

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**Action No. HBC 319 of 2014**

**BETWEEN** : **ASHWANI DEVI SINGH**

**PLAINTIFF**

**AND** : **PRATIMA DEVI** as Administratrix

**FIRST DEFENDANT**

**AND** : **REGISTRAR OF TITLES**

**SECOND DEFENDANT**

**BEFORE** : **Hon. Justice Kamal Kumar**

**COUNSEL** : **Mr M. Nand for the Plaintiff**

: **Mr S. Parshotam for the First Defendant**

: **Ms T. Sharma for the Second Defendant**

**DATE OF HEARING** : **4 February 2015**

**DATE OF JUDGMENT** : **10 November 2015**

---

**RULING**

**Applications to Extend Caveat and Sale of Property**

---

## **1.0 Introduction**

- 1.1 On 15 November 2014, Plaintiff caused to be issued Writ of Summons with Statement of Claim and Inter-Parties Summons seeking an order that time for removing Caveat No. 801241 lodged by the Plaintiff against Certificate of Title Nos. 40857 and 40858 be extended until further order of this Court, which Summons was returnable on 21 November 2014 at 9.30 am.
- 1.2 On 21 November 2014, an interim Order was made extending Caveat No. 801241 until determination of the Summons and parties were directed to file Affidavits and Submissions and the Summons was listed for hearing on 4 February 2015 at 9.30am.
- 1.3 On 19 December 2014, Defendant filed Summons seeking an order for sale of properties comprised in Certificate of Title Nos. 40858 and 40857 with Affidavit in Opposition.
- 1.4 Following Affidavit were filed by the parties:-

### **For Plaintiffs**

1. Affidavit in Support of Plaintiff sworn and filed on 13 November 2014 ("**Plaintiff's 1<sup>st</sup> Affidavit**");
2. Affidavit in Reply of Plaintiff sworn on 30 December 2014 and filed on 31 October 2014 ("**Plaintiff's 2<sup>nd</sup> Affidavit**").

### **For Defendant**

Affidavit in Opposition of Defendant sworn on 18 December 2014 and filed on 19 December 2014 ("**Defendant's Affidavit**").

## **2.0 Application to Extend/Remove Caveat**

- 2.1 Section 106 of the Land Transfer Act Cap 131 provides:

*"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 provision of this Act, or any estate or interest therein, to any other person to be held in trust, may at any time 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 as may be required in such caveat.”*

2.2 In **Cambridge Credit (Fiji) Limited v. W.F.G Limited** 21 FLR 182 Fiji Court of Appeal at page 184 sets out the requirements to be satisfied by a caveator to come within the provisions of Section 106 of Land Transfer Act Cap 131 as follows:-

***“(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 is it so claiming by virtue of any unregistered agreement or other instrument or transmission or any trust expressed or implied or otherwise howsoever.”***

Court of Appeal in **Cambridge’s** case also adopted with approval following comments of his Lordship Stout C.J. in **Staples & Co. v. Corby and District Land Registrar** [1901] 19 N.Z.L.R. 517 whilst dealing with provision in Land Transfer Act (NZ) similar to s106.

***“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 in 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, &c.), ‘or of any trust expressed or implied, or otherwise howsoever.’”***

2.3 The above principle was applied and adopted in **Hussein v. Ali** [2013] FJHC 285, Civil Action No. 328 of 2012 [7 June 2013].

2.4 It is therefore imperative that Plaintiff should show some form of legal or beneficial interest in the subject land to be able to maintain the Caveat.

2.5 It is undisputed fact that:-

(i) Narendra Singh (**“Deceased”**) who died intestate on 21 December 2002, was registered proprietor of all those properties known as Lot 1 on Deposited Plan No. 7937 known as “Naganivitu” in the District of Naitasiri and Island of Viti Levu containing 2354 square meters comprised and described in Certificate of Titles No. 31189 and Lot 2 on

Deposited Plan No. 7937 known as “Naganivitu” containing 2279 square meters comprised and described in Certificate of Title No. 31190;

- (ii) On 20 August 2003, Letters of Administration was granted in favour of Deceased’s spouse Pratima Devi and as such she was appointed as the Administratrix of the Estate of Narendra Singh;
- (iii) On 20 September 2003, Transmission by Death was registered in respect to the Titles to the above properties;
- (iv) Deceased was survived by his spouse, Pratima Devi and three daughters, namely Ashwani Devi Singh (Plaintiff in this action), Roveena Devi Singh and Shaleshni Devi Singh;
- (v) Property comprised in Certificate of Title No. 31190 was sold to Rajesh Kumar and Shaleshni Devi Kumar (one of the beneficiaries) for \$55,000.00 which property was mortgaged to Colonial National Bank by them;
- (vi) First Defendant caused property comprised in Certificate of Title No. 31189 to be subdivided into two lots which are subject to Certificate of Title Nos. 40857 and 40858;
- (vii) On 20 May 2014, First Defendant executed Transfer in respect to property comprised in Certificate of Title No. 40858 in favour of Ravikesh Rajeet Ram for consideration sum of \$82,000.00;
- (viii) On 25 July 2014, Plaintiff caused Caveat to be lodged against Certificate of Title Nos. 40857 and 40858.

### **3.0 Caveatable Interest**

- 3.1 Plaintiff claims to have caveatable interest by virtue of being a beneficiary in the Estate of Narendra Singh, late of Lot 20, Savura Road, Wailoku, Suva, Driver.
- 3.2 First Defendant whilst acknowledging that Plaintiff is a beneficiary in the residuary estate of the Narendra Singh (“**the Deceased**”) that her actual interest has not been determined yet as the Estate is still in the process of administration.
- 3.3 The principle in relation to Caveatable Interest of a beneficiary in the residual estate of the Deceased person has been stated in **Guardian Trust and Executors Co. of New Zealand Ltd. v. Hall** [1938] NZLR 1020 as follows:-

***“The interest conferred upon the caveator by the will of his father was a right to share in the residue, and the residue was to be arrived at by***

**sale, realization, and a discharge of liabilities. This process is not yet complete.”**

- 3.4 His Honour MacGregor J in **Re-Savage’s Caveat** [1956] NZLR 118 stated as follows:-

**“... it seems to me the caveator’s claims is not to an interest in the land but merely to a right to share in any surplus of the intestate estate after all liabilities have been discharged.” (page 120)**

- 3.5 Both **Guardian’s case** and **Re-Savage’s case** were considered in **Costa & Duppe Properties Pty Ltd v. Duppe** [1986] VR 90. In stating the principle in both these cases his Honour Brooking J stated as follows:-

**“A Caveat lodged by one of the next of kin where the estate had not been fully administered seems to have passed without comment in the early case of Colonial Investment & Agency Co. Ltd. v. Cobain (1888) 14 V.L.R. 740; and according to Currey, writing in 1933 (Manual of Titles Office Practice in Victoria, p. 35), a caveat by the next of kin was a claim which the Titles Office had accepted. In Re Savage’s Caveat [1956] N.Z.L.R. 118 one of the next of kin of the deceased registered proprietor was held to have no caveatable interest. The Court of Appeal of New Zealand had taken the same view of a caveat lodged by one of the residuary legatees in Guardian Trust & Executors Co. of New Zealand Ltd. v. Hall [1938] N.Z.L.R. 1020. In neither case had the estate been administered, and both decisions were based on the principle laid down in Lord Sudeley v. Attorney-General [1897] A.C. 11 and more recently considered in Commissioner of Stamp Duties (Qld.) v. Livingston [1965] A.C. 694 that a residuary legatee or the next of kin of an intestate had no beneficial interest in any of the assets of the estate until administration was complete: in the meantime his right was merely a right to have the estate duly administered. (As to the position of a specific legatee before completion of administration: see Re Hayes’ Will Trusts [1971] 2 All E.R. 341; [1971] 1 W.L.R. 758 and Kavanagh v. Best [1971] N.I. 89; and note also Burke v. Dawes (1938) 59 C.L.R. 1, at pp.16-20, per Dixon J. and Re Bielfeld, deceased (1894) 12 N.Z.L.R. 596.)” (page 93)**

- 3.6 The principle in **Guardian** case and **Re Savage** was applied and adopted in **Anganu v. Dayamanti** [1994] FJAC 0629 d. 93S (29 June 1994) (Justice Fatiaki) and **Prasad v. Prasad & Ors.** [1996] FJHC 167 HBC 0348 sd.95s (12 December 1996) (Justice Pathik).

- 3.7 In **Prasad v. Prasad**, Plaintiff attempted to lodge second caveat against the estate property which was sold by the Administratrix. Plaintiff in that case alleged that the Administratrix and Registrar of Titles had no power to transfer

the estate property until such time all beneficiaries interest had been taken care of.

The Court considered the above principle and held that Plaintiff did not establish that he was the person that would be entitled to lodge a second caveat.

- 3.8 First Defendant relied on the principle cited in above mentioned cases in support of her contention that Plaintiff has no caveatable interest against Certificate of Title Nos. 40857 and 40858 on the ground that Deceased's estate is still in the process of being administered and the residue estate of the Deceased can only be determined once the assets are realized to pay debts owed by the Estate.
- 3.9 Plaintiff by her Counsel submits that Plaintiff differs with First Defendant's submission that a beneficiary of an intestate does not have a caveatable interest over specific estate property while the estate is yet to be administered (paragraph 8 of Plaintiff's submission filed on 2 February 2015 refers).
- 3.10 At paragraph 9 of the said Submission Plaintiff submits as follows:-

***“We tend to differ from this conclusion and refer to the case of Sang Yee Jay v. BPTC Limited (In Liquidation) (1994) FJHC 173 in which Justice Byrne said that that the case of Guardian Trust and Executors Co. of New Zealand Ltd (supra) is not an authority for the proposition that the beneficiary of the residue of an estate does not have an interest in a property which forms part of that residue which can be protected by the registration of Caveat. Rather the Court of Appeal of NZ held that until the residue of a deceased estate has been ascertained, a beneficiary entitled to a share in such residence is not “entitled to as beneficially interested” in the land forming part of that estate within the meaning of the Land Transfer Act.”***

- 3.11 Before I proceed further I note that submissions filed on behalf of Plaintiff do not number the paragraph or pages. Also the pages of submissions filed by Plaintiff on 23 January 2015 and by 1<sup>st</sup> Defendant are not numbered.
- 3.12 Legal Practitioners should take more care when filing submissions.
- 3.13 In **Sang Yee Jay's** case his Lordship Justice Byrne at paragraph 6 on page 5 stated as follows:-

***“In this case counsel for the Plaintiff properly points out the difference is that whereas in the Guardian Trust case the interest was not defined, being part of an unascertained residue, in the present case the Plaintiff's***

*interest is very well defined: he is entitled to have his interest in the property conveyed to him.*

*Indeed in the Guardian Trust case at p.1026 of the judgment of the Court cited a line of English cases from 1897 to 1937 which had held that the legatee of a share in residue has no interest in any of the property of the Testator until the residue has been ascertained, and that his right is to have the estate properly administered and applied for his benefit when the administration is complete. It was therefore held on the particular facts that as the administration was not yet completed, the Caveator had no interest in the land sufficient to bring within him the relevant section of the Act.”*

3.14 With due respect I do not think First Defendant’s submission that a beneficiary cannot claim caveatable interest until the residuary estate is determined is not contrary to what was said by his Lordship Justice Byrne in **Sang Yee Jay’s** case.

3.15 Plaintiff relied on case of **Holt v. Anchorages Management Ltd** (1987) 1 NZLR 108 referred to in **Em Jamieson-Bele v. Bellv Pm Hankins and Dvm Trust Hc Wang** Civ 2008 483 294 [2008] NZHC 1982 (11 December 2008) case authority submitted on behalf of Plaintiff.

3.16 In **Holt’s** case a parcel of land was transferred to Anchorage Management Ltd by Redwood Holdings Ltd of which Mr Holt was then governing director. The land was held in trust for Mr Holt and was to be transferred to him subject to him discharging any legitimate liabilities secured against the land.

3.17 It was for this reasons his Honour McMullin held that Mr Holt could point to a specific land and fairly claim an interest as cestui que trust in the land. (paragraph 35, page 114)

3.18 His Honour McMullin J at page 114 stated as follows:-

*“Appellant’s position would have been different if his interest were an interest in a trust of which real property was an undefined part of the subject matter of the trust. In that case he could not claim to be entitled to a beneficial interest on the land. This was the basis on which Gudardian Trust and Executors Co of New Zealand Ltd v Hall [1938] NZLR 1020 was decided. To the same effect is Re Savage’s Caveat [1956] NZLR 118 where all the caveator could claim was a right to share in any surplus of the intestate estate after liabilities had been discharged.”*

3.19 **Em’s** case refers to the following statement of His Honour Justice Cook President of New Zealand Court of Appeal in **Phipot v. NZI Bank** [1990] **NZ Conv Rep** 242:-

***“Counsel for the respondent [caveator] sought to maintain the caveats by a variety of arguments, all of which come to substantially the same. It was said for instance that in section 137(a) the words “beneficial interest” have a wider scope than equitable interest; that a caveat is supportable if the caveator had some “potentially” enforceable right’ and again that, although [the caveator] had to accept that this was not an equitable charge, nevertheless it was an equitable interest. No authority was cited supporting any of these interpretations of section 137(a). In my opinion for all purposes material to the present case the words “beneficial interest” refer to equitable interest and the section cannot be stretched to include mere potentialities which have not ripened into interests in any particular properties.”***

- 3.20 His Honour Gendall D. I, the Associate Judge when deciding whether Applicant in **Emi’s** case had caveatable interest also relied on the principles stated in **Guardian Trust** (Supra) and **Re Savage Caveat** (Supra) paragraphs 27 and 28 of **Em Jamieson Bale’s** case refers.
- 3.21 For Plaintiff to establish that she has caveatable interest she has to prove that her interest in the Estate has been identified to the lands against which Caveat has been lodged.
- 3.22 The brief fact of **Em Jamieson Bale’s** case are as follows:-
- (i) *Helen Mary Mchlaran (Mrs McLachlan) she was one of the settlers of Trust constituted by Trust Deed dated 31 March 1993;*
  - (ii) *“Trust Fund” on the Deed was defined as “the sum of \$10 together with all other money or property which may be added to it by way of capital or income”;*
  - (iii) *Mchlaran’s family farm at Ratana was transferred to Trust which formed major part of the Trust Fund;*
  - (iv) *In 2003, Mrs McLachlan and the co-trustees decided to divide the Trust Land (Farm) between Applicant as Sally as recommended by registered valuer Mr Goudie;*
  - (v) *Mr Goudie recommended that Southern portion of the land be given to the Applicant (“JM Distribution Land”) and Northern portion be given to Sally (“SM Distribution Land”);*
  - (vi) *On 13 May 2003, Trustees signed a resolution adopting the recommendation of Mr Goudie for distribution of farm property;*
  - (vii) *On 17 October 2003, Mrs McLachlan died;*



- (viii) *In 2005, Sally through Respondent (Trustees) negotiated sale of SM Distribution Land and Trustees entered into conditional agreement with the Purchaser;*
- (ix) *This agreement was not completed and on 28 April 2008, Trustees entered into another agreement with same Purchaser of SM Distribution Land for \$1.7m;*
- (x) *On 3 May and 27 June 2008, Applicants lodged caveat against four Titles subject to SM Distribution Land under Sale and Purchase Agreement;*
- (xi) *Applicant stated her interest in the Caveat as “..... by reason of the Caveator’s share as a beneficiary in the undivided land of D.V. Mchlanan Family Trust No. 2 of which registered properties are the trustees”.*

3.23 The Court after analyzing the above facts concluded that:-

**“30. “..... under clause 9 of Trust Deed the applicant and Sallys interest as final Primary Beneficiaries was to receive a distribution of the balance of the Trust Fund. Each beneficiary was entitled to a one-half share. The trust land was not named in the Trust Deed and it is clear from Clause 2.2 of the Trust Deed that the Trust Fund was not limited to the trust land.**

**31. I am satisfied therefore that under the Trust Deed, the applicant is entitled to a one-half share in the Trust Fund generally. As such, in applying the principles referred to above, the applicant does not have a specific interest in the trust land and there is no beneficial interest that can be caveated. The applicant has not satisfied its burden of establishing a reasonably arguable case to support the caveats lodged against the trust land.”**

3.24 The legal position in respect to the issue of caveatable interest of a beneficiary as been succinctly stated by his Lordship Justice Tuivaga (as he then was) in **Sherani v. Jagroop** (1973) 19 FLR 85 (24 October 1973) as follows:-

**“The legal position is summarized in Parry’s Law of Succession (4<sup>th</sup> Edition) at page 225 as follows:-**

**“A residuary legatee or devisee, however, has no claim to any of the deceased’s estate in specie nor to any part of that estate until the residue is ascertained. His right is to have the estate administered and then applied for his benefit.”**

**“In support of the above statement the case of Bernado’s Homes v. I.R. C. [1921] 2 A.C. 1 was cited amongst others. In that case Viscount Cave at page 10 observed:-**

***“When the personal estate (and undoubtedly including real estate) of a testator has been fully administered by his executors and the net residue ascertained, the residuary legatee is entitled to have the residue as so ascertained, with any accrued income, transferred and paid to him; but until that time he has no property in any specific investment forming part of the estate or in the income from any such investment, and both corpus and income are the property of the executors and are applicable by as a mixed fund for the purposes of administration.”***

***A similar observation was made in the same case by Viscount Finlay where at page 8 he said:-***

***“It appears to me that the present case is really decided by the decision of this House in Lord Sudeley’s case [1897] A.C. 11. It was pointed out in that case that the legatee of a share in a residue has no interest in any of the property of the testator until the residue has been ascertained. His right is to have the estate properly administered and applied for his benefit when the administration is complete.”***

***In similar vein Lord Atkinson at page 11 said:-***

***“The case of Lord Sudeley v. Attorney-General [1897] A.C. 11 decided in this House conclusively established that until the claims against the testator’s estate for debts, legacies, testamentary expenses, etc., have been satisfied, the residue does not come into actual existence. It is a non-existent thing until that event has occurred. The probability that there will be a residue is not enough. It must be actually ascertained.”***

3.25 This principle has been re-instated in **Re Savage and Guardian Hall** (Supra) and applied by Courts in Fiji.

3.26 Plaintiff in Plaintiff’s 1<sup>st</sup> Affidavit alleges that:-

- (a) Plaintiff did not receive any benefit;
- (b) Property comprised in Certificate of Title No. 31190 was sold at undervalue;
- (c) Certificate of Title No. 31189 was divided into two lots which are subject to Certificate of Title Nos. 40857 and 40858;
- (d) First Defendant is selling property subject to Certificate of Title No. 40858 to one Ravikesh Rajeet Ram for \$82,000.00;

3.27 First Defendant in First Defendant's Affidavit admits most of the contents of Plaintiff's 1<sup>st</sup> Affidavit including sale of property subject to Certificate of Title No. 31190 and says as follows:-

- (a) Estate owes AUD\$108,000.00 to Roveena Devi (who is her daughter and beneficiary) and Ugesh Chand for Deceased's medical treatment in Australia in 2002;
- (b) Deceased had an Agreement with said Roveena Devi and Ugesh Chand that Deceased will pay them back the expenses incurred by them from sale of Deceased's real properties in Fiji but unfortunately Deceased passed away shortly after the treatment;
- (c) 1<sup>st</sup> Defendant engaged services of Sashi Dutt & Associates, Accountants who prepared Statement of Account (Annexure "F" of Defendant's Affidavit) showing surplus of \$32,052.00 when assets of the Estate are sold and debt (including that of Roveena and Ugesh) are paid;
- (d) On 9 December 2014, MC Lawyers acting on behalf of Roveena Devi and Ugesh Chand wrote to her demanding payment of the sum AUD\$108,000.00;

3.28 Plaintiff in Plaintiff's 2<sup>nd</sup> Affidavit mostly confirmed what she said in Plaintiff's 1<sup>st</sup> Affidavit and "strongly disagreed" that Deceased owed Roveena Devi and Ugesh Chand and further says that:-

- (a) No receipts have been provided for the loan of AUD\$108,000.00;
- (b) 1<sup>st</sup> Defendant (her mother) and her sister are upset with her because she did not consent and raised queries;
- (c) 1<sup>st</sup> Defendant never raised issue of AUD\$108,000.00 being owed to Roveena Devi and Ugesh Chand;
- (d) She does not agree with Statement of Account prepared by Sashi Dutt & Associates;
- (e) 1<sup>st</sup> Defendant when applying for Letters of Administration for Deceased's Estate swore that the final balance of the Estate amounted to \$55,879.93.

3.29 I note the First Defendant as Applicant swore gross value of the Estate to the amount of \$55,879.93;

3.30 If the Plaintiff have any issues with amount sworn as gross and final balance of the Deceased's Estate in the Oath of Administratrix then Plaintiff should raise this matter with Probate Registry and Chief Registrar of this Court for

investigation and reference to appropriate authorities for necessary action if there is a need to take any action;

3.31 Based on the Affidavit evidence and submissions made by the parties I am of the view that:-

- (i) There is a possibility that property comprised in Certificate of Title No. 31190 was sold to one of the beneficiaries of the Estate and her spouse at an undervalued price;
- (ii) The alleged debt owed to Roveena Devi and Ugesh Chand appears to be suspect and an afterthought as no evidence was provided as to the details of the sum of AUD\$108,000.00 allegedly owing to them. There is also no evidence of the claim being lodged with the First Defendant when she was in process of applying for Letters of Administration. The notice published in The Fiji Times on 3 March 2003 pursuant to Section 55 of Succession Probate and Administration Act (Cap 60) required all creditors to submit their claim in writing to the First Defendant by 31 March 2003. No evidence of any such claim has been provided to the Court. Only evidence provided to the Court was in the form of letter written by MC Lawyers on 9 December 2014, to the First Defendant. This letter was written only after the Plaintiff instituted this proceeding and obtained an interim Order for extension of the Caveat;
- (iii) There is a possibility that 1<sup>st</sup> Defendant is not acting in the best interest of the Plaintiff who is one of the beneficiaries of the Estate of Narendra Singh.

3.32 I also note that First Defendant has failed to explain in her Affidavit as to how the sale proceeds of property subject to Certificate of Title No. 31190 was disbursed;

3.33 The alleged debt of Roveena Devi and Ugesh Chand was allegedly incurred in 2002 and **may** be caught by section 4 of the Limitation Act (Cap 35) as there is no evidence that they instituted any action against the Estate to recover the debt;

3.34 I hold that the First Defendant having paid the costs of subdivision of Certificate of Title No. 31189 the alleged debt owed to Roveena Devi (one of the beneficiaries of the Estate) and Ugesh Chand being suspect and almost certainly statute barred the only residue property of the Estate left is properties subject to Certificate of Title No. 40857 and 40858. Apart from these two properties there is no evidence that there is any other assets or sum of monies in Estates Bank Account left for distribution;

- 3.35 I find that the residue of Deceased's Estate has been ascertained and defined in the form of properties comprised and described in Certificate of Title Nos. 40857 and 40858 and as such Plaintiff has caveatable interest over these properties;
- 3.36 Having found that Plaintiff has caveatable interest I now need to determine if balance of convenience requires that caveat in respect to Certificate of Title Nos. 40857 and 40858 be maintained.
- 3.37 In **Eng Mee Young & Ors v. Letchumanan** [1980] AC 331 the Privy Council stated as follows:-
- “...where an application to the court under [section 110] for the removal of a caveat was by the registered proprietor of the land, the caveator had to satisfy the court that there was a serious issue to be tried and, having done so, to show that on a balance of convenience, the status quo should be maintained until trial .....although on such application a conflict of evidence usually indicated that there was a serious issue to be tried and it was normally inappropriate to resolve that conflict on affidavit, the judge was entitled to consider whether the plausibility of the evidence merited further investigation...”***
- 3.38 The above principle was adopted with approval in **Dearnaley v. Kumar** [2012] FJHC; HBC54.2012 (16 July 2012).
- 3.39 In relation Certificate of Title No. 40858, First Defendant as Administratrix of the Estate of Narendra Singh has agreed to sell the property to Ravikesh Rajeet Ram for \$82,000.00 and has already executed the transfer on 20 May 2014;
- 3.40 There is no evidence in respect to status of the said Transfer.
- 3.41 If the transfer of Certificate of Title No. 40858 dated 20 May 2014, in favour Ravikesh Rajeet Ram is proceeding then it is in the Estates interest that the Transfer be completed.
- 3.42 Failure to complete above transaction may lead to claim being made against the Estate for breach of contract which will not be in Estate's interest.
- 3.43 Balance of Convenience therefore dictates that Transfer of Certificate of Title 40858 in favour of Ravikesh Rajeet Ram be completed.
- 3.44 In relation to property comprised in Certificate of Title No. 40857 I see no reason why Caveat No. 801241 should not be extended until final determination of this action.

**Condition for Removal/Extension of Caveat**

- 3.45 The power of Court to extend or remove Caveat is discretionary and as such the Court can impose conditions to do justice between the parties in such cases. **B.P. Oil New Zealand Ltd v. Van Beers Motors Ltd** [1992] 1 NZLR 211.

**Consent of Plaintiff for Sale of Estate Property**

- 3.46 Plaintiff contends that First Defendant sold property comprised in Certificate of Title No. 31190 and is in the process of transferring property comprised in Certificate of Title No. 40858 without her consent as a beneficiary.
- 3.47 In **Singh v. Registrar of Titles** (1999) 45 FLR her Ladyship Madam Justice Shameem (as she then was) stated as follows:-

***“The executor is not obliged to sell the estate to a beneficiary. Furthermore Section 11(3) of the Succession, Probate and Administration Act (Cap 60) provides:-***

***“An executor to whom probate has been granted, or administrator, may, for the purposes of administration, sell or lease such real estate or mortgage the same, with or without a power of sale, and assure the same to a purchaser or mortgagee in as full and effectual manner as the deceased could have done in his lifetime”.***

***If the Registrar’s position in entering the caveat without suspicion of improper dealing, is correct, no executor and trustee could sell the estate and distribute the proceeds, without a Deed of Family Arrangement. Such a position clearly has no legal basis. It is also impractical and would frustrate the orderly administration of the registration process...”***

- 3.48 In **Sharma’s** case Plaintiff purchased estate property. The Registrar of Titles refused to register the Transfer in favour of the Plaintiff and required Deed of Family Arrangement between the beneficiaries of the Estate (Transferor). When Transfer was lodged by Plaintiff for second time Registrar returned the document with Caveat endorsed on the Title to the subject property by the Registrar pursuant to Section 94 of Land Transfer Act (Cap 131) which was backdated to 25 May 1982 being date of registration of Transmission by Death.
- 3.49 Her Ladyship on the basis of comments made and quoted at paragraph 3.47 hereof ordered removal of the Caveat.
- 3.50 Plaintiff relied on case of **Mati v. Devi** Action No. HBC 0242 R of 2002S (Jitoko J) **Kumar & Ors v. Kumar & Anor.** [2012] FJHC 9; HBC 58.2007 (Mutunayagam J); **Khan v. Bibi** [2009] FJHC 253; HBC 288.2008 (Singh J) and **Sang Yee Joy v. BPTC Limited** (In Liquidation) [1994] FJHC 173; HBC 0029d. 92s (17 November 1994).

- 3.51 In **Mati v. Devi** Plaintiff as Administratrix of her husband's estate sought restraining Order against one of the beneficiaries from interfering with administration of Estate properties and for the beneficiary to vacate the estate property.
- 3.52 **Mati's case** dealt with powers and duties of administrator of the Estate and did not deal with the issue of obtaining consent of beneficiaries.
- 3.53 It is not doubted for a minute and it is well established that trustee owe fiduciary duty to the beneficiaries of the Estate/Trust and is duty bound to act in their best interest at all times and keep and provide statement of account of the Estate/Trust properties to the beneficiaries upon request.
- 3.54 Court in **Mati's case** granted restraining and vacant possession Orders against the Defendant/Beneficiary with additional Orders for Plaintiff as Administratrix to provide valuation of Estate property comprised in Certificate of Title No. 13382.
- 3.55 In **Mati's case** his Lordship Justice Jitoko (as he then was) stated as follows:-
- “The Administrator is the trustee for all the beneficiaries, including herself, of the estate. Generally speaking, a trustee's duties and powers are imposed by the terms of the instrument of trust. In addition, or in absence of such an instrument, there are general duties and powers which are implied by law and manifest themselves in case law. There are also statute laws and the inherent jurisdiction of the Court.***
- As far as Fiji is concerned, statute law is to be found in the Succession, Probate and Administration Act (Cap 60) and the Trustee Act (Cap 65).***
- They provide direction and guidance for executors and administrators alike either of their own or acting in the capacity as trustees for beneficiaries, and how they should conduct themselves. For example, Part III of the Succession, Probate and Administration Act, lays down the rules governing distribution of real and personal estate of intestate as well as the Order of Succession. Again Part V of the Act deals with general administration of the estate including the rights of the executor/administrator.***
- The provisions of the Trustee Act provides in great details the duties and powers that executors and administrators of estate possess in their capacity as trustees.”***
- 3.56 In **Kumar's case** the Plaintiffs children of the deceased alleged that the Attorney for Executor and Trustee of their father's Estate sold property comprised in Certificate of Title No. 2908 without their consent as beneficiaries

and at an undervalue. There was no dispute that beneficiaries consent were not obtained for sale of the property subject to Certificate of Title No. 2908.

The Court in respect to Trustees power of sale stated as follows:-

**“Section 23(1)(a) of the Trustee Act (cap 65) provides that a trustee may sell property. The defendants asserted that this provision gives a trustee an unqualified power to sell property. This argument is unsustainable in the face of sub-section (4) which explicitly provides that as regards land, the power shall be exercised “if so required in writing” by the beneficiaries.**

**The argument that the sub-section takes away the discretion of the trustee and compels him to sell land upon a written request from the beneficiaries, seems to me to be unfounded.”**

- 3.57 In **Khan’s case** Plaintiff alleged that Defendant was selling the Estate property comprised in Certificate of Title No. 1841 at an undervalue and as such registered caveat. Plaintiff could not establish that he had a purchaser who was willing to purchase the said property for more than what the Administratrix was selling it for. Court in removing the Caveat lodged by the Plaintiff states as follows:-

**“[6] A trustee has statutory power to sell trust property. Section 23 of the Trustees Act. This is accepted by the Plaintiff. However this power to sell must be subject to implied condition that the trustee will use all reasonable diligence to obtain the best price and that the trustee will pair fair attention to interest of all parties concerned. A trustee must not sell a property at an undervalue. If the trustee acts in good faith, then the Court does not interfere with the trustee’s discretion as to the mode and time of sale”.**

- 3.58 In **Sang Yee Joy’s** case his Lordship Justice Byrne (as he then was) stated as follows:-

**“It has been held that it is a breach of trust to disregard the directions given in the Trust Instrument and to sell in a manner or under circumstances not authorised by the settlor or to sell in such a manner as not to obtain the best price for the property and in such cases the trustee will be held liable for any loss sustained by the trust estate - Oliver v. Court (1820) 8 Price 127 at 165, 146 E.R. 1152 at pp.1166-67. Thus Trustees should ordinarily invite competition before exercising their power of sale.”**

- 3.59 I fully endorse the comments made in case cited at paragraph 3.50 of this ruling in respect to Trustees/Administratrix’s duty to act in the best interest of



the Estate/Trust and the beneficiaries at all times; to sell estate property at fair market value so as not to dilute the interests of the beneficiaries; and to act impartially as between the beneficiaries (**Mati v. Devi, Kumar v. Kumar**).

- 3.60 It must be noted that Trustees Act (Cap 65) makes provision for power of Trustee generally where the instrument creating the Trust (Example: Deed or Will) or specific legislation in relation to certain class of trustees is silent on powers of the Trustee/Administrator.
- 3.61 In this instance the First Defendant has been appointed Administratrix of the Estate of Narendra Singh pursuant to Section 6 of Succession Probate and Administration Act (Cap 60) ("**SPAA**").
- 3.62 Section 11(3) of SPAA deals with the power of Executor/Trustee appointed pursuant to Will and SPAA to sell the Deceased's property.
- 3.63 Pursuant to section 11 of SPAA First Defendant as Administratrix has power to sell Deceased's property as "Deceased could have done in his lifetime".
- 3.64 I note that the Court in **Mati** and **Kumar's** case made **no** reference to s11(3) of the SPAA and instead relied on Trustees power of sale pursuant to section 23 of Trustees Act.
- 3.65 Section 23(1) and (4) of Trustees Act (Cap 60) provides as follows:-

*"23.-(1) Subject to the provisions of this section, every trustee, in respect of any property for the time being vested in him, may-*

- (a) sell the property;*
- b) dispose of the property by way of exchange for other property in Fiji of a like nature and a like or better tenure, or, where the property vested in him consists of an undivided share, concur in the partition of the property in which the share is held. and give or take any property by way of equality of exchange or partition;*
- (c) postpone the sale, calling in and conversion of any property that he has a duty to sell, whether or not it is of a wasting, speculative or reversionary nature; but, in the case of property of a wasting or speculative nature, for no longer than is reasonably necessary to permit its prudent realization;*
- (d) let or sublet the property at a reasonable rent for any term not exceeding one year, or from year to year, or for a weekly, monthly or other like tenancy or at will;*

(e) *grant a lease or sublease of the property for any term not exceeding-*

(i) *in the case of a building lease, thirty years; or*

(ii) *in the case of any other lease (including a mining lease), ten years;*

*to take effect in possession within one year next after the date of the grant of the lease or sublease, at a reasonable rent, with or without a fine or premium either of which if taken shall be deemed to be part of and an accretion to the rental, and shall, as between the persons beneficially entitled to the rental, be considered as accruing from day to day and be apportioned over the term of the lease or sublease; or*

(f) *at any time during the currency of a lease of the property, reduce the rent or otherwise vary or modify the terms thereof, or accept, or concur or join with any other person in accepting, the surrender of any lease.*

(4) *Where the property subject to a trust includes land, the trustee shall exercise the power conferred by the provisions of this section to sell the land, if so required in writing by the person or all of the persons at the time beneficially entitled to an interest in possession under the trust of the land.”*

3.66 On the other hand section 11(1) of SPAA provides as follows:-

*11.-(1) The real as well as the personal estate of every deceased person shall be assets in the hands of the executor to whom probate has been granted, or administrator, for the payment of all duties and fees and of the debts of the deceased in the ordinary course of administration.*

Section 11(3) is quoted at paragraph 3.47 of this Ruling (Singh case).

3.67 Upon grant of Probate or Letters of Administration the real and personal property of the Deceased vests on the Executor and Trustee or the Administrator.

3.68 In this instant Deceased's properties vested on the First Defendant as Administratrix and as such she has the power to sell or mortgage the Estate property in same manner as Deceased could have done.

3.69 Obviously, if Deceased would have sold his property during his lifetime there was no requirement for him to obtain consent from anyone.

- 3.70 This does not mean the Executor and Trustees or Administratrix is not bound by his/her fiduciary duty owed to the beneficiaries of the Estate.
- 3.71 Since, the power of sale of Deceased's property is derived from s11(3) of SPAA not s23(1) of Trustees Act then there is no need for the Trustees or Administrator of Deceased's estate to comply with s23(4) of the Trustees Act.
- 3.72 Section 23(4) of Trustees Act makes it clear that this provision is only applicable if Trustee exercises power of sale under section 23(1) of Trustees Act.
- 3.73 **I hold that Executor/Trustee and Administrator appointed under a Will and Law of Intestacy of a Deceased's estate exercise his/her power of Sale of Estate property pursuant to section 11(3) of SPAA the specific legislation dealing with Deceased estate and not section 23 of Trustee Act.**
- 3.74 It therefore follows that First Defendant in selling property comprised in Certificate of Title No. 31190 and impending sale of Certificate of Title No. 40858 did not/does not require the consent of the Plaintiff as a beneficiary.
- 3.75 This view has support in what was said by her Ladyship Madam Justice Shameem (as she then was) in **Singh v. Registrar of Titles** (supra) when Her Ladyship ruled against requirement by Registrar of Titles for Trustee to provide for Deed of Family Agreement (which is akin to beneficiaries consent) and discharged Caveat lodged by Registrar of Titles.

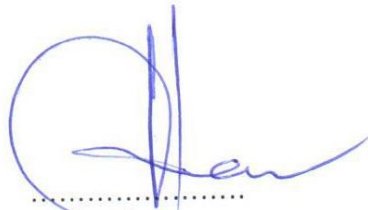
#### **4.0 Conclusion**

- 4.1 In conclusion I find that residue of Estates property can be found and defined in properties comprised in Certificate of Title No. 40857 and 40858 only.
- 4.2 I hold that there is no need for First Defendant as Administratrix to seek consent of Plaintiff as beneficiary to exercise power of sale of Estate properties.
- 4.3 Balance of Convenience dictates that:-
- (i) Transfer of Certificate of Title No. 40858 dated 20 May 2014, in favour of Ravikesh Rajeet Ram for consideration sum of \$82,000.00 proceed to completion with the consideration sum after payment of outstanding city rates, water and electricity charges (if any) and capital gains tax be paid into Court.
  - (ii) Caveat registered against Certificate of Title No. 40857 be extended until final determination of this action or further order of this Court
- 4.4 In relation to cost I take into consideration the nature of the proceeding and the relation of the parties.

4.5 I make following Orders:-

- (i) Caveat No. 801241 registered against Certificate of Title No. 40858 be removed only upon lodgement of Transfer of Certificate of Title No. 40858 in favour of Ravikesh Rajeet Ram of 19 Sese Street, Samabula, Accountant for consideration sum of \$82,000.00 otherwise Caveat No. 801241 registered against Certificate of Title No. 40858 is to continue until final determination of this action or further Order of this Court;
- (ii) Caveat No. 801241 registered against Certificate of Title No. 40857 be extended until final determination of this action or further Order of this Court;
- (iii) First Defendant do pay sale proceeds of Certificate of Title No. 40858 to be paid by Ravikesh Rajeet Ram after payment of outstanding city rate, water and electricity charges and capital gains tax (if any) into High Court (Civil Registry);
- (iv) Each party is to bear their own costs for Application to Extend Caveat and Application for Sale of Property;
- (v) This matter be adjourned before Master for parties to attend to pre-trial matters.



  
K. Kumar  
JUDGE

At Suva

10 November 2015

**Nands Law for the Plaintiff**

**Parshotam Lawyers for the First Defendant**

**Office of Attorney-General for the Second Defendant**