

A

SIR SATHI NARAIN

v.

PHYLLIS KATHLEEN MALLEY

B

[HIGH COURT—Fatiaki, J.—13 May 1988]

Civil Jurisdiction

C *Real Property—Caveat—extension thereof—onus on caveator—must show interest described in Land Transfer Act s.106—no “equitable express trust” shown.*

D. N. Sahai for the Plaintiff**F. G. Keil for the Defendant**

D Sir Sathi Narain (plaintiff) made application under section 110 of the Land Transfer Act (Cap. 131) (the Act) for an order that Caveat No. 250738 be extended and remain on C.T. Vol. 36 Folio 3541 until further order. Phyllis Kathleen Malley (defendant) opposed the applicant on the ground that the plaintiff had no caveatable interest. The plaintiff had the task of persuading the Court he is a person within the terms of the Act.

E The scope of this section was described by the Privy Council in *Abigail v. Lapin* (1934) A.C. 491 at p. 500—

F “For the general protection of equitable interests or estates, the Act provides that a caveat may be lodged with the Registrar by any person claiming as cestui que trust, or under any unregistered instrument or any other estate or interest; the effect of the caveat is that no instrument will be registered while the caveat is in force affecting the land, estate or interest until after a certain notice to the person lodging the caveat. Thus, though the legal interest is in general determined by the registered transfer, and is in law subject only to registered mortgages or other changes, the register may bear on its face a notice of equitable claims, so as to warn persons dealing in respect of the land and to enable the equitable claimant to protect his claim by enabling him to bring an action if his claim is disputed.”

G See also *Cambridge Credit (Fiji) Ltd. v. W.F.G. Limited* 21 F.L.R. 182 at 185 (FCA) as to the design of the section to protect unregistered instruments that the caveator must be a person beneficially interested in land estate or interest claiming by an unregistered instrument transmission or trust or otherwise. The plaintiff here relied on s.106(a) of the Act (....claiming to be beneficially interested/entitled in land or estate therein by unregistered agreement or instrument....transmission....or trust....or otherwise howsoever. Ed.)

H

The Caveat No. 250738 where relevant expressed the claim as—

“an equitable owner of one undivided half share by virtue of an expressed trust in favour of the Caveator contained in a letter to the Caveatee’s former Solicitors Messrs. Cromptons of Suva dated the 28th day of May 1970 and signed by the Caveatee.”

That letter addressed to Messrs Cromptons in material parts read—

I WISH TO PLACE ON RECORD THE FOLLOWING, viz—

When “*NAWI ISLAND*”, comprising 33—acres Freehold, located in Savu Savu Bay, Vanua Levu, Fiji—is sold—*HALF THE PROFIT ABOVE THE COST OF THE ISLAND*, is to be paid to *SETHI NARAIN, of NARAIN CONSTRUCTION COMPANY, WALU BAY, SUVA, FIJI.*

Yours faithfully,

(Sgd) _____

Phyllis Malley

Counsel for plaintiff argued for continuation of the Caveat as supported by an “equitable express trust”.

Held: This was not a case of an option, beneficiary to a proprietary estate, interest under a will or a trust express or implied or where estoppel might arise.

From the reading of the letter no estate or interest could be gleaned.

The words in s.106 or “otherwise howsoever” are restricted in meaning by the words which precede them (*Cambridge Credit (Fiji) Limited v. W.F.G. Limited* (supra) (*Shepherd v. Houston*) (1927) SASR 144). A caveator was strictly limited to justify a caveat by the matter stated in it (See the Act s.110(3)). Despite this, by considering the contents of a further letter produced by the plaintiff no relevant interest was thereby shown.

A caveat may not be extended merely because it is advantageous to the caveator.

Extension of caveat refused.

Ordered that Registrar of Titles remove Caveat No. 250738 from Certificate of Title Bol. 36 Folio 3541.

Cases referred to:

Cambridge Credit (Fiji) Ltd. v. W.F.G. Limited 21 F.L.R. 182

Shepherd v. Houston (1927) SASR 144

In re Bielfeld, Deceased (1894) 12 N.Z.L.R. 596

Guardian, Trust, and Executors Co. of N.Z. Ltd. v. Hall (1938) N.Z.L.R. 1020

Abigail v. Lapin (1934) A.C. 491

Keppel v. Bailey (1834) 2 My & K 517

FATIAKI—Judge

Judgment

A

This is an application by the plaintiff under section 110 of the Land Transfer Act Cap. 131 for an order that Caveat No. 250738 be extended and do remain on C.T. Vol. 36 Folio 3541 until further order. The defendant opposes the further extension of the caveat on the ground that the plaintiff has no caveatable interest in the land in question.

B

At the hearing of this application the plaintiff's Counsel raised a preliminary objection to the photocopy annexures lodged with the affidavit filed by the defendant's Solicitors. He argued that the annexures were secondary evidence being photocopies and the Court should not take cognizance of their contents since the affidavit was sworn by a person other than the author of the documents. The copies were only proof of the existence of correspondence but not of the truth of the contents.

C

As has been mentioned earlier, this is an application pursuant to s.110 of the Land Transfer Act Cap. 131. By the clear unrestricted terms of section 110(3) this Court may act "...upon such evidence as (it) may require...." Further by Or. 38 rule 2 para. 3 I am satisfied that affidavit evidence is admissible in this application by summons and that copy documents are permitted by virtue of Or. 41 rule 11 of the High Court Rules.

D

In any event, the plaintiff as caveator bears the burden of satisfying this Court that he is a person within the terms of section 106 of the Land Transfer Act Cap. 131. I also note that the plaintiff's counsel does not specifically deny or challenge the photocopy annexures only the form and means by which they came to be before the Court.

E

The scope and purpose of the section dealing with caveats has been generally and succinctly described by the Privy Council in the N.Z. case of *Abigail v. Lapin* (1934) A.C. 491 at p.500:

F

"For the general protection of equitable interests or estates, the Act provides that a caveat may be lodged with the Registrar by any person claiming as cestui que trust, or under any unregistered instrument or any other estate or interest: the effect of the caveat is that no instrument will be registered while the caveat is in force affecting the land, estate or interest until after a certain notice to the person lodging the caveat. Thus, though the legal interest is in general determined by the registered transfer, mortgages or other changes, the register may bear on its face a notice of equitable claims, so as to warn persons dealing in respect of the land and to enable the equitable claimant to protect his claim by enabling him to bring an action if his claim is disputed."

G

Similarly the Fiji Court of Appeal in *Cambridge Credit (Fiji) Ltd. v. W.F.G. Limited* 21 F.L.R. 182 at p. 185 stated:

H

"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."

and dealing more specifically with the requirements of s. 106(a) the Court stated:

"The respondent must...satisfy the Court that the following are fulfilled: A

- (1) That (he) 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 (he) is so claiming by virtue of any unregistered agreement or other instrument or transmission, or any trust expressed or implied or otherwise howsoever."

The plaintiff in this case does not claim to be within the terms of s.106(b) of the Land Transfer Act Cap. 131 and the subsection does not fall to be considered by the Court. However he does rely on the terms of s.106 (a) and has argued forcefully for the continuation of his caveat on the basis of an "equitable express trust" to quote his counsel's expression. B

In dealing with this application I am mindful that it is inappropriate for this Court at this stage to determine the rights of the parties to this action in a summary manner particularly where there are conflicting affidavits or where the question of a caveatable interest is a distinctly arguable one. C

Conversely, a caveat being a creature of statute and having been sometimes described as a "blot" on the title cannot be allowed to continue merely because its continued existence would be in some way advantageous to the caveator or because the caveator has not fully disclosed all his evidence in support of the caveatable interest he claims to have. D

In this case so far as may be discerned from the Caveat No. 250738 which surprisingly formed an annexure to the defendant's affidavits only, the plaintiff claims an estate or interest as:

"an equitable owner of one undivided half share by virtue of an expressed trust in favour of the Caveator contained in a letter to the Caveatee's former Solicitors Messrs. Cromptons of Suva dated the 28th day of May 1970 and signed by the Caveatee." E

The relevant carbon copy letter reads:

"Messrs. Crompton'ss,
Barristers,
Suva, Fiji. F

Dear Sirs:

I WISH TO PLACE ON RECORD THE FOLLOWING viz—

When "NABU ISLAND", comprising 33—acres Freehold, located in Savu Savu Bay, Vanua Levu, Fiji—is sold—*HALF THE PROFIT ABOVE THE COST OF THE ISLAND*, is to be paid to *SETHI NARAIN, of NARAIN CONSTRUCTION COMPANY, WALU BAY, SUVA, FIJI.* G

Yours faithfully,

(Sgd) _____
Phyllis Matley

C/o Bank of Hawaii,
Head Office,
Financial Plaza,
HONOLULU,
28th May/70" H

A The express terms of the letter are clear in themselves. They merely entitle the plaintiff to a half share of the nett proceeds of the sale of the island. In my view on no reading of the plain wordings can an estate or interest in the land be gleaned such as to vest the plaintiff with a caveatable interest. Nor can "legal-sounding" expressions be used to cloud the plain words in the letter sufficient to elevate them into a trust expressed or otherwise.

B With respect to learned counsel for the applicant this is not a case of an option to purchase, or a beneficiary to a proprietary estate or interest devised in a will nor is it one where an implied or constructive trust arises out of a marital or other relationship, or where the doctrine of proprietary estoppel might apply.

Indeed it fell upon the defendant's counsel to provide a case that appeared to support the plaintiff's claim. This was the case of *In re Bielfeld, Deceased* (1894) 12 N.Z.L.R. 596 in which the head note reads:

C **"Section 138 of the 'Land Transfer Act, 1885', gives a caveating capacity to any person having an interest in the proceeds of the sale of land under the provisions of the Act."**

However that was a case in which the caveator was given a reversionary interest in leasehold land under the will of his brother and as such is easily distinguishable from the nature of the interest claimed by the plaintiff in this case.

D The New Zealand Court of Appeal accepted such a distinction in respect of the same case in rejecting an appeal against the removal of the caveat in the case of *Guardian, Trust, and Executors Co. of N.Z. Ltd. v. Hall* (1938) N.Z.L.R. 1020.

E Learned counsel for the plaintiff also sought assistance from the words "... or otherwise howsoever" in section 106(a) of the Land Transfer Act Cap. 131. But as was stated by the Fiji Court of Appeal in *Cambridge Credit (Fiji) Limited v. W.F.G. Limited* (op.cit) at p.188:

"The words are obviously very wide words but in our view are restricted in meaning by the words that precede them. The respondent would have to establish that such an undertaking or trust created as alleged by the relationship claimed, would constitute an interest in the land."

F However, I am fortified in my view by the case of *Shepherd v. Hosten* (1927) SASR 144 in which the caveatable interest was claimed to have been by virtue of a letter in the following terms:

"I hereby agree to allow to you equal third shares of all nett profits out of the proceeds of sale of approx. 36 acres land situated at Pt. Victor which was lately owned by one J.R. subject to completion."

G In that case the full Court of South Australia held that the caveator, had, at most, a claim against the vendor—mortgagee under his contract to an account and accordingly, had no caveatable interest.

H Nevertheless, the plaintiff seeks to rely also on a further letter from the defendant dated the 16th March/77 which I shall for convenience call the "taxes letter" which is annexure 'B' to the plaintiff's affidavit of the 27th of Jan., '88. In the letter the plaintiff is requested inter alia to pay his "half share of the tax" on Nawi island which was calculated at \$2,206.87. By this letter it is extrapolated the defendant intended or implied that the plaintiff held or owned half a share of the island.

The letter, although available at the time the plaintiff lodged his caveat dated the 15th day of May 1987 is not referred to or mentioned as one of the supporting agreements or instruments by virtue of which the plaintiff's caveatable interest is derived.

A

There is authority to the effect that a caveator is strictly restricted to the matters stated in his caveat and reliance may be had to nothing else but I take the more lenient view that it is open to the Court to consider the "taxes letter" as part of the "evidence" which the Court may consider within the terms of section 110(3) of the Land Transfer Act Cap. 131.

B

Nevertheless, I am satisfied from the correspondence of the defendant and her solicitors that no such intention or inference can be drawn from the contents of the letter or that it is outside the "costs of the island" envisaged in the defendant's letter of 28th May '70.

As was stated as long ago as 1834 in *Keppel v. Bailey* (1834) 2 My & K 517 at 535 by Lord Brougham:

C

"It must not be supposed that incidents of a novel kind can be devised and attached to property at the fancy and caprice of any owner. It is clearly inconvenient both to the science of the law and the public seal that such a latitude should be given. There can be no harm in allowing the fullest latitude to men in binding themselves . . . to answer in damages for breach of their obligations . . . but great detriment would arise and much confusion of right if parties were allowed to invent new modes of holding and enjoying real property."

D

In the event I have come to the conclusion that the plaintiff's application for an extension of caveat No. 250738 should be refused and the Registrar of Titles is directed to remove it from the Certificate of Title Vol. 36 Folio 3541 after 21 days of the date hereof.

E

Application dismissed.