

FIJI NATIONAL PROVIDENT FUND BOARD v VIVRASS HOLDINGS LTD and Anor (HBC0325D of 2002S)

HIGH COURT — CIVIL JURISDICTION

5 JITOKO J

3 June 2004

Real property — caveats — equitable interest.

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In 1997, the Plaintiff advanced \$3.3 million to Vivrass Development Ltd (VDL), a subsidiary of the first Defendant. To secure the advance made, the Plaintiff was granted first mortgage over the lands and buildings on CT No 24128. There was in addition a guarantee by one Vishnu Prasad, a majority shareholder in the first Defendant. Subsequently, VDL defaulted under the mortgage and the Plaintiff, in exercise of its power of sale, proceeded to sell the mortgaged property for \$3.3 million. However, the sale has been held up by a caveat lodged by the first Defendant.

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The Plaintiff filed an originating summons for the first Defendant to show cause why the instrument of caveat lodged by Vivrass Holdings Ltd on CT No 24128 should not be removed under s 109(2) of the Land Transfer Act; that the caveat lodged on 2 July 2002 against CT No 24128 be removed under s 102(2) of the Land Transfer Act; and that the Registrar of Titles be prevented from registering the said caveat, which they have noted on the register as, the caveat lodged and noted is null and void.

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The first Defendant's caveat No 511531 claimed that it had "an equitable interest by virtue of being a financial contributor on the land", being the mortgaged CT No 24128.

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The issue was whether the first Defendant has caveatable interest in law to be allowed to lodge a caveat on the property.

Held — There was no evidence that there was a prior agreement of an equitable mortgage for the loan of \$2.0 million between the first Defendant and VDL. Evidence further showed that documents referred to by the Plaintiff such as the investment proposal form and the subsequent formal loan offer to VDL specifically stated that the land (CT No 24128) has a clear title. Thus, even if the court were to find in favour of the existence of an agreement creating an equitable mortgage, the question was whether the terms of the agreement where the equitable mortgage came into existence when called upon to do so had sufficient interest in land to support a caveat. The same would depend on whether the term "when called upon to do so" represented an option that was available to the first Defendant to exercise in the future. If so, then the same would become a condition precedent to the exercise of the option. Moreover, in *Piper Industries Pty Ltd v Hemphill* (unreported, NSWSC decision) Young J held that an option holder does not have a caveatable interest in land until the conditions precedent to the exercise of the option are fulfilled. Similarly, there was no evidence that the condition precedent that required the first Defendant to call for the creation of an equitable mortgage was not exercised. Thus, the first Defendant did not have a caveatable interest in law to be allowed it to lodge a caveat on the property.

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Application dismissed.

Cases referred to

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Cambridge Credit (Fiji) Ltd v WFG Ltd [1975] 21 FLR 182; *Eng Mee Yong v Letchumanan* [1980] AC 331; *Guardian, Trust & Executors Co of New Zealand Ltd v Hall* [1938] NZLR 1020; *Hooker Industrial Developments Ltd v Trustee of the Christian Brothers* (1977) 2 NSWLR 109; *Piper Industries Pty Ltd v Hemphill* (unreported, NSWSC decision); *Vivrass Development Ltd v Fiji National Provident Fund* HBC No 312 of 2002, cited.

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Concord Municipal Council v Coles (1905) 3 CLR 96; *Staples & Co Ltd v Corby and District Land Registrar* [1900] 19 NZLR 517, considered.

G. P. Lala for the Plaintiff

S. P. Sharma for the first Defendant

Jitoko J. This is the Plaintiff's application by originating summons for:

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- (a) The first Defendant show cause why instrument of caveat lodged by Vivrass Holdings Limited on CT No 24128 Lot 1 on DP Plan No 6007 should not be removed under s 109(2) of the Land Transfer Act.
 - (b) The caveat lodged on 2 July 2002 receipt No 127372 lodged against CT No 2418 be removed under s 102(2) of the Land Transfer Act.
 - 10 (c) The Registrar of Titles be prevented from registering the said caveat, which they have noted on the register as, the caveat lodged and noted is null and void.

The Defendant had earlier on unsuccessfully tried to join Vivrass Development Ltd to be a party to this proceedings and/or alternatively, it be joined as a Plaintiff
15 in the other case HBC No 312 of 2002: *Vivrass Development Ltd v Fiji National Provident Fund*.

Background

In 1997 the Plaintiff advanced \$3.3 million to Vivrass Development Ltd
20 (VDL) a subsidiary of the first Defendant. As security for the advance, the Plaintiff was granted first mortgage over the lands and buildings on CT 24128. There was in addition a guarantee by one Vishnu Prasad the majority shareholder in the first Defendant. VDL subsequently defaulted under the mortgage and the Plaintiff, in exercise of its power of sale, proceeded to sell the mortgaged
25 property for \$3.3 million. However, the sale has been held up by a caveat lodged by the first Defendant.

The first Defendant's caveat No 511531 claims that it has "*an equitable interest by virtue of being a financial contributor on the land*", being the mortgaged CT 24128.

30 In order for the first Defendant to sustain its caveat, it must show that it has a caveatable interest in CT 24128.

What is a caveatable interest

Under the Torrens system, a caveatable interest amounts to a proprietary
35 interest in land. In *Concord Municipal Council v Coles* (1905) 3 CLR 96, Griffith CJ said (at 107):

It is only a person who has a legal or equitable interest in land, partaking of the character of an estate in it or equitable claim to it, who can lodge a caveat.

40 The essential requirement is that the right based on statute confers an estate or interest in land. It is this interest in land that gives a person the locus standi to caveat. As Gallan J explained in *Guardian, Trust & Executors Co of New Zealand Ltd v Hall* [1938] NZLR 1020 at 1025:

45 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.

In an earlier decision on the same issue Stout CJ in *Staples & Co Ltd v Corby and District Land Registrar* [1900] 19 NZLR 517 said, at 536:

50 Before a person can caveat under this section he must be a person who claims to be entitled to the land, or any estate or interest to the land, or to be "beneficially interested"

in the land, or in any estate or interest in the land, and the person in either event must claim “by virtue of any unregistered agreement” or other “instrument or transmission” (“transmission” meaning acquirement by title or estate consequent on death, will, intestacy, bankruptcy, etc) “or of any trust expressed or implied,” or otherwise howsoever.

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The Fiji equivalent to New Zealand’s s 146 (now NZ s 137(a)), is s 106. It states:

106. Any person—

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(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

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(b) transferring any land subject to the provision of this Act or any estate or interest therein, to any other person to be held in trust, may at anytime 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 or maybe required in such caveat.

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The effect and reach of the section was fully examined by the Fiji Court of Appeal in *Cambridge Credit (Fiji) Ltd v WFG Ltd* [1975] 21 FLR 182. The case involved a deed between the parties whereby one (the vendor) agreed to sell to the other (the purchaser) its interest in a certain land for a total consideration payable by instalments. The unpaid purchase monies were unsecured, but pursuant to the deed provisions, the land had been transferred and registered with the Registrar of Titles upon the payment of the initial deposit. A caveat was lodged by the vendor to protect his rights of the unpaid purchase price, and the caveat extended by the Supreme Court (as it then was), before the appeal came before the Court of Appeal.

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The court agreed that s 106 is concerned with the protection of unregistered instruments in land, and added, (at 185):

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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.

The court continued, at 184:

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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.

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On examination of the records before it, the court was satisfied that pursuant to the deed, the interest of the vendor had been completely extinguished after the transfer had been registered, upon payment of the deposit. All that was left was the vendors right in contract arising out of the deed. The Court of Appeal noted that the vendor, in the negotiation of the terms of the sale, could have insisted upon a mortgage being given to secure the payment of the purchase moneys, or even an agreement to mortgage, but did not do so. It concluded that there was no caveatable interest conferred on the vendor by the original deed.

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In this case, the first Defendant submitted that it had given VDL a loan of \$2 million and that there was an agreement between the first Defendant and VDL for the latter to give the first Defendant a prior equitable mortgage for the loan “when called to do so”. It had lodged the caveat on CT 24128, “claiming an equitable interest by virtue of being a financial contributor on the land”.

The Plaintiff denied any knowledge of the \$2 million loan to VDL by the first Defendant nor the internal arrangement between them. Counsel submitted that Mr Vishnu Prasad, a common director to both companies, and majority shareholder in the first Defendant, had full knowledge of the operations of the company. Yet, Mr Prasad signed and accepted the conditions of the loan from the Plaintiff to VDL, with the understanding that CT 24128 was unencumbered.

In my view the affidavits including other documents that form part of the record are unequivocal. There is no evidence before this court to show that there exists a prior agreement between the first Defendant and VDL giving the former an equitable mortgage for the loan of \$2 million. Indeed, documents referred to by the Plaintiff such as the FNPFI Investment Proposal Form and the subsequent formal loan offer to VDL and signed by Vishnu Prasad, specifically stated that the land (CT 24128) was a clear title. As Vishnu Prasad was the majority shareholder of the first Defendant company as well as a director of VDL, he was perfectly placed to make known to the Plaintiff of the existence of the agreement. At the very least, an agreement to mortgage, in a substantive form may possibly dissuade the court from drawing its own conclusion, which it is entitled to do under the principle enunciated by the Privy Council in *Eng Mee Yong v Letchumanan* [1980] AC 331.

Even if this court were to find in favour of the existence of an agreement creating an equitable mortgage, the question is whether the terms of the agreement whereby the equitable mortgage comes into existence “when called upon to do so” has sufficient interest in land to support a caveat. This depends on whether the term “when called upon to do so” represents an option that is available to the first Defendant to exercise in the future. If so, which I believe it is, then it becomes a condition precedent to the exercise of the option. In *Piper Industries Pty Ltd v Hemphill* (unreported, NSWSC decision) Young J held that an option holder does not have a caveatable interest in land until the conditions precedent to exercise of the option are fulfilled. Similarly, in this case, the condition precedent requiring the first Defendant to call for the creation of an equitable mortgage, had not been shown to any degree of satisfaction to this court, that it had been exercised. There is also the element of uncertainty that such a condition precedent brings to commercial transactions. It cannot surely encourage lenders of finance, if their securities offered are dependent on an option that remain available to the borrower. The option, must be capable of being properly exercised: see *Hooker Industrial Developments Ltd v Trustee of the Christian Brothers* (1977) 2 NSWLR 109. Until the option has been properly exercised and the condition precedent satisfied, the first Defendant does not have a caveatable interest on CT 24128.

In any event, for the reasons I have elaborated above. I find that the first Defendant does not have a caveatable interest in law to be allowed it to lodge a caveat on the property.

Order is made for the Registrar of Titles to remove caveat No 127372 lodged against Certificate of Title No 2418 with immediate effect.

I award cost of \$400 against the first Defendant.

Application dismissed.

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