

CAMBRIDGE CREDIT (FIJI) LIMITED

v.

W.F.G. LIMITED

[COURT OF APPEAL, 1975 (Gould V.P., Marsack J.A., Spring J.A.),
5th, 26th November]

Civil Jurisdiction

Sale of land—purchase price payable by unsecured instalments—whether vendor entitled to lodge caveat to protect rights in respect of unpaid purchase monies—Land Transfer Act 1971 ss. 106, 110.—Land Transfer Act 1885 (N.Z.) s. 138.

Caveat—purchase price payable by unsecured instalments—whether vendor entitled to lodge caveat to protect rights in respect of unpaid purchase monies—Land Transfer Act 1971 ss. 106, 110.—Land Transfer Act 1885 (N.Z.) s. 138.

Lien—outright sale and purchase of interest in land—purchase price unsecured and payable by instalments—whether vendor's lien arises in respect of unpaid purchase monies.—Property Law Act 1952 (N.Z.) s. 28—Land Transfer Act 1952 (N.Z.) s. 137.

A deed had been executed between the respondent and appellant whereby the respondent agreed to sell and the appellant agreed to purchase the interest of the respondent in certain land for a total consideration payable by instalments. The unpaid purchase monies were unsecured. When default was made in the payment of the instalments, the respondent lodged a caveat protecting his rights in respect of the unpaid instalments.

Application was made by the respondent to the Supreme Court for an extension of time for the removal of the caveat, and the judge in chambers ordered that the caveat be so extended until all the instalments had been paid.

Held: 1. Section 106 Land Transfer Act 1971 was designed to protect unregistered instruments in land such as an unregistered mortgage or an option to purchase land, and these could be protected by the lodging of a caveat. However, in the present case there was no caveatable interest conferred on the respondent by the original deed.

2. There was no vendor's lien over the land sold for the unpaid purchase monies which could support a caveat.

3. The order made in the Supreme Court would be rescinded.

Cases referred to:

Staples & Co. v. Corby and District Land Registrar (1900) 19 N.Z.L.R. 517.

Miller v. Minister of Mines [1963] 1 All E.R. 109; [1963] A.C. 484.

Shepherd v. Houston [1927] S.A.S.R. 144.

Wossidlo v. Catt et anor (1934) 52 C.L.R. 301.

Guardian Trust and Executors Co. of New Zealand Ltd. v. Hall [1938] N.Z.L.R. 1020.

Capital Finance Co. Ltd. v. Stokes [1968] 3 All E.R. 625; [1968] 3 W.L.R. 899.

Bank of Africa v. Salisbury Gold Mining Co. [1892] A.C. 281.

Haupiri Courts Ltd. (No. 2) in re an application [1969] N.Z.L.R. 353.

Gregory v. Fearn [1953] 1 W.L.R. 974; [1953] 2 All E.R. 559.

Archbishop of Canterbury's case [1596] 2 Co. Rep. 46(a); 76 E.R. 519.

Appeal from an order of the Supreme Court extending a caveat.

- A *P. I. Knight* for the appellant.
R. W. Mitchell for the respondent.

Judgment of the Court (read by SPRING J.A.) : [26th November 1975]—

B This is an appeal from an Order of the Supreme Court of Fiji given at Suva on the 17th June 1975 (made on Summons in Chambers under the provisions of Section 106 of the Land Transfer Act 1971). The facts briefly are as follows. A partnership or joint venture called Nadi Island Development Company was formed on 14th November 1972 between the appellant, the respondent and another company called Bula Limited to purchase and develop Nasoso Island in Nadi Bay, Fiji; the lands owned by the joint venture were subject to the provisions of the Land Transfer Act 1971. The title to the said Nasoso Island was held by Burns Philp Trustee Company Limited on behalf of the members of the joint venture all of whom had beneficial interests

C in varying amounts in the said Nasoso Island. Sometime prior to May 1974 it was agreed to dissolve the partnership or joint venture and agreement was reached whereby the appellant was to buy out the interests of the other members in the joint venture. On the 1st May 1974 a deed was executed between the respondent and the appellant whereby the respondent agreed to sell, and the appellant to purchase the whole of the estate and interest of the respondent in the said lands described in the deed and in Nadi Island Development Company

D for a total consideration of \$385,000 to be paid by the appellant as follows :

- (a) The sum of \$125,000 to be paid on settlement which was on or before 1st June 1974 ;
- (b) \$260,000 by equal quarterly payments of \$30,000 each on the first day of January, April, July and October in each year with a final payment of \$20,000 on 1st January 1977. The first instalment of \$30,000 being due and payable on 1st January 1975 ;
- E (c) The appellant to pay interest on the balance of \$260,000 at \$10 per centum per annum by monthly payments on the first day of each month until the balance was duly paid.

It was further provided that the law governing the said deed was to be the law obtaining in Fiji.

F Settlement between the appellant and the respondent took place on 13th June 1974 and a deed of assignment was concluded between the respondent as vendor and the appellant as purchaser, whereunder the respondent assigned and transferred the whole of his estate and interest in the said lands to the appellant and released and quitted all claims to any right title estate or interest therein.

G The deposit of \$125,000 was duly paid to the respondent and a transfer of the said lands to the appellant registered with the Registrar of Titles in June 1974. The unpaid purchase moneys payable to the respondent were unsecured.

On or about 5th November 1974 a caveat was lodged by the respondent with the Registrar of Titles in Fiji under No. 135513 to protect the rights of the respondent in respect of the unpaid purchase moneys due to it under the deed dated 1st May 1974.

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On the 10th March 1975 the Registrar of Titles caused a notice to be issued under Section 110 of the Land Transfer Act 1971 to the respondent requiring the respondent to withdraw the said caveat within a period of 21 days from

the date of service thereof. The solicitor for the respondent applied to the Supreme Court at Suva, Fiji by way of summons for an extension of time for the removal of the caveat. When the matter was heard before the Supreme Court the appellant was in arrears with the payments due under the deed of 1st May 1974 and was in receivership. The matter came before the Supreme Court at Suva in Chambers on the 17th June 1975 and the learned judge after considering the evidence which was tendered by way of affidavits ordered that the caveat be extended until the balance of moneys due under the deed dated 1st May 1974 had been paid to the respondent or until further order of the Court. The appellant has appealed to this Court against this determination.

The grounds of appeal are :

- “ 1. The learned trial judge erred in law and in fact in holding that the interest of the Plaintiff under a Deed dated the 1st May 1974 and made between the Defendant of the one part and the Plaintiff of the other part amounted to an interest in land as defined in section 106 of the Land Transfer Act 1971 and that such interest was protectable by a caveat. A
2. The learned trial judge erred in law and in fact in holding that upon settlement under the said Deed dated the 1st May 1974 the Plaintiff retained an interest in the said land as defined in section 106 of the Land Transfer Act 1971. B
3. The learned trial judge erred in law and in fact in holding that the Plaintiff retained an interest in the land defined by section 106 of the Land Transfer Act 1971 as long as the total purchase price for the land remains unpaid. ” C

It will be convenient first to examine Section 106 of the Land Transfer Act which says :

“ Any person— D

- (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 ; E
- 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, F
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. ”

It was submitted that the respondent after it had sold its share or interest in the lands described in the deed of 1st May 1974 retained an interest in the lands by virtue of the said deed sufficient to support a caveat under section 106 (supra). It is true to say that Section 106 is concerned with the protection of unregistered instruments in land and for the good reason that such interests are particularly vulnerable in the event of some dealing by the registered proprietor. G

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. H

- (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

- A (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.

It was submitted by counsel for the respondent that section 106(b) also applied to the instant case, but from an examination of the documents and the record we are satisfied that the respondent cannot bring itself within Section 106(b) as a person transferring land or any estate or interest therein, subject to the Act, to any other person *to be held in trust*. In our view the deed of 1st May 1974 was an agreement for the sale of the respondent's interest in Nasoso Island. There is not a title of evidence to suggest the existence of any trust reposed in the appellant; it was a straightforward commercial transaction. The real question is whether the respondent founding its right to caveat solely on its position as unpaid vendor under the deed dated 1st May 1974 can be said to claim an interest in land by virtue of the unregistered instrument i.e. the above deed.

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C Section 138 of the Land Transfer Act 1885 (N.Z.) (which was not dissimilar from our Section 106) was discussed in *Staples & Co. v. Corby and District Land Registrar* [1900] 19 N.Z.L.R. 517 where Stout C.J. at page 536 said:

D “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 even 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.’”

- E Section 106 of the Fiji Act is designed to protect unregistered instruments in land. For instance an agreement for sale and purchase, an unregistered mortgage, an agreement to give a mortgage or an option to purchase land are just a few examples of unregistered instruments which are capable of being protected by the lodging of a caveat.

F In this case the respondent sold its interest in the lands of Nasoso Island to the appellant by virtue of the deed dated 1st May 1974 (which for all practical purposes is an agreement for sale and purchase) and no security was to be given by the appellant to the respondent to secure payment of the unpaid balance. The unpaid purchase moneys remained unsecured.

At settlement the respondent handed to the appellant a duly executed deed of assignment of its interest in the said lands the relevant clauses of such deed (bearing date 13th June 1974) are as follows.

- G “1. W.F.G. hereby sells, assigns, transfers, alienates and releases unto CCF and CCF hereby purchases and accepts from W.F.G. the whole of the right title and interest of W.F.G. in the land referred to in the Schedule to the said Deed.

2. This Deed shall act as an absolute transfer of the right title and interest of W.F.G. in the land hereinbefore referred to and W.F.G. hereby releases and forever quits claim to any right title or interest therein.”

- H (W.F.G. refers to the respondent and CCF to the appellant).

It will be noted that the respondent in the said deed sells, transfers and assigns its interest in the said lands and releases and forever quits claim to any right title or interest therein.

A transfer (under the Land Transfer Act) of the legal estate in the said lands in favour of the appellant was duly executed and registered in June 1974 registering the appellant as the sole registered proprietor of the lands. A

In our view the documents on the record speak for themselves ; the respondent was left with a mere right in contract (arising under the deed 1st May 1974) against the appellant for payment of the balance of the purchase moneys and interest thereon. Nothing could be more emphatic than the language used in the deed of the 13th June 1974, as indicating an intention that all the interest of the vendor in the land be extinguished. The question is does this right support the lodging of a caveat against the land. In *Miller v. Minister of Mines* (1963) 1 All E.R. 109 at page 112 Lord Guest said : B

“ The caveat procedure is an interim procedure designed to freeze the position until an opportunity has been given to a person claiming a right under an unregistered instrument to regularise the position by registering the instrument. ” C

Their Lordships stated that the correct view of the use of caveat procedure was expressed by Stout C.J. in *Staples & Co. v. Corby and District Land Registrar (supra)* where he said :

“ The whole policy of the law was to allow the registration of legal interests only. . . . If, then, the plaintiffs have not a legal interest in the land, and are not entitled to an interest either legally or beneficially, they cannot caveat under section 138. They are in this position : Having only a covenant which only binds a purchaser on notice, they have no interest in the land, either legal or equitable, and the Land Transfer system does not recognise trusts or equitable interests on its registry or certificates. If they cannot caveat under section 138 they have no means of bringing their covenant to the notice of intending purchasers. ” D

In this case the respondent when it negotiated the terms of sale could have sought and insisted upon a mortgage being given by the appellant to secure payment of the purchase moneys or even an agreement to mortgage both of which would have supported a caveat, or taken other security ; it did not do so ; it relied instead on the personal covenant of the appellant to pay. E

In *The Law & Practice relating to Torrens Title in Australasia* by E.A. Francis Vol. 1 at page 318 the learned author says :

“ In *Shepherd v. Houston* [1927] S.A.S.R. 144 the Full Court of the Supreme Court of South Australia, held that, where the registered proprietor of land had entered into an agreement with the caveator to ‘ allow ’ to the caveator an equal one-third share of the ‘ net profits ’ which the proprietor might make on the resale of the land, and the land was in fact resold at a considerable profit, a mortgage being given back to the vendor to secure the payment of a balance of the purchase money, which the vendor-mortgagee was to hold in trust for the caveator, subject to a charge for money advanced, the caveator, who had lodged a caveat against dealings with the mortgage, had, at most, a claim against the vendor-mortgagee under his contract to an account and, accordingly, had no caveating interest. No doubt, if the right to the proceeds of sale of land, or to a share in such proceeds, were secured by an unregistered mortgage of or charge on the land, such mortgage or charge would confer a caveatable interest, but where the right to the proceeds or share of the proceeds arises solely ex contractu, without any mortgage or charge, it seems clear that no caveatable interest is conferred by the contract. ” F
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A *In Wossidlo v. Catt et Anor* (1934) 52 C.L.R. 301 Dixon J. (as he then was) says at Page 311.

“ Where a caveat, or other contractual obligation for a life annuity is taken by a transferor in exchange for a transfer of a legal estate in land, and the annuity is not expressly secured over the land, it is difficult to understand him as intending to invest the transferee with full beneficial ownership only when and if the annuity is paid. His intention is evident to take the obligation of the covenant in exchange for his land, and to depend upon it for the repayment of his annuity. ”

B In the case under appeal we conclude that the respondent intended to rely on the covenant to repay given by the appellant in the deed dated 1st May 1974 and accordingly had no caveatable interest conferred upon it by the deed of 1st May 1974. As was said by Callan J. in delivering the judgment of the Full Court in *Guardian Trust and Executors Co. of New Zealand Ltd. v. Hall* [1938] N.Z.L.R. 1020 at page 1025.

C “ 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. ”

D The respondent is not without its remedies but it will have to rely on the covenant to repay under the above deed.

We turn now to a consideration of the question whether the respondent has an unpaid vendor's lien for the balance of the purchase moneys ; and if so whether such lien will support a caveat.

Under the deed dated 1st May 1974 the respondent would have a vendor's lien over the lands sold for the unpaid purchase moneys.

E The vendor's lien in respect of unpaid purchase moneys can however be excluded by agreement between the parties. *In Capital Finance Co. Ltd. v. Stokes* [1968] 3 All E.R. 625 at page 629 Harman L.J. says :

F “ The remaining and most serious question is whether the first defendant did not have an unpaid vendor's lien. Such a lien arises in the ordinary course in favour of a vendor who has not received the purchase money and it is the creature of the law and does not depend on contract or possession. It depends on the fact that the vendor has a right to specific performance of his contract. The existence of the lien, however, depends on the terms of the bargain between the parties and on the surrounding circumstances and may be excluded, as is pointed out in *Snell's Principles of Equity* (26th Edn.) at pp. 490, 491 para. 2 and para. 3.

G “ As soon as a binding contract of sale is made, the vendor has a lien on the property for the purchase-money and a right to retain the property until the money is paid. . . . Occasionally, however, the vendor will have no lien. If he receives all that he bargained for, e.g. if he sells the property in consideration of the purchaser giving him a promissory note or a bond to pay him an annuity, and a promissory note or bond is duly given, there will be no lien on the property sold, even though the note is not met at maturity or the annuity is not paid. Moreover, the nature of the contract may exclude the vendor's lien, as where the existence of a lien would prevent the purchaser from selling the property, or where the intention of the parties is that the purchaser shall resell or mortgage the property and pay off the vendor out of the proceeds ”

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On settlement of the sale of the respondent's interest in the lands the deed of assignment dated 13th June 1974 was exchanged for a cheque for the deposit of \$125,000. A transfer conveying the legal estate in the lands to the appellant was handed over and later registered. The question is did the unpaid vendor's lien continue. The vendor's lien may be extinguished or abandoned if the person entitled thereto so intends or the intention to extinguish or abandon the lien may be inferred from the conduct of the parties and the particular circumstances. A

In Bank of Africa v. Salisbury Gold Mining Company (1892) A.C. 281 B
at page 284 Lord Watson said :

" Their Lordships do not doubt that a right of lien may be discharged by a new arrangement between creditor and debtor the terms of which are incompatible with its retention, or by any other arrangement which sufficiently indicates the intention of the parties that the right shall no longer be enforced. "

In our view the provisions of Clauses 1 and 2 of the deed of assignment dated 13th June 1974 extinguished the vendor's lien. There is no necessity to traverse the question whether the registration of the transfer would have the effect of extinguishing the vendor's lien because in our view we are satisfied that the terms of the deed of assignment did precisely that. C

We conclude therefore that the vendor's lien had, on the facts of this particular case, been extinguished by the date that the respondent lodged its caveat namely 5th November 1974 and accordingly the caveat could not support a lien which in our view did not exist. D

It is pertinent to note, that, in New Zealand by virtue of Section 28 of the Property Law Act 1952 the lien of an unpaid vendor has been expressly removed ; there is no corresponding provision in the Property Law Act 1971 of Fiji.

Counsel for respondent urged upon us that there was an undertaking by the appellant to pay the purchase moneys which was contained in the deed 1st May 1974 and further by virtue of the previous relationship between the respondent and the appellant as former co-owners of the lands there was a trust reposed in the appellant to pay the respondent the unpaid purchase moneys and that the words " or otherwise howsoever " contained in Section 106(a) were sufficiently wide to support the lodging of a caveat in respect of such undertaking or trust. E
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The words " or otherwise howsoever " are obviously very wide words but in our view are restricted in meaning by the words that precede them. The respondent would have to establish that such an undertaking or trust created as alleged by the relationship claimed, would constitute an interest in the lands. We are satisfied that, on the facts of this particular case, the respondent does not have such an interest in the land which would support the lodging of a caveat. *In re an Application by Haupiri Courts Limited* (No. 2 [1969] N.Z.L.R. 353 Richmond J. was called upon to consider the words " or otherwise howsoever " in Section 137 of the Land Transfer Act 1952 (which is similar to Section 106 of the Fiji Act) and at page 356 said : G

" It can only come within the section if its claim as the registered proprietor falls within the words " or otherwise howsoever ". There is no New Zealand authority of which I am aware in which these particular words have been specifically considered. They are obviously very wide words but may, nevertheless, be restricted in meaning to some greater or lesser degree by their context. An illustration of such words being construed *eiusdem generis* is to be found in *Gregory v. Fearn* [1953] 1 W.L.R. 974 ; H

A [1953] 2 All E.R. 559. Mr Bathgate contends that in their present context their meaning should be restricted by reference to a somewhat analogous rule of construction which is expressed in the following way in *Craies on Statute Law*, 6th ed. 182 ;

..... It has always been held that general words following particular words will not include anything of a class superior to that to which the particular words belong.

The learned author continues :

B This was pointed out by Coke in Archbishop of Canterbury's case (1596) 2 Co. Rep. 46(a) ; 76 E.R. 519 where he says, as to 31 Hen. 8, c. 13, which discharged from payment of tithes all lands which came to the Crown by dissolution, renouncing, relinquishing, forfeiture, giving up, or by any other means, that this statute only discharged from tithes lands which came to the Crown by these or by an other inferior means, but did not discharge from tithes land which came to the Crown by virtue of an Act of Parliament, " which is the highest manner of conveyance that can be. "

C To my mind, this rule of construction is peculiarly applicable to the interpretation of s. 137. "

D For the reasons we have given we allow the appeal and rescind the Order made in the Supreme Court ; the appellant to have the costs of the proceedings in both courts. The Registrar of Titles is authorised and directed to remove the caveat No. 135513 from the register in the manner indicated by section 110(1) of the Land Transfer Act 1971.

Appeal allowed ; Order rescinded.