

06/12/17

**IN THE LAND COURT OF TONGA  
NUKU'ALOFA REGISTRY**

**LA 38 of 2017**

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**IN THE MATTER OF** Section 137 (5) of the Land Act CAP 132

**AND**

**IN THE MATTER OF** an Application by **Australia and New Zealand Banking Group Limited** in its capacity in as mortgagee of Lease No. 6314 for an order under Section 137 (5) of the Land Act that **Graeme McLean Wallace and Valerie Isobel Wallace** as caveators under a caveat lodged against Lease no.6314 on 8 September 2017 be summoned and do appear before this Court to show cause why the caveat should not be withdrawn.

**BEFORE PRESIDENT PAULSEN**

**To: Mr R. Stephenson for the applicant  
Mr L. M. Niu SC for the respondents**

**Hearing: 27 November 2017**

**Ruling: 27 November 2017**

**RULING**

[1] This ruling concerns an opposed application for costs by the applicant, Australian and New Zealand Banking Group Limited (ANZ), against the respondents, Graeme McLean Wallace and Valerie Isobel Wallace (the Wallaces).

rec'd 06/12/17  
JIC

- [2] The ANZ has a registered mortgage of Lease no. 6314 held by Lucy Ana Ilaiu. On 8 September 2017 the Wallaces lodged a caveat against the lease. The caveat alleges, rather cryptically, that the Wallaces were:

..claiming as lender of funds borrowed by LUCY ANNA ILAIU against the guarantor of that loan, H.R.H PRINCESS SALOTE MAFILE'O PILOLEVU TUITA (the said borrower having defaulted) the funds lent, interests and costs and fees in respect thereof from the said Guarantor, and until payment of the same be made to us, having a lawful interest in the lease no. 6314 ...

- [3] ANZ is intending to exercise its power of sale as mortgagee of the lease. When alerted to the fact that the caveat was lodged its lawyer, Mr. Stephenson, entered into correspondence with the Wallaces' lawyer, Mr. Niu, pointing out that it did not appear that the Wallaces had a caveatable interest and requesting that the caveat be withdrawn. He also requested a copy of the documents evidencing the alleged loan and guarantee referred to in the caveat to consider whether that might have any impact on the ANZ's position.

- [4] The Wallaces refused to disclose the documents and in a letter of 14 November 2017 Mr. Niu advised that the Wallaces would withdraw the caveat only subject to conditions which were as follows:

I have discussed the matter with my clients and advise that they will agree to withdraw the caveat registered over Lease 6314 (Halalaeva, Kolofo'ou) on the following terms:

- 1 ANZ Bank to sell the property as first mortgagee to a third party bona fide purchaser:
- 2 I am to receive and approve the terms of any sale and purchase agreement prior to acceptance:

- 3 I am to receive details of the amount owing under the mortgage together with the daily penalty rates:
- 4 Prior to settlement of any sale I am to receive and approve all settlement statements: and
- 5 You confirm that following the repayment of the monies owing under the mortgage to ANZ Bank and deduction of the usual costs associated with the sale of the property, any balance of the sale proceeds be disbursed to my clients.

Any approval required as above will not be unreasonably withheld.

- [5] In a lengthy email of 17 November 2017 Mr. Stephenson responded to Mr. Niu's letter setting out reasons why the conditions that the Wallaces wished to impose on the Bank were unreasonable. He asked them to reconsider their position to avoid legal action being taken to remove the caveat. He also put Mr. Niu (and thus the Wallaces) on notice that the Bank would be seeking costs on an indemnity basis if forced to issue proceedings.
- [6] The caveat was not withdrawn (at that stage at least) and on 20 November 2017 the ANZ filed this action for an order under section 137(5) of the Land Act that the Wallaces show cause why the caveat should not be withdrawn.
- [7] I issued a summons that the Wallaces appear before the Court on 28 November 2018 and show cause. When the matter was called before me today Mr. Niu advised me that the caveat had been withdrawn last Friday (24 November 2017) and that the only issue outstanding was whether the ANZ was entitled to costs.

**The position of the parties.**

- [8] The ANZ's position is that the Wallaces never had any interest in the lease which would support a caveat and that they did not withdraw the caveat notwithstanding that they were made aware that it could not be sustained. As a consequence the ANZ was forced to issue this proceeding to remove the caveat and is entitled to its costs.
- [9] As far as the Wallaces' conditional offer to withdraw the caveat is concerned the ANZ argues that the Wallaces were not entitled to impose any conditions upon the ANZ and that the ANZ was never able to agree to those conditions in any event, not least because in some respects they would have put it in breach of statutory confidentiality requirements under the Financial Institutions Act.
- [10] The ANZ submits that the circumstances of this case justify the imposition of indemnity costs against the Wallaces which will send a message that the Court will not condone the improper use of the caveat procedures.
- [11] For the Wallaces, Mr. Niu argues that costs should not be awarded against the Wallaces. First, he contends that it was quite proper for the Wallaces to lodge the caveat as all that section 137 of the Land Act requires is that they be persons 'claiming to be interested' in the lease. He referred me to section 110 of the Land Act which provides that a mortgage deed is effective as between the parties to it but it does not, Mr. Niu argues, prevent a creditor claiming to be interested in leasehold land from using the caveat procedures under the Act to secure payment of what is owed to him.

[12] Mr. Niu also argued that the conditions that the Wallaces sought to impose upon the ANZ for providing a withdrawal of the caveat were reasonable. He submitted that all they were intended to ensure was that the ANZ took reasonable steps to obtain the best price for the lease and that the Wallaces were paid what was owed to them. He also submitted that the caveat would have been withdrawn by the Wallaces in time in any event and there was no need for the ANZ to issue proceedings.

**Discussion**

[13] I do not accept any of the submissions advanced by Mr. Niu. The starting point must be that the caveat was withdrawn by the Wallaces in response to ANZ's application. Contrary to what Mr. Niu has said about the matter, the Wallaces did not have a caveatable interest in the lease. On the information before the Court the Wallaces are owed a debt by Ms Ilaiu but that alone gave them no right to lodge a caveat. A mere contractual right, such as the right to receive payment of a debt, does not create a caveatable interest (*Fund Management Limited anor v 'Uta'atu* [2011] Tonga LR 80 at [11] and [12]).

[14] I reject Mr. Niu's submission that the Wallaces can avoid a costs award because they were entitled to lodge the caveat as persons 'claiming to be interested' in the lease. If Mr. Niu was correct in his submission any person who brings or defends proceedings 'claiming' to have a good claim or defence would be immune from costs regardless of how unreasonable, unreasoned or misguided their view. That is clearly not the law. Secondly, Mr. Niu's submission presumes that the Wallaces had a reasonable basis for lodging the caveat. On the evidence before me I cannot see that they (or the lawyers who were advising them) could possibly have thought that any such basis existed. What is absent in the

correspondence that passed between Mr. Stephenson and Mr. Niu is any reasonable justification for the lodging of the caveat on legal grounds. In addition, the Wallaces refused to disclose the loan agreement and guarantee that they relied upon, which I cannot believe they would have done had they genuinely believed that those documents justified the caveat. Thirdly, even if the Wallaces had initially considered that they had an interest in the lease justifying the lodging of a caveat they could not have reasonably continued in that belief after Mr. Stephenson so carefully corresponded with Mr. Niu setting out in detail why they had no such interest. This proceeding was a direct response to the Wallaces' failure to withdraw the caveat despite being given plenty of opportunity to review their position.

- [15] I do not agree either that the Wallaces would have withdrawn the caveat in time. Nothing in the correspondence suggests to me that they would do so unless the ANZ agreed to conditions that it could not be expected to accept.
- [16] It is not open to persons to use legal processes, such as the procedure for lodging caveats, unreasonably or for improper purposes. In other jurisdictions there are statutory provisions rendering a person who lodges a caveat without reasonable cause liable in damages for losses suffered as a result. I do not rule out the possibility that such an award could be made under section 137(5).
- [17] Law practitioners must realise that they cannot be party to the improper use of legal processes either. A law practitioner should not lodge a caveat for an improper purpose or where he or she has not made reasonable enquires and satisfied him or herself that a proper basis for lodging the caveat does in fact exist. If authority is needed for this

proposition it is to be found in Rule 6.04 of The Rules of Professional Conduct for Law Practitioners which provides:

A practitioner shall make all reasonable efforts to ensure that legal processes are used for their proper purposes only and that their use is not likely to cause unnecessary embarrassment, distress or inconvenience to another persons' reputation, interests or occupation.

- [18] A law practitioner who fails to observe his or her obligations in this regard may find themselves the subject of a complaint or even an application for costs or damages.
- [19] In relation to Mr. Niu's submission that the Wallaces had agreed to withdraw the caveat subject to reasonable conditions, in my view the conditions were not ones that the Wallaces were entitled to impose nor were they reasonable. The Wallaces had no legal interest in the lease or in the proceeds of sale of the lease. Furthermore, the ANZ could never have been expected to agree to conditions which would render the exercise of its power of sale subject to the agreement of the Wallaces and, even if only potentially, put it in breach of its statutory obligations.
- [20] In my view the only real issue that arises in this case is whether the ANZ should be awarded indemnity costs. I consider that there is clearly an arguable case for indemnity costs (see for instance *Fonua v MBf Bank Ltd* [1999] Tonga LR 4). On reflection and by a close margin I am not minded to make such an award because whilst the proceeding was justifiably filed the Wallaces did withdraw the caveat promptly once that had occurred. I also believe that the obligations that I have referred to in paragraphs [16]-[18] above are not widely understood. In future the Court cannot be expected to take such a lenient approach.

**Result**

- [21] As the caveat has been withdrawn there is no requirement for me to make any orders except in relation to costs.
- [22] The ANZ is awarded its reasonable costs on the usual basis which are to be fixed by the Registrar if not agreed.

**NUKU'ALOFA: 27 November 2017**

