

Solicitor General.  
Fulginiti  
30/08/11

IN THE LAND COURT OF TONGA  
NUKU'ALOFA REGISTRY

LA 13 of 2011

**IN THE MATTER** of Caveat No.19 lodged against lease  
number 5404 on 8 September 2003.

**Mr R. Stephenson for the Applicant**

**Mr L. Niu for the Respondents**

**DECISION**

1. This is an application brought under the provisions of Section 137(5) of the Land Act (Cap.132) by the court-appointed receiver of certain property, including lease number 5404, for the removal of a caveat lodged against the lease by the Respondents, Robina Nakao, Fund Management Ltd and Tourist Services Ha'apai Ltd on 8 September 2003.
2. The central question is whether the Respondents have established that they have an interest in the lease which may be the subject of a caveat lodged under the provisions of Section 137 of the Land Act.
3. The facts are not in dispute and both counsel filed helpful written submissions for which I am grateful.
4. The relevant part of Section 137 (1) is as follows:  

"Any person claiming to be interested under any will settlement or trust deed or any instrument of transfer or transmission or under any unregistered instrument or otherwise howsoever in any leasehold land may lodge a caveat..."
5. As explained in *CPR v District Registrar of Dauplin Land Titles Office* (1956) 4 DLR (2d) 518 :

"A caveat is merely a notice of a claim which may or may

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not be a valid one. The validity of the claim must be determined after and not before the filing of the caveat. The purpose of caveats is to warn the registered owner and, what is more important, all persons who might deal on the faith of the certificate of title, that the caveator claims an interest which is not disclosed on the certificate of title.”

6. Section 137(2) requires a caveat to be in the Form contained in Schedule XI to the Act. This Form specifies that the “nature of the interest and the grounds on which such claim is founded” must be included in the notice. In the present case the relevant parts of the caveat are as follows:

“... by written agreement dated the 23<sup>rd</sup> of February 1998, Dr Wong agreed and undertook to perform and carry out certain obligations towards [the caveators] within 2 years from the date of that agreement in default of which he was to pay a certain sum with interests at a specified rate as liquidated damages and to secure payment of those liquidated damages, he agreed that a caveat be registered by the [caveators] on the said lease no.5404. Dr Wong defaulted to perform and carry out the said obligations ... and the [caveators] have been granted Judgment in the Land Court of Tonga in the sum of the said liquidated damages.”

7. The judgment referred to is the judgment dated 13 February 2003 in action number LA11/2002 in the amount of US\$225,000.00. The judgment has not been satisfied.
8. Among a number of other objections to the validity of the caveat, Mr Stephenson suggested that the caveators were unable to point to any “interest in land” which was being protected by the caveat. As appears from the caveat itself it is the payment of liquidated damages that is being protected. In Mr Stephenson’s submission, Section 137(1) does not allow such an interest to be protected by caveat.
9. Mr Stephenson referred me to the closely similar provision in Section 137 of the New Zealand Land Transfer Act 1952, which confers the right to lodge a caveat against dealings upon any person:

“Claiming to be entitled to or to be beneficially interested in any land, estate or interest under this Act by virtue of any unregistered agreement or instrument or transmission, or of any trust expressed or implied, or otherwise howsoever...”.

10. There is also a similar provision in Section 74 F(1) of the Real Property Act 1900 of New South Wales. In a commentary on this section the author of *Land Law* (LBC 3<sup>rd</sup> Edition) states (page 705):

“The claim must be an interest in *land* : a caveat cannot be lodged to protect a mere contractual or personal right or a right based on statute not also conferring an interest in land.”

This comment is consistent with the statement in *Land Law* (Butterworths New Zealand, 1978) Vol 1 paragraph 2.151 :

“The crucial question in deciding whether a person has a caveatable interest under s137(a) is usually whether he claims to be entitled to or to be beneficially interested in “any land, estate, or interest. ... a caveat which is based on some right less than an interest in land ... cannot be supported”.

11. Mr Niu pointed to the words “or otherwise howsoever” appearing in our own section 137(1) and suggested that these words were wide enough to include the interest said to have been acquired by virtue of the agreements signed in February 1998. In my view however the words quoted refer to the manner of acquisition of the interest in land and do not extend the range of caveatable interests beyond those that may be acquired in leasehold land.
12. In paragraph 13 of his submissions Mr Niu also analysed the various restrictions which are included in Section 137(1). While I accept that analysis and also agree that they would afford protection to the caveators, I am of the opinion that the existence of the interest in land must first be established before the protections can be invoked.

13. It is worth comparing the approximately corresponding provision in English law which is section 54(1) of the Land Registration Act 1925 :

“Any person interested under any unregistered instrument or interested *as a judgment creditor, or otherwise howsoever*, in any land or change registered in the name of any other person may lodge a caution with the registrar to the effect that no dealing with such land or change on the part of the proprietor is to be registered until notice has been served on the cautions”.

In my opinion the fact that the words “as a judgment creditor” have been included in addition to the words “or otherwise howsoever” points to the conclusion that the first quoted right is not included in the second.

14. Mr Niu’s alternative submission was that it would be unjust for the caveators to lose the protection that the caveat afforded them. While any loss is unfortunate the caveators’ remedy lies, as it seems to me, with the legal advisors who approved the lodgment of the caveat in question.
15. In my opinion the caveators have not established that they have any caveatable interest in lease 5404 and accordingly I direct that the caveat be removed.
16. It will be noted that this ruling also disposes of an application filed by the caveators in LA 11/2002 for extension of the caveat under Section 137(8) of the Act.

NUKU'ALOFA: 20 August 2011.

  
PRESIDENT