

IN THE HIGH COURT OF FIJI AT SUVA
CENTRAL DIVISION
CIVIL JURISDICTION

Civil Action No. HBC 182 of 2023

BETWEEN: **AUSTRALIA NEW ZEALAND BANKING GROUP LIMITED**

PLAINTIFF

AND: **UBHESH CHAND MAHARAJ**

FIRST DEFENDANT

AND: **THE REGISTER OF TITLES**

SECOND DEFENDANT

For the Plaintiff	:	Ms. Devan, S.
For the Defendant	:	Not Present
Date of Hearing	:	14 May 2024
Date of Decision	:	15 August 2024
Before	:	Waqainabete-Levaci, S.L.T.T, Puisne Judge

JUDGEMENT

(MORTGAGEE POWER OF SALE AND CAVEAT)

PART A - BACKGROUND

1. This is an application by way of Originating Summons by the Mortgagor Banker, the Plaintiff.
2. The Plaintiff holds mortgage for a total sum of \$1, 086, 500 (One Million and Eighty Six and Five Hundred Thousand Dollars) over two owned by Sangita Devi Sagar trading as Shiv Enterprises registered as Native Lease No. 31062 being on Lot 16 on SO 6622, in Tacirua East Subdivision – Stage 3 A (part of) ITLTB No. 4/3/39463.
3. Ms Sangita Devi trading as Shiv Enterprise fell into arrears concerning the loan account totaling \$229,931.12 (Two Hundred and Twenty Nine Thousand, Nine Hundred and Thirty One Dollars Twelve cents) with a loan balance of \$1, 008, 227.85 (One million and eight Hundred Thousand, two Hundred and Twenty Seven Thousand Dollars and Eighty Five cents). A default notice was issued on 27th September 2021 and warning of mortgage sale on 26 October 2021.
4. In Civil Action number 237 of 2019, the Defendant entered default judgment against Sangita Devi trading as Shiv Enterprise for the liquidated debt of \$66,831.02 (Sixty Six Thousand Eight Hundred and Thirty One Dollars Two Cents) and entered a Caveat No. 897569 against the owned by Sangita Devi Sagar trading as Shiv Enterprises registered as Native Lease No. 31062 being on Lot 16 on SO 6622, in Tacirua East Subdivision – Stage 3 A (part of) ITLTB No. 4/3/39463.
5. The Plaintiff is now seeking that the Caveat entered by the Defendant be removed pursuant to section 109 of the Land Transfer Act to enable the Plaintiff to exercise its Mortgagee Power of Sale.

PART B: ORDERS SOUGHT

6. The Originating Summons seeks the following Determination:
 - (1) Whether Caveat No. 897569 lodged by the First Defendant and registered against Native Lease No. 31062 ought to be removed on the grounds that:

- (a) The First Defendant does not have a caveatable interest in the property legally described as Native Lease No. 31062 being Lot 16 on SO 6622, in Tacirua East Subdivision – Stage 3A (part of) TLTB No. 4/3/39463.
 - (b) The First Defendant only has a monetary interest in the total sum of \$66,831.02 pursuant to a default judgment sealed on 30 April 2019.
 - (c) That in absence of caveatable interest, the Plaintiff is entitled to priority over any interest that the First Defendant has by virtue of Plaintiff's Mortgage No. 842471 on 5 April 2017.
 - (ii) Whether the Plaintiff's Mortgage No 842471 registered on 5 April 2017 against Native Lease No. 31062 takes priority over Caveat No. 897569?
- (2) For the following Orders and/or Reliefs:
- (i) A Declaration that the Plaintiff's Mortgage No. 842471 registered on 5 April 2017 against Native Lease No. 31062 constitutes a first charge on the mortgaged property in priority to Caveat No. 897569.
 - (ii) A Declaration that the Plaintiff is entitled to proceed with mortgagee sale of the mortgaged property legally described as Native Lease No. 31062 be removed forthwith.
 - (iii) An Order that Caveat No. 897569 lodged by the First Defendant and registered against Native Lease No 31062 be removed forthwith.
 - (iv) An Order under section 168 of the Land Transfer Act of Fiji Cap 131 that the Second Defendant forthwith remove and/or cancel Caveat No. 897569 lodged by the First Defendant affecting land, legal description of which is Native Lease No. 31062 being Lot 16 on SO 6622, in Tacirua East Subdivision – Stage 3A (part of), TLTB No. 4/3/39463 pursuant to its Mortgage No 842471.
 - (v) An Order under Section 168, section 21 (1) and Section 24 of the Land Transfer Act of Fiji, Cap 131 that the Second Defendant make and enter all such memorials of instrument being the cancellation of Caveat No. 897569 affecting the land, legal description of which is Native Lease No. 31062 being Lot 16 on SO 6622, in Tacirua East Subdivision – Stage 3A (part of) TLTB No. 4/3/39463.
 - (vi) Further or other reliefs as this Honorable Court may deem fit.

- (vii) Costs against the Application on a full solicitor client indemnity basis against the Defendants.

PART C: SUBMISSION

7. In their submissions, the Plaintiff submits that the Defendant has no caveatable interest on the said property based on the judgment by default entered against Sangita Devi Sagar trading as Shiv Enterprises registered as Native Lease No. 31062 being on Lot 16 on SO 6622, in Tacirua East Subdivision – Stage 3 A (part of) ITLTB No. 4/3/39463. The Default Judgment has not been registered on the title. Referring to the case of Municipal District of Concord –v- Coles (1903) 3 CLR 96 where a person with a legal or equitable interest has an equitable claim on the land can lodge a caveat.
8. In their submissions they contend that there is no direct beneficial interest as a creditor. In Hall -v- Richards (1961) 108 CLR held that creditors have a right to execute the judgment but not to give a caveatable interest. Similarly local cases of Kala Wati -v- Krishna Sami Goundar HBC 185 of 2003 where Jitoko J held that even a monetary contribution towards the improvement on the land was not enough to establish a caveatable interest.

PART D: LAW ON CAVEATS AND MORTGAGOR POWER OF SALE

9. Section 106 of the Land Transfer Act entitles a person to a two pronged approach. The provisions reads:

“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 lodged 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.”

10. A person is entitled to lodge a Caveat if he or she is entitled or beneficially interested in the subject land. This is the first approach. In Prasad -v- Home Finance Limited [2003] FJHC 322; HBC0116D.2002S (23 January 2003) Jitoko J referred to the case of Barry v. Heider [1914] HCA 79; (1914) 19 CLR 197 where Lordship obtained guidance:

“Isaacs J defined the nature of the caveat while pronouncing that caveats are lodged, not registered@ (p.219). Francis ‘The Law and Practice Relating to Torrens Title in Australasia@’ (Vo. 1) observed (at p.332) that a caveat unlike a dealing with land which derives its statutory effect from the act of registration, is so far as it may be effective at all, gains the effect from the mere act of lodgment at the Titles Office, and such effect as it comes into operation immediately. (emphasis added).”

11. On lodgment of a Caveat, injunctions registration of any dealings as stipulated under section 113 of the Land Transfer Act.
12. In Prasad -v- Home Finance Limited [2003] FJHC 322; HBC0116D.2002S (23 January 2003) Justice Jitoko (as he was then) said:

‘A Caveat, by its very nature, is meant to act as a statutory injunction to prevent any alteration to a title under the Torrens register, until the rights of the parties have been decided in the ordinary way by the Courts. A Court, when dealing with an application to extend the life of a Caveat, is not expected to enter into the underlying legal issues, but will normally extend the Caveat, if necessary with conditions, until the rights of the parties can be decided (see: Ex-parte Muston [1903] NSWStRp 105; (1903) 3 SR (NSW) 663; Evandale Estates Pty Ltd. v. Keck [1963] VicRp 88; (1963) VR 647).

Mortgagor power of sale

13. Section 79 of the Property Law Act empowers the Mortgagor to exercise his power of sale as follows:

Mortgagee may sell

79. -(1) If default in payment of the mortgage money or in the performance or observance of any covenant continues for one month after the service of the notice referred to in section **77**, the mortgagee may sell or concur with any other person in selling the mortgaged property, or any part thereof, either subject to prior leases, mortgages and encumbrances or otherwise, and either together or in lots, by public

auction or by private contract, or partly by the one and partly by the other of those methods of sale, and subject to such condition as to title or evidence of title, time or method of payment of the purchase money or otherwise as the mortgagee thinks fit, with power to vary any contract for sale and to buy in at any auction or to vary or rescind any contract for sale and to resell without being answerable for any loss occasioned thereby, with power to make such roads, streets and passages and grant such easements of right of way or drainage over the same as the circumstances of the case require and the mortgagee thinks fit, and may make and sign such transfers and do such acts and things as are necessary for effectuating any such sale.

(2) No purchaser shall be bound to see or inquire whether default has been made or has happened, or has continued, or whether notice has been served, or otherwise into the propriety or regularity of any such sale.

(3) Where a transfer is made in purported exercise of the power of sale conferred by this Act, the title of the transferee shall not be impeachable on the ground that no cause had arisen to authorize the sale or that due notice was not given or that the power was otherwise improperly or irregularly exercised, but any person damnified by any unauthorized or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.”

14. The long established rule in the High Courts of Fiji which was adopted and cited by Justice Scott in Ram Dutt Prasad -v- Australia New Zealand Banking Group Limited [1999] 45 FLR 101 is as follows:

‘the mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute because the mortgagor has begun a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained however if the mortgagor pays the amount claimed into Court, that is the amount which the mortgagee claims to be due to him.

(Halsbury 4th Edn, Vol 32, para 725)

Although the rule appears on its face to be absolute it is in fact subject to qualification. Whilst the power of sale is given to a mortgagee for his own benefit, to enable him the better to realize the debt (Warner –v- Jacob (1882) 2 Ch. D 220, 234; Forsyth -v- Blundell [1973] HCA 20; (1973) 129 CLR 477, 483, 494) and the mortgagee is not a trustee of the power for the mortgagor yet nevertheless the mortgagee must pay regard to the interests of the mortgagor. Where the interests conflict the mortgagee is not entitled to act in a manner which sacrifices the interest of the mortgagor (Forsyth –v- Blundell supra).

15. Therefore for the purposes of caveats, the Courts have determined that a transfer from a mortgagee exercising power of sale is an exception to prohibition of dealings under caveat

(Ram Dutt Prasad -v- Australia New Zealand Banking Group Limited [1999] 45 FLR 101, Scott J).

PART E: ANALYSIS

16. The lodgment of a Caveat is governed under Part XVII of the Land Transfer Act. A person claiming to be entitled or having a beneficial interest may lodge a Caveat against any subsequent dealings against the said property.
17. Section 109 and Section 110 of the Land Transfer Act provides for the removal of the Caveat after notification has been made to the Caveatee by the Registrar of the Caveat being lodged. Summons may be issued by the Caveatee to the Caveator why the caveat has been lodged or apply to Court for the removal of the Caveat requiring the Registrar to notify the Caveator to remove the caveat.
18. In the case of Joe Edward Lee -v-Waikalou Developments Limited HBC 0294 of 1995 Scott J held that a person who has an unregistered equitable charge over land has a right to protect that by filing a caveat and furthermore a person who has a beneficial interest on the land is entitled to have that caveat lodged in order to protect the person's interests.
19. However this protected interest is subject to certain qualifications. Where a mortgagee exercises his power of sale over a property for which was the mortgage was registered subsequent to the Caveat, that mortgagee power of sale overrides the right of protection over dealings extended to a Caveator.
20. The right to exercise the mortgagor's power of sale can only be restrained by the Court where the mortgage dealings were not entered in good faith or where there are claims of fraud. These require evidences to be proven at trial.
21. In this case the Defendant has filed a Caveat against the registered owner of the property on the basis that he has a Court Order for a liquidated debt owing against the registered owner of the property.
22. Section 103 to section 105 of the Land Transfer Act prescribes the procedure for the registration of a judgment or order of the Court by the Registrar of Titles. The provisions also stipulates that the registered judgment acts like a Caveat for any future dealings but is subject to a prior registered mortgage where the Mortgagee exercises his power of sale.
23. From sections 103 to 105 and also 106 of the Land Transfer Act, it is clear that the Mortgagee is empowered to exercise his power of sale.

24. Mortgagee's dealings in exercise of his power of sale by way of transfer will therefore stand in priority over and above the Caveat and the registered order.
25. There has not been any challenges to the validity of the Mortgage nor has the registered owner exercised his or her right of redemption by making payments into Court.
26. The Caveator had initially lodged his Caveat on the basis of a caveatable interest.
27. He however is unable to maintain that Caveatable interest in light of the power by the Mortgagee to exercise their power of sale.
28. I therefore find that on this basis, that the Defendant has no caveatable interest and the caveat cannot remain lodged or extended and must be removed.

Costs

29. Given that the Plaintiff has succeeded, the Court will award the Plaintiffs costs summary assessed at \$1000.

Orders of the Court

30. **The Court orders as follows:**

- (a) That A Declaration that the Plaintiff's Mortgage No. 842471 registered on 5 April 2017 against Native Lease No. 31062 constitutes a first charge on the mortgaged property in priority to Caveat No. 897569.*
- (b) A Declaration that the Plaintiff is entitled to proceed with mortgagee sale of the mortgaged property legally described as Native Lease No. 31062 be removed forthwith.*
- (c) That Caveat No. 897569 lodged by the First Defendant and registered against Native Lease No 31062 be removed forthwith.*
- (d) That pursuant to section 168 of the Land Transfer Act of Fiji Cap 131, the Second Defendant forthwith remove and/or cancel Caveat No. 897569 lodged by the First Defendant affecting land, legal description of which is Native Lease No. 31062 being Lot 16 on SO 6622, in Tacirua East Subdivision – Stage 3A (part of), TLTB No. 4/3/39463 pursuant to its Mortgage No 842471.*

(e) That pursuant to under Section 168 of the Land Transfer Act of Fiji Cap 131 and section 21 (1) and Section 24 of the Land Transfer Act of Fiji, Cap 131, that the Second Defendant make and enter all such memorials of instrument being the cancellation of Caveat No. 897569 affecting the land, legal description of which is Native Lease No. 31062 being Lot 16 on SO 6622, in Tacirua East Subdivision – Stage 3A (part of) TLTB No. 4/3/39463;

(f) Costs against the Defendant summarily assessed at \$1500.00.



Ms Senileba LTT Waqainabete-Levaci

Puisne Judge