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IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0057 OF 2004S
(High Court Civil Action No. HBC 494 of 2003S)

BETWEEN: BAHADUR ALI

Appellant

AND: FIJI DEVELOPMENT BANK

Respondent

Coram: Tompkins, JA
Smellie, JA
Scott, JA

Hearing: Wednesday, 16 March 2005, Suva

Counsel: Mr S. Sharma for the Appellant
Mr D. Sharma and Ms Y. Fatiaki for the Respondent

Date of Judgment: Friday, 18 March 2005

JUDGMENT OF THE COURT

Introduction

[1] This is an appeal from the decision of the High Court delivered on 22/7/04 in which Jitoko J. ordered that a caveat lodged by the appellant on State leasehold land mortgaged to the respondent (FDB) should be "discharged forthwith."

Chronology of Non-contentious Issues

[2] The appellant and his family incorporated Valebasoga Tropikboards Limited (VTL) which than acquired what became State lease 12023 of approximately 9.5 hectares in the Naiyaca Subdivision in the district of Labasa.

[3] In order to finance the establishment of a saw mill and chip board factory on the said land VTL on 31/9/93 mortgaged the land to FBI. The mortgage was collateral to

a debenture securing, ***inter alia***, a charge over all the company's assets and those of another family company (Ali's Engineering Company Limited) plus joint and several guarantees from the directors of both companies. The mortgage was duly registered and is No. 344611.

[4] FDB advanced the following amounts to VTL.

28/5/93 - $3,070,750.
4/10/94 - $3,924,119
13/6/95 - $1,156,659

At the date of the last advance the total indebtedness was $8,524,190. The appellant admits the advances but says only the first amount of $3,070,750 is secured by the mortgage.

[5] On 7/3/01, VTL having defaulted on its payments, FDB made demand for payment of the then amount owing of $9,703,905.91 within 30 days. Interest at 10.6% began to run from 1/3/01 to date of payment.

[6] On 30/10/03 the appellant lodged caveat number 531997 claiming an estate or interest "as an equitable owner by virtue of making contributions towards VTL through buildings and improvements on the land" contained in State lease 12023. As required the appellant confirmed on oath at the time of filing that the allegations in the caveat were true in substance and fact.

[7] On 1/12/03 FDB issued an originating summons supported by affidavit evidence seeking the removal of a caveat 531997 and costs.

[8] On 4/2/04 the appellant swore an the affidavit in which he exhibited a deed of family arrangement apparently signed on 24/6/94 which stated that he and his wife had an option to purchase all the leasehold interest in the land in State lease 12023 on discharge of the sum of $3,070,750 said to be owing to the FDB at that time. He also swore that the sum of $3,070,750 had been repaid. In the same affidavit the

appellant contended that the debenture and mortgage referred to in paragraph 3 above were unlawful and null and void.

[9] In Civil Action No. 183 of 2001 between the Receivers of VTL and others and the appellant and his sons as defendants, Pathik J. on the 2/11/01 dismissed an application by the defendants for an order that the appointment of the receivers appointed under the FDB's debenture should be revoked. In Civil Action 28 of 2002 Pathik J. on the 30/10/03 dismissed an application for interlocutory and mandatory injunctions by VTL and Ali's Engineering Limited seeking to oust the receivers appointed by the Bank from their control of the VTL. There have been several other pieces of litigation since early 2001 all involving the appellant and seeking to avoid or forestall recovery by FDB of the moneys owed to it.

The Judgment in the High Court

[10] The judgment commences with a recital of undisputed facts and then records that the respondent FDB sought removal of the caveat. Also that the Bank challenged the appellant's legal capacity to lodge, and contended there was an absence of a caveatable interest and that it was entitled to priority over any such interest by virtue of mortgage 34461.

[11] On the issue of the legal capacity to lodge, the judgment is somewhat equivocal but accepts that if the deed of family arrangement referred to in paragraph 8 above is valid then it provided a basis for the appellant to take the action he did on 3/10/03. On the other hand the Judge held that the mortgage did secure the advances made on the 4/10/94 and 13/6/95 and that variation of the mortgage was not required in respect of them.

[12] On the core issue whether the appellant had a caveatable interest, as opposed to a right to lodge a caveat, the Judge ruled in the favour of FDB. He relied upon an earlier ruling of the High Court in other proceedings that the full amount remained

owing. He applied ***Fiji National Provident Fund Board v. Virass Holdings Limited*** HPC 325 of 2002 and ***Court Bros (Furnishers) Limited v. Sunbeam Transport Limited*** 1969 FLR Vol. 15 207 holding that payment of $3,070,750 to FDB was a condition precedent to the option becoming a caveatable interest. As it had not been paid there was no caveatable interest.

[13] Having reached that conclusion the Judge found it unnecessary to address the question of priority. He also recorded that as other matters raised by the defendant (nullity and/or illegality of the debenture and mortgage as collateral to the debenture) had been ruled upon in earlier litigation he was not prepared to traverse them again. Discharge of the caveat was ordered forthwith.

Grounds of Appeal

[14] The grounds of appeal may be summarised as follows:

1. The Judge made findings of fact on affidavit evidence when there should have been a full hearing with viva voce evidence.

2. The debenture was null and void and so was the mortgage.

3. That the mortgage secures no more than $3,070,750 and any further advances are not secured.

4. The Judge failed to take account of the family settlement agreement of 24/6/94.

5. Relevant matters had not been taken into account, irrelevant matters had been taken into account, and the decision was unreasonable. (No particulars of that pleading were provided).

[15] During the hearing in this Court Mr S. Sharma, properly in our view, abandoned grounds 2 and 5. The remaining grounds identified in 1, 3 and 4 above are all related and will be dealt with together later in the judgment.

The Estate or Interest claimed in the Caveat

[16] Section 107 of the Land Transfer Act Cap. 131 (LTA) deals with the particulars to be stated in and to accompany a caveat. It reads as follows:

> ***"Ever (sic) caveat shall state the name, address and description of the person by whom or on whose behalf the same is lodged and, except in the case of a caveat lodged by order of the court or by the Registrar, shall be signed by the caveator or his agent and attested by a qualified witness and shall state with sufficient certainty the nature of the estate or interest claimed and how such estate or interest was derived."*** (emphasis added).

[17] Form 15 of the Subsidiary Legislation (Regulation 17) requires an Attestation Clause as follows:

> **"Attestation Clause.**
>
> ***A declaration under the Statutory Declarations Act saying that the allegations in the above caveat are true in substance and in fact either from personal knowledge or information and belief."***

As recorded in paragraph 6 under the heading "Chronology of Non-contentious Issues" the appellant purported to satisfy the above requirements by claiming, (and verifying the claim on oath) "an estate or interest as an equitable owner by virtue of making contributions towards Valebasoga Tropikboards Limited through buildings and improvements."

[18] Called upon by the respondent's summons to show cause why the caveat should not be removed the appellant filed an affidavit sworn on 4/2/04. In it he made no mention whatever of the grounds relied upon in the caveat as filed. Critically no

instrument was exhibited or referred to. The absence of any document capable of registration under the LTA means that the interest claimed could never support an estate or interest in the land (s.37 LTA). In truth what is claimed is an interest in personam which demonstrably will not support a caveat. No doubt the realisation of that flaw in the appellant's position explains the dramatic change of direction to reliance upon the deed of family arrangement.

[19] It follows that the appellant has not shown cause why the caveat, as it stands, should not be removed. Although it was not canvassed in argument before us, we have no doubt a caveator cannot be allowed to chop and change as to the nature of the estate claimed and how it was derived. Were it otherwise the legitimate interests of registered mortgagees and others could be frustrated endlessly. Both the text and purpose of the LTA, based as it is on the Torrens system, make that clear beyond argument.

[20] In this Court we are satisfied that the removal of the caveat on the grounds that no caveatable estate or interest was claimed could, and indeed should, have been ordered in the High Court. The consequence is that the appeal could be dismissed summarily at this point without further discussion. Out of deference to the judgment under appeal, however, and the extensive submissions of Counsel we shall address the other issues.

The Law as to Removal of Caveats

[21] Counsel for the appellant cited the leading Privy Council authority ***Eng Mee Yong v. Letchumanan*** [1980] AC 331. The essential holdings in that case, (by way of analogy with interlocutory injunctions) regarding serious issue to be tried and balance of convenience are well known and require no repetition here. We would add, however, that when those two matters have been addressed, the discretion vested in the Court requires the tribunal to stand back and look at the overall justice

of the case. Cooke J. (as he than was) in ***Klissers v. Harvest Bakeries*** [1985] 2 NZLR at 142 line 25 delivering the judgment of the Court of Appeal put it this way.

> ***"In any event the two heads (serious issue and balance of convenience) are not exhaustive. Marshalling considerations under them is an aid to determining, as regards the grant or refusal of an interim injunction, where overall justice lies. In every case the Judge has finally to stand back and ask himself that question."***

[22] In ***Eng Mee Yong*** (***Supra***) the Privy Council also recognised that disputed issues of the fact can in an appropriate cases be resolved on affidavit evidence. Again Cooke P. in ***Barrett v. IBC International Limited*** [1995] 3 NZLR 170 at 175 line 30 dealing with what was described in that case as a 180 degree change of direction said:

> ***"Evidently the learned Master was inclined not to rule out the possibility that this new allegation might be credible. I am afraid I am unable to take so generous a view. On the contrary, the case seems transparently to be one for the application of Lord Diplock's well-known statement in Eng Mee Yong v. Letchumanan [1980] AC 331, 341:***
>
> > ***"Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement in an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be."***
>
> ***That proposition has been acted on in this Court more than once. It is sufficient to refer to Bilbie Dymock Corporation v. Patel [1989] 1 PRNZ 84,86, where encouragement was found in Lord Diplock's words for adopting a robust and realistic judicial attitude....."***

We consider that aspects of this case call for a similar approach.

The remaining grounds of Appeal

[23] In his submissions in support of the appeal Mr Sharma argued that the key issue was the exercise of the Judges discretion under s.109(2) LTA which records as follows:

> ***"109 - (1).....***
>
> ***(2) Any such applicant or registered proprietor, or any other person having any registered estate or interest in the 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."***

[24] Counsel contended that the disputes in the affidavits as to the validity of the deed of family arrangement, the payment of the initial advance of $3,070,750 and whether the further advances of $3,929,119 and $1,156,659 were also secured by mortgage 344611 could only be resolved in a witness action where the truth of the conflicting versions of events could be tested by cross-examination.

[25] So far as the validity of the deed of family arrangement is concerned it was entirely understandable that the trial Judge should have reservations. But in the end he resolved the case against the appellant on the basis that if the deed created a valid option the same had never been exercised and so no estate or interest had come into existence. In that he was undoubtedly right. In ***Court Bros. (Furnishers) Limited v. Sunbeam Transport Limited*** [1969] FLR Vol. 15 206 where the issue was whether the granting of an option amounted to a dealing in land, Marsack, JA delivering the first judgment said at page 208:

> ***"It is of the essence of an option, in my view, that any interest in the land, other than a contingent or an executory interest, which it may confer on the holder of the option can arise only when that holder***

has given notice of acceptance of the option; that is necessarily at some future time. If that is so, the holder of the option does not acquire any immediate interest in the land at the time of the granting of the option. If there can be no "dealing in land" until such an interest is acquired by the other party from the vendor, then no dealing in land can arise until the further act of acceptance is performed by the holder of the option."

[26] To similar effect is the decision of Austin J. in the Equity Division of the Supreme Court of New South Wales in ***Allam Homes v. Vocata*** [2003] NSWC 628 in paragraphs 32,33 and 34 under the heading ***"Caveatable interest:***

> *32 The grant of an option creates an equitable interest in land, in the sense that the grantor is bound to sell the land to the grantee if and when the option is exercised, and then the grantee has the right to call for the transfer of the legal estate: Laybutt v. Amoco Australia Pty Ltd. (1974) 132 CLR 57 at 75-76; the case law was recently summarised and considered by Barrett J in Forder v. Cemcorp Pty Ltd. (2001) 10 BPR 18,615, esp at page 97871.*
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> *33 Counsel for the plaintiff properly drew my attention to a potential weakness in his client's case. It arises out of clause 3.1. That clause makes the plaintiff's call options in respect of each of the Lots exercisable only when the Grantor notifies the Grantee in writing that the relevant Development Consent has been issued. Counsel's concern, arising out of some observations by Young J (as the Chief Judge in Equity then was) in Piper Industries Pty Ltd. V. Hemphill (unreported, 8 June 1989) was that arguably a caveatable interest does not exist if a call option is subject to a condition not yet fulfilled.*
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> *34 In the Piper Industries case, Young J said:*
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> *"Although the option may confer an interest in land from its inception, that will only occur if the option is exercisable from the date of its creation. If an event has to occur before the option is exercisable then, no matter what may be the juristic nature of an option, in my view, no interest in land is created in the grantee until the time the condition occurs and the option becomes presently exercisable."*

[27] In this case the exercise of the option required at least the repayment of the initial advance from the appellant and arguably the approval of the Director of Lands. There was no suggestion the latter was available but the repayment of $3,070,750 and discharge of the respondent's mortgage is in dispute.

[28] Towards the end of his submissions Counsel for the appellant submitted that the whole case turned on the amount of the debt under the mortgage and whether it had been paid off.

[29] Whether the mortgage secured all advances or just the initial advance is not an issue of fact. Rather it is a question of law to be resolved on the correct interpretation of mortgage 344611.

[30] The mortgage states on the first page that VTL mortgages to the mortgagee (FDB) "all the estate and interest of the mortgagee as such proprietor as aforesaid in all the land particularised in the following schedule (the schedule identifies the land in State lease 12023) for the purpose of securing to the mortgagee the payment in the manner here and after mentioned of the monies here and after described namely:

> ***"(a) all monies whether advanced by way of loan or fixed term or provided by way of over draft or otherwise now or hereafter to become owing or payable to the mortgagee by the Debtor and the Mortgagor or either of them either alone or on joint or partnership account or on any other account whatsoever."***

[31] The appellant does not dispute the 3 advances earlier referred to, but sought in the High Court and again before us, to argue that because the Director of Lands consent is recorded on the duplicate mortgage held in the office of the Registrar approving a mortgage "subject to the principal sum not exceeding $3,070,750" the certificate overrides the terms of the mortgage itself. That in our view is an untenable proposition. The Director of Lands consent is required pursuant to the State Lands Act (Cap.132) but it is not part of nor does it affect the terms of

mortgage. Moreover as the respondent has demonstrated the necessary consents for the further advances are endorsed on the duplicate mortgage held by FDB. Even if the further advances be regarded as variations, (which they were not), registration of such changes is optional (s.67 LTA).

[32] In the result we uphold the trial Judges conclusion on this aspect of the case.

[33] The remaining disputed issue is whether in any event the initial advance was repaid. The appellant provides no information on this issue other than the bald statement in para 6 of his affidavit in opposition where he deposes:

> ***"I say that the said mortgage sum $3,070,750 and the interest thereon has been paid in full."***

[34] The respondent on the other hand in its affidavit in reply of 3/5/04 exhibits documents B, C, and D, being the formal letters advising of approval for the 3 advances subject to extensive conditions which VTL had to agree to before the monies were released. The seal of VTL was affixed affirming acceptance of the conditions in each case accompanied by the appellant's signature.

[35] As the documents show, when the second advance of $3,924,119 was made on 4/10/94, the documents acknowledged by VTL as indicated above show the initial account at that time stood at $3,077,487 and the total indebtedness therefore rose to $7,001,600. Similarly when the third advance of $1,156,659 was made the account stood at $7,367,531 leading to a total indebtedness of $8,524,190. When the default notice was given early in 2001 the indebtedness (obviously as a result of defaults on agreed payments) stood at close to $10,000,000 and interest has been accruing at approximately $1,000,000 per annum ever since.

[36] To adopt Cook P's words in ***Derrett v. IBC International Limited*** (Supra) this is a case "transparently" suited to the "robust and realistic" approach enunciated by Lord Diplock in ***Eng Mee Yong***. The learned trial Judge was well justified in proceeding

as he did. The contention that the initial advance had been repaid was "inconsistent with undisputed contemporary documents...(and) inherently improbable in itself... ..."

Conclusion and Costs

[37] The appeal is dismissed. The points finally argued were without substance or merit and those abandoned even more so.

[38] Moreover this is the last in a string of 4 or 5 substantial pieces of litigation in which by one means or another the appellant has endeavoured to thwart FDB's legitimate right to recover its advances and interest.

[39] We award costs in the sum of $2,500 plus all reasonable disbursements to be fixed by the Registrar if the parties are unable to agree.

Tompkins, JA

Smellie, JA

Scott, JA

FIJI COURT OF APPEAL

Solicitors:

Messrs. Patel Sharma and Associates, Suva for the Appellant
Messrs. R. Patel and Company, Suva for the Respondent

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