

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 064 OF 2024

BETWEEN : KONTIKI FINANCE LTD

Plaintiff

**AND : BOBBY RATISH LAL trading as RATU TAI & LAIJI
INVESTMENTS or RATU TAI & LALJI INVESTMENTS**

First Defendant

AND : FIJI DEVELOPMENT BANK

Second Defendant

AND : THE REGISTRAR OF TITLES

Third Defendant

AND : THE ATTORNEY-GENERAL OF FIJI

Fourth Defendant

Counsel : Mr K Goundar for the Plaintiff

No appearance for First Defendant¹

Mr N Lajendra for Second Defendant

Mr V Ram for Third and Fourth Defendants

Hearing : 15 March 2024

Judgment : 18 March 2024

¹ The First Defendant was only served with the Summons on 14 March 2024. The Affidavit of Service was produced to the Court at the hearing on 15 March.

JUDGMENT

(On Summons for Extension of Caveat)

- [1] The Plaintiff has a caveat registered over Crown Lease 13370 Lot 1 SO 3525, at Macuata, Labasa (hereinafter referred to as 'Crown Lease 13370'). The Second Defendant has applied to remove the caveat in order to undertake a mortgagee sale of Crown Lease 13370.
- [2] The Plaintiff says that the caveat will be removed by the Registrar of Titles on 18 March 2024 if an extension is not granted by the Court. Hence, the urgency of the present application by the Plaintiff to extend the caveat.

Background

- [3] The First Defendant owns Crown Lease 13370. The property was purchased by him in May 2017 on, it appears, a loan from the Bank of Baroda. Only a little more than a year later, the First Defendant obtained a mortgage from the Second Defendant. The mortgage was registered on the Title on 6 September 2018.²
- [4] About the same time the First Defendant secured a mortgage from the Second Defendant, he was in communication with the Plaintiff to obtain a loan for about \$114,000 for domestic expenses. A loan offer was made by the Plaintiff to the First Defendant on 2 October 2018 and signed by the First Defendant on the same day.³ The terms of the offer included placing a security on Crown Lease 13370. It being noted at clause 17.1 that '*consent and caveat fee to be borne by client*'. The First Defendant duly arranged for a caveat to be registered on the Title on 25 October 2018. I note that the First Defendant obtained the consent of the Director of Lands on 24 October 2018 to the caveat – the Director's stamp and signature can be found on the caveat at Annexure G of the affidavit of Mr Bhavishna Chand dated 8 March 2024.
- [5] It does not appear that the First Defendant made many repayments on his loan to the Plaintiff. Only a relatively short time after the loan was secured, the Plaintiff obtained Default Judgment against the First Defendant in the Labasa High Court in the amount of

² The mortgage to the Bank of Baroda was cancelled around this time.

³ This occurred after the Second Defendant registered its mortgage over Crown Lease 13370.

\$139,492.29.⁴ It appears that the Plaintiff has tried to enforce the judgment but been unable over the years to serve the First Defendant, who apparently has been evading service.

- [6] It also appears that the First Defendant has not been keeping up with his mortgage payments to the Second Defendant either. The Second Defendant intends to sell Crown Lease 13370 in order to recoup the unpaid mortgage. In early 2024, the Second Defendant took steps to have the caveat removed. The Registrar of Titles issued a Notice of Removal of Caveat on 6 February 2024. The Notice reads:

NOTE – After the lapse of 21 days from the date of service of this Notice, the said Caveat will be removed, unless an order from the High Court to the contrary has been served upon me.

- [7] The Notice was received by the Plaintiff on 27 February 2024. The parties agree that the 21 days expires on 18 March 2024. By my calculation, the 21 days ends on 19 March. Either way, the time available for the Plaintiff to obtain an extension is limited. It has filed an Originating Summons seeking a declaration that it has a caveatable interest in Crown Lease 13370 and an order permitting it to register a mortgage or charge on the lease. In the meantime, the Plaintiff seeks an urgent extension of the caveat so that these matters can be properly determined.

Decision

- [8] The relevant provisions pertaining to the lodgment and removal of a caveat are found in the Land Transfer Act 1971, in particular ss 106 to 110. A person entitled to a legal or equitable interest may lodge a caveat with the Registrar of Titles. Section 110 sets out the procedure for removal of a caveat. Where the Registrar has issued a 21 day Notice of Removal, a caveator may apply for an extension of the caveat. Section 110(3) provides:

The caveator may either before or after receiving notice from the Registrar apply by summons to the court for an order to extend the time beyond the twenty-one days mentioned in such notice, and the summons may be served

⁴ Civil Action No 52 of 2019. There are two amounts recorded in the Judgment by Default, being \$139,492.29 and \$35,159.35. The former pertains to the loan of 2 October 2018.

at the address given in the application of the caveatee, and the court, upon proof that the caveatee has been duly served and upon such evidence as the court may require, may make such order in the premises either ex parte or otherwise as the court thinks fit.

[9] There is no dispute between the parties that the procedural requirements have been met by the Plaintiff.⁵

[10] Mr Goundar relies on *Eng Mee Yong & Ors* [1980] AC 331 for the test that the Court must apply in determining whether to grant the extension.⁶ The passage from the English decision reads:

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.

Is there a serious question to be tried?

[11] The parties agree that the primary issue here is whether the Plaintiff can demonstrate that it has a caveatable interest in the property.

[12] The Second Defendant argues that it does not and relies on the decision of Master Lal in *Kontiki Finance Ltd v Amhaz & Ors* Civil Action No 147 of 2023, issued on 16 May 2023. There are a number of similarities between that case and the present case. That case also involved a loan from Kontiki Finance Ltd where the terms of the loan purported to grant a security in the form of a caveat over the property. It involved a lease over native land. The borrower did not seek the mortgagee's consent to the registration of the caveat. There was a term in the mortgage instrument that required the registered proprietor to obtain the bank's consent before allowing any security over the property. In

⁵ Mr Ram stated that the Third and Fourth Defendants take a neutral position on the Summons.

⁶ It does not appear that the Second Defendant disagrees.

that case, the learned Master declined to extend the caveat because the 21 day period in the Notice had already expired when the hearing was conducted. On the issue of whether Kontiki Finance had a caveatable interest, the learned Master found that the loan documents between Kontiki Finance and the borrower did not provide for a mortgage over the property. The learned Master also determined that Kontiki Finance did not have an equitable mortgage because the borrower did not have power to allow a caveat without the mortgagee's consent which it did not obtain. Further, a condition on obtaining a security over a lease on native land is to obtain approval from the iTaukei Land Trust Board, which, again, the borrower did not obtain. The learned Master also determined that the balance of convenience did not lie with an extension as this would cause difficulties and expense to the mortgagee exercising its rights over the land.

- [13] The Second Defendant argues that *Kontiki Finance Ltd v Amhaz* is on all fours with the present case and for the same reasons the Plaintiff's summons should be dismissed. I add at this point that given the short notice of the hearing, driven by the impending expiry of the 21 days, neither counsel were able to refer me to any other authorities, other than *Kontiki Finance Ltd v Amhaz*, that were directly on point, although Mr Goundar did supply an overseas authority which I discuss later.
- [14] The Plaintiff accepts that the facts in *Kontiki Finance Ltd v Amhaz* and the present case are largely the same. Mr Goundar argued, however, that the Plaintiff here has a stronger position as it has secured an order of the High Court against the First Defendant for Judgment in Default. I am not sure that that assists the Plaintiff to demonstrate a caveatable interest. It certainly provides the Plaintiff with more enforcement options against the First Defendant.
- [15] Returning to *Kontiki Finance Ltd v Amhaz*. Unlike that case, the Plaintiff here is still within the 21 day period to extend the caveat. The consent of the iTaukei Land Trust Board is not required as the property in question, Crown Lease 13370, is a Crown Lease and the Director of Lands has consented to the caveat. The only basis that the learned Master determined that Kontiki Finance Ltd did not have a caveatable interest, that applies to the present case, is due to the borrower not obtaining the mortgagee's consent to registration of the caveat. On this point, Mr Lajendra referred me to the Mortgage document at Annexure H of Mr Chand's affidavit and, in particular, clause 4.4(e) which

requires the mortgagor to obtain the Bank's consent before creating or allowing '*another security interest to be created over the property*'.

[16] On the other hand, Mr Goundar took me through the Offer Agreement between the Plaintiff and the First Defendant⁷ to demonstrate the intention of the parties to create a caveatable security over Crown Lease 13370. Clause 9.0 provides that the securities '*to be taken to secure the Loan Facility are stated in Schedule 2*'. Schedule 2 lists the securities over the loan. There are two, being a motor vehicle and '*Asset Finance Agreement over Crown Lease # 13370, Lot 1 SO 3525*'. Clause 17.0 also provides that '*consent & caveat fee to be borne by client*' and '*Caveat to be placed on CL13370*'.

[17] On the basis of the facts of this case and the law, is there a serious question to be tried as to whether the Plaintiff has a caveatable interest? The same 'serious question' test applies with respect to interlocutory injunctions. It is clear from those authorities that it is not necessary (in order to show that there is a serious question to be tried) for an applicant to demonstrate that it will succeed with its claim, it suffices that the Plaintiffs' claim is not hopeless. Ajmeer J noted in *Deo v Hans* [2018] FJHC 1113 at [31]:

...the Court is required to investigate the merits to a limited extent only. All that needs to be shown is that the claimant's cause of action has substance and reality...

[18] In *Andrews v Prasad* [2019] FJHC 904, Nanayakkara J stated (again in respect to an application for an interlocutory injunction):

...there is no requirement that before an 'interlocutory injunction' is granted the plaintiff should satisfy the Court that there is a 'probability', a 'prima facie case' or a 'strong prima facie case' that if the action goes to trial he will succeed; but before any question of balance of convenience can arise the party seeking the injunction must satisfy the Court that his claim is neither frivolous nor vexatious; in other words that the evidence before the Court discloses that there is a serious question to be tried.

⁷ Annexure B of the affidavit.

[19] I am left with the following narrow issue in terms of applying *Kontiki Finance Ltd v Amhaz* to the present case. Does the Plaintiff fail to establish a caveatable interest simply because the borrower/mortgagor did not obtain consent from the mortgagee to register the caveat over the property? The question could be also be reformulated as follows: can a contractual right to lodge a caveat create a caveatable interest in favour of the lender?

[20] In terms of the first question, a variation on this question was considered by Jitoko J (now President of the Court of Appeal) in *Prasad v Home Finance & Anor* Civil Action No HBC 116 of 2002, issued on 23 January 2003. The High Court considered whether the consent of the registered mortgagees was required before a caveat could be created by the Registrar of Titles. His Lordship referred to s 109 and proceeded to state:

It is very clear from all of the above, that the answer to the First Defendants submission, namely that prior consent should have been obtained from the registered mortgagee or charge holder before the lodgment of caveat...is in the negative. A Caveator is not required to obtain the prior approval of either the registered proprietor of the estate or anyone with interest in the land, before lodging a caveat with the Registrar...

[21] In terms of whether a caveatable interest can be created by a contractual right, Mr Goundar relies on the New South Wales Court of Appeal decision, from Australia, in *Ta Lee Investment Pty Ltd v Antonios* [2019] NSWCA 24.⁸ In that case, Ta Lee loaned money to MV Developments to develop a block of land. Clause 7.2 in the agreement between the two parties permitted Ta Lee to lodge a caveat on the title in the event of default of repayment. The Court of Appeal discussed the Australian cases on the subject, referring to the decision of Bryson AJ in *Taleb v National Australia Bank Ltd (2011) NSWSC 1562*. The Court of Appeal stated:

*...Bryson AJ reviewed the authorities dealing with contractual provisions authorizing the lodgment of a caveat. His Honour observed, at [53], that it was necessary to commence with the basic principle stated in *Murphy v Wright (1992) 5 BPR 11,734*:*

⁸ I note that the High Court in *Prasad* (supra) relied on an Australian decision on the basis that Fiji had the same system of land registration as New Zealand and Australia; page 6 of the decision.

'Section 74F(1) of the Real Property Act 1900 enables a person who claims to be entitled to an estate or interest in any land to lodge a caveat against the title. A registered proprietor cannot by contract confer a right to lodge a caveat where no caveatable interest exists...If the clause only confers a contractual right it will be ineffective. However the existence of this right suggests that the lender was intended to have an equitable charge which would support a caveat.'

96 Bryson AJ noted that the contractual clause in *Murphy v Wright* included the phrase:

'...the Lender shall in addition to the rights set out herein or in the Security Documents be entitled to attach the debt due to any of the assets of the Guarantor or Guarantors...'

And observed that that clause was much more than a simple authorization to lodge a caveat.

97 ...Bryson AJ noted that *Troncone v Aliperti* had often been interpreted...to mean that, in all cases, a clause conferring authority to lodge a caveat carried with it by implication the grant of an equitable charge. That was not, as his Honour observed, the 'true principle'. Rather, in his Honour's view:

'...the meaning conveyed by a contractual document, including what is conveyed by implication, must be understood by addressing the terms and the whole terms of the document in question...there is no principle or true principle establishing what implication must be drawn in all cases from authority to lodge a caveat in connection with an obligation to pay money...

98 *I fully agree with this observation. His Honour's view was also endorsed by this Court in Aged Care Services Pty Ltd v Kanning Services Pty Ltd... [2013] NSWCA 393.*

99 *Underpinning the Court's factual finding in Aged Care Services, as Gleeson JA noted, at [85], was the express reference in the discussions between the parties to Aged Care Services obtaining 'security' by way of a 'caveatable interest' over the relevant piece of land. The terms of that discussion, between the director of Aged Care Services and one of the owners of the property, was:*

'We will pay out the loan if we get a caveatable interest. Until the whole deal is put together I want to be a secured lender in place of the bank.'

[22] In *Ta Lee* the Court of Appeal proceeded to determine:

104 *In our opinion, cl 7.2(a), on its proper construction, did not create an equitable interest or give rise to an equitable charge in favour of Ta Lee. First, as already mentioned, there is no reference to 'security', 'secured interest', 'charge', 'caveatable interest', or any other language which would point to Ta Lee having an equitable interest. The Deed was a professionally drafted business document. Had the parties intended for Ta Lee to have a secured interest, the Deed could have said so and it is to be expected that it would have made express provision to that effect.*

105 *Secondly, the parties used language of 'secured moneys' when specifying the obligations of the guarantors. Importantly, the parties, in recital G, characterized the relationship between Ta Lee and MV Developments as 'simply that of a lender (creditor) and borrower (debtor)': see above at [8]. This language is inconstant with Ta Lee being a 'secured creditor'.*

[23] On the face of it, the Plaintiffs' position here is stronger than *Ta Lee*. The agreement between the Plaintiff and the First Defendant expressly required the Crown Lease as a

security over the loan and expressly required the First Defendant to obtain consent and create a caveat over Crown Lease 13370. However, and relying here on *Ta Lee*, whether the Plaintiff has a caveatable interest will turn on a reading of the terms of the agreement.

[24] I am left with the following. The learned Master in *Kontiki Finance Ltd v Amhaz* appears to have accepted that a caveatable interest can be created by a contract on a loan. The learned Master determined in that case that no such interest existed because, amongst other matters, the consent of the mortgagee had not been obtained and the mortgagor did not, therefore, have power to agree to any caveat. The learned Master did not identify any authority to support this proposition. Like me, the learned Master will have been constrained by time due to the urgency of the application – directly affecting the parties preparation as well. However, there are Australian authorities recognizing the creation of a caveatable interest through contracts. That is not to say that I am satisfied that the Plaintiff has a caveatable interest. I am simply satisfied that there is a serious question to be tried and that the legal issue requires more consideration.

Where does the balance of convenience lie?

[25] There are certainly competing interests here. If the summons is dismissed then the Plaintiff's Originating Summons becomes redundant. Its claim is dead in the water. On the other hand, extending the caveat will hamper the Second Defendant, affecting any mortgagee sale. The Second Defendant may still exercise its powers of sale but cannot register any transfer of the property until the caveat is removed.

[26] At this time, I am not aware what, if any, stage the Second Defendant is at with its mortgagee sale, and whether it has executed any Sale & Purchase Agreement with a purchaser.

[27] In light of the fact that removal of the caveat will effectively end the proceedings, I am satisfied that the balance favours extending the caveat. In my view, the status quo must be maintained so that there is a proper opportunity for argument, with the parties supplying the relevant authorities, at the substantive hearing. It will also provide the defendants, including the recently served First Defendant, an opportunity to file affidavits in response.

Orders

[28] Accordingly, I make the following orders:

- i. Caveat No 868158 registered on the First Defendant's property described in Crown Lease No. 13370, Lot 1 on Plan No. (d) SO 3525 situated in the land of Rara, on the island of Macuata and District or Town of Labasa having an area size of 3203 square meters, is extended until further order of the Court.
- ii. The Costs of the Plaintiff's application to be costs in the cause.




D. K. L. Tuiqereqere
JUDGE

Solicitors:

Kumar Goundar Lawyers for the Plaintiff

Lajendra Lawyers for Second Defendant

Attorney General's Chambers for Third and Fourth Defendants