whether it desired to proceed with this application for removal and finally in April, 2013 it indicated that settlement could not be reached and the court granted parties to file written submissions and the Applicant- mortgagee did not file any submission.

B. THE LAW AND ANALYSIS

2. Section 106 of the Land Transfer Act deals with the lodgment of caveats and states as follows

“PART XVII-CAVEATS

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.”(emphasis is added)

3. Section 109 of the Land Transfer Act deals with the procedure of opposition to caveats and states as follows

‘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.’

4. The Applicant being the mortgagee has instituted this action in terms of Section 109 (2) of the Land Transfer Act. In *The Fiji National Provident Fund Board v Vivrass Holdings Limited* and *Registrar of Titles Office* Justice Jitoko’s decision of the High Court of Fiji at Suva Civil Action No. HBD 325D of 2002S in dealing with an application by the Plaintiff by originating summons under section 109 (2) of the Land Transfer Act for the First Defendant to show cause as to why the caveat lodged by the First Defendant should not be removed by the Court held that **“In order for the First Defendant to sustain its caveat, it must show that it has a caveatable interest in C.T.24128”**.The said *Fiji National Provident Fund Board* case determined that the Fiji equivalent to New Zealand’s section 146 (now NZ section 137 (a)) is section 106 of the Land Transfer Act).
5. Justice Jitoko in the said case stated that the essential requirement in caveatable interest is that the right base on statute confers an estate or interest in land. It is this interest in land that gives a person the locus standi to caveat. It was quoted with authority **“Guardian, Trust and Executors Company of New Zealand, Limited v. Hall [1938] NZLR 1020 at 1025** where it held in Gallan J’s judgment as follows

“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 section 146 of the Land Transfer Act.”(emphasis is added)

6. The summons in this action was filed by the Applicant- mortgagee in terms of Section 109 (2) of the Land Transfer Act seeking the removal of the caveat lodged by the Respondent-Mortgagor. The Respondent is also the joint tenant of the property and he is holding a registered interests in the property as opposed to any unregistered interest as stated in of Section 106 (a) or any provision of Land Transfer Act under Section 106(b). The ‘*caveatable interest*’ has to be described clearly, in the affidavit in opposition, the burden is fairly and squarely with the Respondent-mortgagor. The Respondent had not filed the said caveat which should have described the caveatable interest. Neither party had produced the caveats to the court in order to ascertain the alleged caveatable right of the caveators. The Applicant- mortgagee had stated in its affidavit in support that caveat was not available to obtain a certified copy, at the moment they inquired it from the Registrar of the Title since it was handed over to the caveator for a correction, but this is a duty of the Respondent and he had even failed to address it in his affidavit in opposition.
7. This is a vital fact in the determination of the removal of caveat. Section 106 (a) and (b) indicate separate instances where a person could lodge a caveat. Section 106(a) deals with an entitlement or beneficial interest by virtue of any unregistered agreement or other instrument or transmission, or of any trust expressed or implied, or otherwise howsoever, and this has to be described in the caveat if not the process of caveat can lead to abuse and suppression of the rights of the parties who are restrained from dealing with the property. The caveator should be able to demonstrate the caveatable interest in terms of the statute as held in Guardian, Trust and Executors Company of New Zealand,

Limited v. Hall [1938] NZLR 1020 at 1025. The best evidence of caveatable interest is the caveat which should specify the basis of the caveat. The caveat is a statutory creature which restrains dealing of the said property, and caveator has to be specific as to its right to caveat the property and this should only be confined to Section 106 of Land Transfer Act. The caveator cannot be vague and speculative, by writing letters to Registrar and the interest should be clearly and succinctly stated in the caveat itself. The Respondent even in its affidavit in opposition failed to annex a copy of the caveat he lodged which should denote the caveatable interest.

8. The Applicant had filed a letter written by the mortgagor – caveator to the Registrar of Titles on 20th December, 2010 and in that letter had indicated the purported basis for his caveat as the fraud of the joint owner of the property and ANZ Bank (the Applicant). This letter is annexed to the affidavit in support by the Applicant.

9. The Respondent – mortgagor filed an action against the Applicant and also sought to stay the mortgagee sale of the property which was struck out twice for non-appearance in support of the injunctive relief against the Applicant – mortgagee. In the ruling delivered for the reinstatement of the said motion seeking injunctive relief against the Applicant-mortgagee, the High Court Judge observed as follows

It further shows that the plaintiff has **no arguable case against the defendant** also (sic). Therefore, even if the plaintiff's application for reinstatement is allowed, **it is very unlikely, that he would succeed in the injunction application.**

The Plaintiff resorts to the injunctive relief in order to stop the mortgage sale(sic), which **in my view is a clear case of misuse or unfair use of court process and procedure, and therefore, would amount to an abuse of process.**

If the plaintiff's application for reinstatement is allowed, it would restrain the defendant from exercising their lawful rights under the mortgage, and it would certainly cause serious prejudice to the defendant bank.' (emphasis added)

10. The said observations of the High Court Judge, indicate that Plaintiff in the said action, who is the caveator in caveat no 735229 lodged against certificate of Title No 10153, and the Respondent in this action, did not have and arguable case and the mortgagee sale was not restrained in any manner by the High Court Judge. The said decision of the High Court Judge was not appealed and the Respondent-mortgagee who is also a joint tenant who has a registered interest on the property is attempting to do what he could not achieve through the refusal to obtain an injunctive relief. This can be considered as an abuse of process, where the registered joint owner had lodged a caveat against the property on which he had mortgaged the property to the Applicant-mortgagee. The Respondent-mortgagor cannot re-litigate the same issue before the court in this application.

11. The Respondent is not alleging any fraud against the Applicant for the said execution of the mortgage instrument, all parties agree that it was executed on the free will of the parties hence the Respondent had parted with his right to the property as far as the mortgage instrument authorized. The mortgage agreement between the mortgagor and mortgagee granted certain rights to the mortgagee and the mortgagor cannot prevent such exercise of the rights of the mortgagee through a caveat. The mortgagor is estopped from denying the rights he voluntarily granted to the mortgagee. This is not the scope of the Section 106 of the Land Transfer Act. If this is allowed any mortgagor could stall mortgagee sale administratively by lodging of a caveat, which is clearly outside the scope of the Section 106. The mortgagee's rights cannot be restrained by the owner-mortgagor in terms of section 106 as such interest is not covered in the said provision of law.

12. Any subsequent act of the mortgagee after the execution of the mortgage agreement cannot create a caveatable interest to the owner- mortgagor. If such right is recognized the right of the mortgagor to sell the property is undermined, and can lead to abuse. In order to lodge a caveat the caveator should have a right recognized under Section 106 of the Land Transfer Act and also it should be clearly stated in the caveat. The provision of the law contained in Section 106 of the Land Transfer Act stated that right of the caveator has to be '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**'. The Respondent mortgagor is registered owner – mortgagor of the property. The Respondent does not fall in to any category that is being recognized in the said provision of law.
13. Once he had parted with his rights to the mortgagee, the exercise of them cannot be prevented by a caveat though that may be a subject of an injunction in limited circumstances, as developed by case law. Having being unsuccessful in obtaining an injunction against he mortgagee sale the Respondent cannot prevent the transfer of the said property in order to complete the mortgagee sale. He is having a registered right as a joint owner of the property, which he had voluntarily mortgaged to the Applicant – mortgagee. So, he could not be allowed to prevent the exercise of the mortgagee rights by lodging a caveat against the exercise of mortgagee rights. This is not a recognized right in terms of the Section 106 of the Land Transfer Act.
14. In Cambridge Credit (Fiji) Ltd v. W.F.G. Ltd Vol. 21 FLR 182 the Fiji Court of Appeal stated that section 106 is concerned with the protection of unregistered instruments in land, and added, (p.185).

“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.’ (emphasis added)

The Fiji Court of Appeal in the said case p 184 at paragraph [H]stated,

“That the respondent 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 an unregistered agreement or other instrument or transmission or any trust expressed or implied or otherwise howsoever.”

15. In Miller v Minister of Mines and Another - [1963] 1 All ER 109 at p 112-113 Lord Guest in the Privy Council interpreting the New Zealand law regarding caveat procedure, which is similar to Fiji, stated as follows

‘The caveat procedure is an interim procedure designed to freeze the position until an opportunity has been given to a person claiming a right under an unregistered instrument to regularize the position by registering the instrument.’

16. The analysis of the statute and case law is that a register owner of the property who had voluntarily mortgaged the property cannot lodge a caveat to prevent the exercise of the mortgagee rights as his right to the property is registered and had parted some rights to the mortgagee in terms of the mortgage agreement.

Even if I am wrong on the above lack of caveatable interest in terms of Section 106 of the Land Transfer Act, to the Respondent-mortgagor to lodge a caveat I would further discuss the issue of caveatable interest below.

Has the Respondent established a caveatable interest on alleged fraud of the Applicant –mortgage.

17. In the said Eng Mee Yong &Ors [1980] AC 331 judgment of Lord Diplock held

“This is the nature of the onus that lies upon the caveator in an application by the caveatee under s 327 for removal of a caveat: he must first satisfy the court that on the **evidence presented to it his claim to an interest in the property does raise a serious question to be tried;** and, having done, so he **must go on to show that on the balance of convenience it would be better to maintain the status quo until the trial of the action,** by preventing the caveatee from disposing of his land to some third party.” (emphasis added)

18. When the Respondent-mortgagor sought injunctive relief against the mortgagee the observation of the High Court Judge was that the Respondent was trying to abuse the process of the court when the Respondent did not have an arguable case before the court. The conduct of the Respondent is found wanting in many a time and when he appeared in person and frequently tried to mislead the court and was also not truthful to say the least. A party seeking interim relief similar to injunction or a caveat should not suppress material facts and the Respondent had not produced material correspondence between the parties from 2009 when the loan account 978851, was already in arrears. There were evidence that even earlier the same account was in arrears and the Applicant-Mortgagee had allowed the mortgagor to reduce the repayment of loan installment by restructuring the loan. This indicate bona fides of the Bank in

this dealing and more particularly of this loan account and their desire not to proceed with the mortgagee sale in the first opportunity of default.

19. The Respondent is stating in his affidavit filed on 28th April, 2011 in paragraph 4 that he was advised to let the loan account to accumulate in arrears so the applicant mortgagee could set demand notice to the other joint owner of the property, who is a brother of the Respondent, in order to force him to transfer his share of the property to the Respondent. For this the Respondent had filed an email he had written to the Applicant-mortgagee marked RN3 where he alluded the same sentiments, but apart from this there were no evidence before the court that supports said email RN3. This is an email sent by the Respondent and there were evidence against this contention, through the communications between the Applicant- mortgagee and the Respondent-mortgagor after the loan account went in to arrears. The observations of the earlier ruling and the conduct of the Respondent in this whole episode cannot be ignored in the analysis of the material before me. So the email of Respondent annexed RN3 and allegations therein has to be considered with a pinch of salt.

20. Even as far back on 6th February, 2009 the Applicant-mortgagee had written to the then solicitors of the Respondent describing the predicament of the same loan account and the impasse between the joint owners of the property and the said communication amply demonstrate the efforts taken by the Bank to regularize the loan account 9758851 which was stated in the said email annexed as RN3 to the affidavit in opposition. The email RN3 is dated 12th January, 2010 and the said letter of 6th February, 2009 which was nearly one year prior to the said email describe circumstances that had led to the accumulation of the arrears of the loan account. The said letter of Applicant dated 6th February, 2009 **Re Housing Investment Loan account No 978851**, stated inter alia as follows

‘Messrs Nairs had repayments problems in 2008 and were assisted by Bank in April 2008 via restructure of loan. **We approve maximum term of 25 years with reduction in**

loan repayments to \$5554.21 for 1st 12 months thereafter repayments to increase to \$6553.98 effective May 2009. **Bank also approved an overdraft Limit of \$3000 for 3 months in July 2008 to assist them to catch up with arrears and this was to clear from rentals and salaries.** We still carry this overdraft and is inoperative now. **Messrs Nairs cannot complain that we have not assisted them during the difficult times when they were unable to meet repayments.**

The Bank has already spent too much administration on this account to date and do not intend to do so in the future., except for full clearance of arrears and commencement of payments in terms of arrangements. We had put them on Notice via our letter dated 21/11/2008 and 5/12/2008 to clear arrears when this was \$5586.23 however this continued and we were forced to serve Demand Notice on them.

However as a last measure of assistance we have agreed to hold further actions until 01/03/2009 to arrange for clearance of arrears and to commence with normal monthly repayments.’ (emphasis added)

21. The said letter was annexed as ‘F’ to the affidavit in opposition filed by the applicant to the motion seeking injunction, and the entire proceedings of the said action was filed through an affidavit in response since the counsel for the Respondent consented said evidence being led in this proceedings as it had already been filed in the said action relating to the injunction. So, the affidavit in reply to the affidavit in opposition contains the documents already submitted to the court earlier in the application regarding the injunction, and this was done with consent. In any event the right to reply remained with Applicant and

what was produced were entire proceeding including the affidavits of the Respondent.

22. In the circumstances the materials before me does not indicate caveatable interest. The balance of convenience is in favour of the Applicant. The Respondent-mortgagor's application to prevent the mortgagee sale being completed was struck out twice by the court for want of appearance and in the application for reinstatement the court held that the said application for injunction was an abuse of process. The Applicant proceeded with the mortgagee sale and a successful tender was accepted and a sale and purchase agreement was entered between the Applicant and the prospective buyer. The caveat lodged by the said prospective buyer was extended. The Applicant had granted ample opportunity for the Respondent to settle the arrears of the loan account from 2009 and he had failed to do so and finally the mortgagee sale was conducted after the unsuccessful attempt to stall the mortgagee sale, but due to the effort of the Respondent the property could not be transferred though a sale and purchase agreement was reached between the Applicant –mortgagee and the prospective buyer. The said buyer had also instituted an action seeking specific performance of the said sale and purchase agreement. The specific performance of the sale and purchase agreement is restrained by the caveat lodged by the Respondent for a considerable time. The loan account had accumulated during the time period and the actions of the Respondent had prevented the Applicant from clearing its overdue loan account through a mortgagee sale. The damage and loss to the Applicant is evident due to non-settlement of the arrears of the loan account 978851. Though the sale was conducted and a successful tender was selected the actual transfer of the property did not eventuate due to the caveat of the Respondent. So, the balance of convenience rests heavily on the Applicant who is incurring legal costs as well as arrears in the said loan account of Respondent – mortgagor. The allegation contained in email RN3 cannot establish a caveatable interest in terms of Section 106 of the Land Transfer Act upon the analysis of the evidence before me.

C. CONCLUSION

23. Neither party had produced the caveat to the court in order to ascertain the caveatable right of the caveator. The Applicant had stated in its affidavit in support that it was not available at the moment they inquired it from the Registrar of the Title since it was handed over to the caveator for a correction. The Applicant had filed a letter written by the mortgagor –caveator to the Registrar of Titles on 20th December, 2010 and in that letter had presumably indicated that the basis for his caveat as the fraud of the co-owner and ANZ Bank (the Applicant). The Respondent being the joint owner of the property who has a registered interest which is subject to a mortgage cannot lodge caveat in terms of Section 106 of the Land Transfer Act as to the property to prevent the exercise of the mortgagee rights. It was held in Privy Council in Miller v Minister of Mines and Another [1963] 1 All ER 109 that basis of a caveatable interest is that **‘opportunity has been given to a person claiming a right under an unregistered instrument to regularize the position by registering the instrument’**. This clearly not the position of the Respondent- mortgagor who is also a joint owner of the property in issue, there is no right for the Respondent to be regularized his right is already registered on the title. The caveat process cannot be abused for ulterior motives. The caveat process is an interim measure till the caveator registering his unregistered instrument as held in Privy Council in Miller v Minister of Mines and Another [1963] 1 All ER 109 . The allegation contained in the affidavit in opposition does not disclose a caveatable interest. Without prejudice to what was stated above, the pending action filed by the Respondent sought an injunction against the mortgagee sale and he was not successful in obtaining a restraining order against the mortgagee sale. In the said ruling the court had stated that the action of the Respondent was an abuse of process. So, the Respondent –mortgagor cannot prevent the transfer of property in pursuant to a mortgagee sale by lodging a caveat, which is the result that Respondent is trying to achieve indirectly. The conduct of the Respondent in this case amounts to abuse of process. The Respondent was unsuccessful in obtaining and injunction against the Applicant –mortgagee directly now attempting to obtain a restraint against the same party

against the same transaction indirectly, by lodgment of the caveat. The Applicant-mortgagee had allowed sufficient time to settle the account which was in arrears since 2009. The Respondent's conduct and the Applicant's efforts are amply demonstrated in the letter dated 6th February, 2009 which stand against the email annexed RN3 to the affidavit in opposition. The balance of convenience rests with the applicant who was prevented from the performance of sale and purchase agreement with the successful tenderer to transfer the property. There is no caveatable interest to the Respondent and the caveat No 735229 is to be removed forthwith. The Applicant is granted a cost of \$1,000 assessed summarily to be paid by the Respondent.

D. FINAL ORDERS

- a. The Caveat No 735229 is removed.
- b. The Applicant is granted a cost of \$1,000 assessed summarily.

Dated at **Suva** this **9th day** of **May, 2013**.

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Justice Deepthi Amaratunga
High Court, Suva