

IN THE COURT OF APPEAL
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 065 OF 2012
[High Court Civil Action No. HBC 14 of 2005B]

BETWEEN : 1. **ATTORNEY-GENERAL OF FIJI**
2. **REGISTRAR OF TITLES**

Appellants

AND : **RAM KUMARI**

First Respondent

: **YOGESH PRASAD**

Second Respondent

Coram : Calanchini, P
Basnayake, JA
Prematilaka, JA

Counsel : Mr. J. Mainavolau for the Appellants
Mr. A. Ram for the Respondents

Date of Hearing : 10 September 2015

Date of Judgment : 2 October 2015

JUDGMENT

Calanchini P

[1] I have read in draft form the judgment of Prematilaka JA and agree that the appeal should be dismissed.

Basnayake JA

[2] I agree with the reasons and conclusion of Prematilaka JA.

Prematilaka JA

[3] This appeal had been lodged against the ruling dated 12 October 2012 on the question embodied more or less in issue No.17, whether the removal of the Caveat registered on behalf of the 01st Respondent by the Registrar of Titles was legal and lawful, which the Learned High Court Judge thought, would finalise the rest of the issues. However it is clear that had the answer been in the negative the trial would have had to proceed to determine the rest of the issues including whether the plaintiff is entitled to damages and if so, from whom and how much. The High Court Judge ruled in the negative and the appellants have appealed against the said ruling.

Preliminary observations

[4] At the stage of hearing this Court found that no leave had been obtained by the appellants in terms of section 12(2) (f) of the Court of Appeal Act and therefore no appeal would lie against the impugned ruling that was considered to be an interlocutory order. However considering the question of law and the element of public interest (see **R.B. Patel Limited v. J.P. Bajpai & Co Ltd. & Ors (1987) 33 FLR 92**) involved in the appeal this Court, in the interest of justice decided to entertain the appeal in terms of section 17 of the Court of Appeal Act and heard the parties on the merits of the matter.

[5] It was held in **Fai Insurance (Fiji) Limited & Rajendra Prasad Brothers Limited**, (Civil Appeal No. ABU0032 of 2004S: 12 August 2004) by Justice M.D. Scott sitting alone that

"In my opinion the law in Fiji is that where a split trial is held then at the conclusion of each part of the trial the order of the Court determining the issue in respect of which that part of the split trial was held is a final order." While I think that this view is sound in law, in view of the our decision to act in terms of section 17 of the Court of Appeal Act as aforesaid, we did not have to consider whether the impugned ruling canvassed in the

instant appeal arose from a split trial and therefore leave was in any event not required in terms of section 12(2) (f) of the Court of Appeal Act.

The factual background as recorded under the agreed facts

- [6] The First Respondent, pursuant to letters of administration granted by the High Court of Fiji had become the administratrix in the estate of deceased Rajendra Prasad where both she and the Second Respondent were beneficiaries. The First Defendant, Vimal Prasad in the original case ('First Defendant') had entered into an agreement in 1997 with the deceased requiring the former to transfer the property on Lot No. 5 C.T. No. 13589 at Naqere, Savusavu to the latter subject to him fulfilling certain conditions set out in the agreement. In 2004 the said First Defendant entered into a Sale and Purchase Agreement with the Second Defendant, Hemant Kumar in the original case ('Second Defendant') in respect of the same property.
- [7] Thereafter the First Respondent had caused a Caveat to be registered against the said property on 01st December 2004. The Solicitors for the First and Second Defendants had submitted Transfer documents but withdrawn on the same day, presumably, due to the Caveat. The First Defendant then had made an application to the Registrar of Titles ('Registrar') on 11 March 2005 for the removal of the Caveat. Thereupon the Registrar on 17 March 2005 had sent a twenty-one days' notice as required by section 110(1) of the Land Transfer Act by registered post to the First Respondent, the caveator to her address for service which had been received by the her solicitors on 30 March 2005. Having received no order of court extending the twenty-one days' time the Registrar removed the caveat on 12 April 2005 and accepted *inter alia* the Transfer of the said land from the First defendant to the Second Defendant. Although, the Second Respondent had lodged a caveat against the property in issue on 18 April 2005 it had been rejected by the Registrar on the basis that the said property had already been transferred.

Proceedings in the High Court

- [8] The Respondents instituted action against the First and Second Defendants and the Appellants (Third & Fourth Defendants in the High Court) seeking *inter alia* declarations that the removal of the caveat and the transfer of the land were wrongful and orders that the said caveat be restored and the Registrar be directed to register the Second Respondent's caveat. They also had claimed damages but had not stated from whom and how much to recover.
- [9] On 30 November 2011 the High Court Judge had made an order to the following effect:
- "Since the parties here admitted the fact that the caveator was notified the application for removal of notice. On 30 March 2005 and subsequent removal of caveat was affected on 12 April 2005 the issuance of legality or lawfulness of removing the caveat would in my opinion finalise rest of the issues in this matter. Therefore, the parties are ordered to file submissions on that issue."*
- [10] All parties had tendered their written submissions and the High Court Judge had delivered the Ruling on 12 October 2012 and concluded as follows:
- "[31] Hence, it is my considered opinion that the computation of 21 day period shall commence not from the date of notice but from the date of service. In other words, 21 days should have started to run from the date on which the caveator in fact received the notice."*
- "[32] On the above premise, I conclude that the cancellation of the caveat in the instant case by the 03rd defendant was unlawful. Thus, the 3rd defendant is liable for the damages caused to the plaintiff as a result of the cancellation of caveat."*

- [11] The High Court judge had based the above findings to a very great extent on the interpretation of sections 110 and 176 of Land Transfer Act [Cap.131].

The Appellants' position

- [12] The Appellants take up the position that the 21 days' time period stipulated in section 110 (1) of the Land Transfer Act should be counted from the date of service of the notice which, it is argued, in terms of section 176 (1) of the said Act is the date of sending the said notice by registered post. However as an act of administrative practice the Registrar is said to be counting the 21 days excluding the day of posting and the three days immediately after the completion of 21 days to accommodate the time taken in the distribution of mail so that the caveat would not be removed until after 24 days of posting. Section 51(a) of the Interpretation Act anyway excludes the day of posting and requires the twenty one days to run from the day next after posting and the Registrar merely complies with section 51(a) in excluding the day of posting. Thus the counsel for the Appellants sought to justify the removal of the caveat after a 24 day period on 11 April 2005.
- [13] In order to buttress the above argument it was also submitted on behalf of the Appellants that in the absence of specific stipulation in section 110 or 176 as to when service of notice is effected the postal rule found in the common law should be applied.
- [14] **Raghwan Construction Company Ltd v Endeavour Youth Co-operative Society** HC Civil Action No. HBC0322 of 2005, [2005] FJHC 233, **A/S Catherineholm v Norequipment Trading Ltd** [1972] 2 QB 314; 2 All ER 538, CA, **Cooper v Scott-Farnell** [1969] 1 WLR 120; [1969] 1 All ER 178, CA and **Moody v Godstone RDC** [1966] 1 WLR 1085; [1966] 2 All ER 696 DC have been cited to us as authorities in support of the Appellants' position.

The Respondents' position

[15]

It is the position of the Respondents that the date of the service of notice contemplated in section 110(1) of the Land Transfer Act is the date of actual receipt of the notice by the caveator and the stipulation in section 176 (1) that such notice shall be by registered post clearly envisages actual receipt and therefore the postal rule is inapplicable. Thus, according to the Respondents the 21 days should run from the date of actual receipt of the notice under section 110(1) by the caveator and not from the date of sending the notice by registered post.

[16]

Raghwan Construction Company Ltd v Endeavour Youth Co-operative Society HC Civil Action No. HBC0322 of 2005 [2005] FJHC 233, Holwell Securities Ltd. V Hughes [1974] 1 WLR 155, [1974] 1 All E.R. 161 (C.A.), Anganu v. Dayawanti High Court Civil Action No. HBC0629 of 1993 [1994] FJHC 72], ANZ v. Maharaj Civil Appeal No. 49 of 1983 have been cited as authorities advancing the Respondents' position.

Main statutory provisions relevant to the issue

[17]

It is useful to begin our deliberations by considering the relevant statutory provisions in the Land Transfer Act, in particular those under Chapters on Removal of caveat and Service of notice.

Section 110 (1) of Land Transfer Act states as follows:

"Except in the case of a caveat lodged by the Registrar the caveatee or his agent may make application in writing to the Registrar to remove the caveat, and thereupon the Registrar shall give twenty-one days' notice in writing to the caveator requiring that the caveat be withdrawn and, after the lapse of twenty-one days from the date of the service of such notice at the address mentioned in the caveat, the Registrar shall remove the caveat from the register by entering a memorandum that the same is discharged unless he has been previously served with an order of the court extending the time as herein provided." (emphasis mine)

Section 110(3) provides that:

"The caveator may either before or after receiving notice from the Registrar apply by summons to the court for an order to extend the time beyond the twenty-one days mentioned in such notice, and the summons may be served at the address given in the application of the caveatee, and the court, upon proof that the caveatee has been duly served and upon such evidence as the court may require, may make such order in the premises either ex parte or otherwise as the court thinks fit."

[18] Section 176 (1) of Land Transfer Act states:

"Any notice required by or under the provisions of this Act to be served or given to any person may be served or given by being sent by registered post to that person at his address for service."

[19] Despite our enquiries at the hearing neither counsel cited before us section 2(5) of the Interpretation Act which is crucial to resolve the main issue before us.

Section 2(5) states as follows:

"Where any written law authorises or requires any document to be served by post, whether the expression "serve" or "give" or "send" or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing to the last known postal address of the person to be served, prepaying and posting, by registered post, an envelope containing the document, and, unless the contrary is proved, to have been effected at the time at which the envelope would be delivered in the ordinary course of the post."

[20] Section 26 of the Interpretation Act 1889 in the U.K. (which has now been superseded by Interpretation Act 1978) is very similar to section 2(5). It states as follows.

"Where an Act passed after the commencement of this Act authorises or requires any document to be served by post, whether the expression "serve" or "give" or "send", or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the envelope would be delivered in the ordinary course of the post."

It could be noted that section 2(5) prescribes registered post while section 26 does not. However in my view the interpretation relating to section 26 is immensely helpful to

decide matters relevant to section 2(5), whether the method of service is 'post' or 'registered post'.

[21] Lord Denning MR said in A/S Catherineholm v Norequipment Trading Ltd [1972] QB 314; [1972] 2 All ER 538, CA with regard to section 26 that it has two parts; the first part deals with the fact of delivery and the second part with the time of delivery. He said of the first part at p. 541¹ "The fact of service is deemed to be effected by properly addressing, prepaying and posting the letter. That was done. So service was effected quite regularly; no appearance entered; and judgment was entered quite regularly."

[22] In R v Appeal committee of County of London Quarter Sessions, ex parte Rossi [1956] 1 ALL ER 670 ; [1956] 1 QB 682 a bastardy summons had been served on the defendant but he had not been properly served with a written notice indicating the date of an adjourned hearing. The English Court of Appeal held that where there has been no service at all then the subsequent order is irregularly obtained and one to which the defendant is entitled to have set aside as of right. Lord Denning MR said 'He [that is the clerk of the peace] sent a letter by registered post to Mr Rossi telling him the date, time and the place of the adjourned hearing; but it was returned to him unopened and undelivered. In those circumstances was the Act complied with? Did the clerk of the peace in due course give 'notice' to Mr Rossi? It is argued that it is sufficient to comply with section 3 (1) if he sends a registered letter to the respondent, even though it is not received by him, and known not to be received. I do not think this is correct. When construing this section, it is to be remembered that *it is a fundamental principle of our law that no one is to be found guilty or be made liable by an order of any tribunal unless he has been given fair notice of the proceedings so as to enable him to appear and defend them.*" (emphasis added)

¹ [1972] 2 All ER

- [23] Lord Denning MR dealing with the first part of section 26 and registered post also said in the same case of R v Appeal committee of County of London Quarter Sessions, ex parte Rossi².

"To sum up, when service of process is allowed by registered post, [and in parenthesis we may observe that nothing here can turn on whether it was permitted by registered post or by ordinary post] without more being said on the matter, then if the letter is not returned, it is assumed to have been delivered in the ordinary course of post and any judgment or order by default obtained on the faith of that assumption is perfectly regular..."

- [24] Parker LJ's comments on section 26 in **Rossi's case**³ are more relevant to the matter before us. He pointed out

*"The section, it will be seen, is in two parts. The first part provides that the dispatch of a notice or other document in the manner laid down shall be deemed to be service thereof. The second part dealing with delivery comes into play, and only comes into play, in a case where, under the enactment to which section 26 is being applied, the document has to be received by a certain date. If in such a case 'the contrary is proved' " , i.e., that the document was **not received by the time** or at all, then the position appears to be that though under the first part of the section the document is deemed to have been served, it has been proved that it was **not served in time.**" (emphasis added).*

This passage was quoted with approval by Lord Widgery in Maltglade and Others v. St Albans Rural District Council [1972] 3 All ER 129.

- [25] In Cooper v Scott-Farnell [1969] 1 ALL ER 178 & [1969] 1 WLR 120 the defendant did not receive summons as he was abroad when summons arrived. The trial took place and judgment was given in default. The county judge later set aside the judgment when it appeared that the process did not come to the knowledge of the defendant in time. The Court of Appeal said that the county judge had acted correctly and reasonably. Rossi's case was followed in Cooper's case.

² [1956] 1 ALL ER 670 at p. 676; [1956] 1 QB 682 at 694

³ [1956] 1 ALL ER at 676 & [1956] 1 QB at 700

- [26] In **Thomas Bishop Ltd v Helmville Ltd** [1969] 1 ALL ER 365 & [1972] 2 WLR 149 the majority laid down that, in a case where a defendant is able subsequently to prove that the *writ was in fact has not been timeously served*, he is entitled as of right to have that judgment set aside. The minority judgment of Orr LJ said: "... if ...there is nothing known to the court which indicates that the relevant process has not been delivered in the ordinary course of post, it is to be deemed to have been so delivered for the purposes of that judgment, although it will be open to the defendant to apply to have the judgment set aside in the court's discretion on the ground, inter alia, that he was not served or *was not served in time*." (emphasis added).

Both the majority and minority agreed that it was open for the defendant to apply to have the judgment set aside if the writ had not in fact been served despite the presumed delivery but only deferred as to whether it could be done as of right or at the discretion of court.

- [27] Therefore I hold that section 2(5) of Interpretation Act also can be divided into two parts where the first part deals with the fact of service and the second part deals with the time of delivery. I am also inclined to follow the reasoning of Parker LJ's comments in **Rossi's case** on the second limb of section 26 which I think is of immense help to deal with section 110(1) read with the second part of 2(5) of the Interpretation Act.

Sections 110, 176 of Land Transfer Act and section 2(5) of Interpretation Act

- [28] Therefore in the backdrop of the above discussion the main question to be answered; when service of the 21 days' notice under section 110(1) of the Land Transfer Act is effected could be dealt with. Is it the date of actual service or the date of presumed service (i.e. date of posting the notice)?

- [29] Section 110(1) mandates that the Registrar shall remove the caveat after a lapse of 21 days from the date of service of the notice unless before the expiry of the 21 days he has been served with an order extending the time. Section 110(3) permits the caveator either before or after the receipt of such notice apply by summons to court for an order to extend time. It appears to me that the legislature intended to give a mandatory period of 21 days to the caveator to take steps under section 110(3) to have the time extended from the date of service for the reason that any failure to do so would compulsorily result in

the removal of the caveat paving way for a rival instrument of title to be registered forthwith. In terms of section 38 of the Land Transfer Act such a registered instrument would be considered conclusive evidence of title. In such a scenario the caveator would be deprived of any title to the land concerned. Thus, the legal repercussions of failure to have the time extended beyond the 21 days seem irreversible and irrevocable as far as the Registrar's authority goes.

- [30] I am of the view that the interpretation of Parker LJ in **Rossi's case** of section 26 quoted above is equally applicable to the instant case in as much as the notice, though, need not be served by or at a certain date under section 110(1), the caveator has to take steps under section 110(3) within a specific time frame, namely 21 days of service in order to protect his property rights. The argument advanced by the Respondents would result in denying the caveator that time afforded by the Land Transfer Act for him to safeguard his rights. Therefore we should adopt an interpretation which will uphold the protection afforded by the statute.
- [31] Could the caveator be expected to act in order to avoid such a drastic consequence until he or she actually receives the 21 days' notice from the Registrar? If intended otherwise, the legislature could easily have used the words 'date of sending or posting' instead of 'date of service' in section 110(1). Some statutes provide in effect that upon proof of posting of a document it shall be deemed to have been received in the ordinary course of post, and the addressee cannot be heard to say that he has not in fact received the document (e.g. **R. V. Westminster Union Assessment Committee** [1917] W. N. 28, Div. Ct.). Section 110(1) does not say so.
- [32] In terms of section 2(5) of the Interpretation Act when the expression "serve", "give" or "send" or any similar expression is used where written law requires any document to be served by post, the service, unless a contrary intention appears, should be deemed to be effected by registered post. No ordinary post or any other method of post, even if available, is possible. Section 176 (1) of Land Transfer Act contains all the three words

referred to above and the word 'registered post'. Therefore section 2(5) of the Interpretation Act need not be resorted to in order to decide the method of post as section 176(1) anyway prescribes registered post as the mode of service of any notice under the Land Transfer Act. Thus, once sent by registered post, as section 176 (1) stipulates, the service of the notice under section 110(1) is deemed to be effected by virtue of section 2(5) as no contrary intention can be gathered. Thus under the first part of section 2(5) the fact of service is satisfied. There is no dispute at all on the matter of service of notice in the instant case.

- [33] However it is the second part of section 2(5) that is crucial to the issue we are called upon to determine. It states that, unless the contrary is proved, the service shall be deemed to have been effected at the time at which the envelope would be delivered in the ordinary course of the post. It is clear that the word 'delivered' means delivery to the recipient and the word 'deemed' suggests that service may not be actual but presumed. Making a classical statement on the meaning of the word 'deemed' Justice Cave said in **The Queen (R) v Norfolk County** [1891] 60 LJ QB 379

"When you talk of a thing being deemed to be something, you do not mean to say that it is that which it is to be deemed to be. It is rather an admission that it is not what it is to be deemed to be, and that, notwithstanding it is not that particular thing, nevertheless it is to be deemed to be that thing."

The word *deemed* is also capable of meaning 'rebuttably presumed', that is, presumed until the contrary is proved.

- [34] The legal implication arising from the use of the word 'deemed' therefore is that, even if the envelope had not been actually delivered to the recipient he or she will be presumed or assumed to have received it at the time when a letter would have normally been delivered to that person in the ordinary course of post. Once the service is presumed under the first part of section 2(5), the time of delivery under the second part of section 2(5) is determined by how long it takes to deliver an envelope in the ordinary course of the post. It is not and cannot be the time or date of handing over the notice to the post office.

- [35] However, service is deemed to have been effected by delivering the envelope in the ordinary course of the post only if the contrary is not proved. Thus the presumption of service is subject to proving the contrary. The legislature has left room for the party against whom the presumption operates to rebut the presumed service by placing evidence of actual service. When the recipient does rebut the presumption the service has to be considered to have been effected at the time the envelope has been actually delivered to the recipient in which event time starts running from the date of actual service.
- [36] Thus, when the Registrar sends the notice under section 110(1) of the Land Transfer Act by registered post which is not returned, the fact of service is and can be presumed. However it is still open to the caveator to demonstrate that the notice was not in fact served or not served in time for him to take steps under section 110(3).

Application of rules of interpretation

- [37] I may call in aid the rules of construction too to justify the interpretation given above. To make sense of the words in legislation and give effect to the intention of legislature, courts historically have relied on four types of interpretative tools; the literal rule, golden rule, mischief rule and purposive rule. These are however loose labels and not mutually exclusive R.v Cockburn [2008] EWCA Crim. 316; [2008]QB 882.
- [38] Lord Diplock in Duport Steels Ltd v Sirs [1980] 1 WLR 142; [1980] 1 All ER 529, 541 explained “*where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they consider the consequences of doing so would be inexpedient, or even unjust or immoral*”. This is the gist of the literal rule. The golden rule instead of the concerned words looks into the whole text of the statute to ascertain the meaning and to avoid ambiguity River Wear Commissioners v Adamson [1876-77] 2 App Cas 743, at 764-5 and therefore is a variation of the literal rule. The mischief rule in Heydon’s Case [1584] 3 Co Rep 7a, 7b requires one to look at the previous common law and the history prior to the Act to identify the defect or mischief sought to be remedied. The

purposive rule ascertains what was intended by the words by examining the purpose of the Act and wider legal, social, economic or political external context Pepper v Hart [1992] 3 WLR 1032; [1993] 1 All ER 42 which has become the most popular and dominant interpretative tool in the UK.

[39] As already explained above, the purpose of the notice clearly is to put the caveator on notice that unless he obtains an order from court extending the time beyond 21 days his or her caveat would be removed which, as in this case, could lead to him or her having to surrender the right and title in the property. Thus, one cannot understand how the caveator could act under section 110(3) without receiving the notice. Though it is possible for him take steps under section 110(3) even before receiving the notice there may not be any practical purpose of invoking the jurisdiction of court if no application had been made to remove the caveat. That being the case, when one applies the above rules of interpretation it would not be correct to interpret the words 'date of service' to mean 'date of posting' because such a narrow interpretation would defeat the purpose of 21 days notice under section 110(1). I do not think that a public functionary should be overriding the legislative intention and should be allowed to do so for the sake of administrative convenience.

[40] But on the other hand the Registrar should be able to determine the 21 day period commencing from a definite point of time which is a duty cast on him under section 110(1). This, he can do by relying on the second limb of section 2(5) and act on the presumed service of notice until and unless the contrary is proved by the caveator where the burden is fairly and squarely on the latter.

Comparison with 'Notice and opposition to caveat' - The effect of section 109 of Land Transfer Act

[41] Section 109 of Land Transfer Act is as follows:-

(1) Upon the receipt of any caveat, the Registrar shall give notice thereof to the person against whose application to be registered as proprietor of, or, as the case may be, to the registered proprietor against whose title to

deal with, the land, estate or interest, the caveat has been lodged.

(2) Any such applicant or registered proprietor, or any other person having any registered 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

[42] Accordingly, the Registrar is bound to give notice of a caveat to the applicant or registered proprietor against whose interest or title in the land concerned the caveat has been lodged. Such applicant or registered proprietor could then get the caveator to attend and to show cause why the caveat should not be removed before a court of law which upon proof of service of summons and upon such evidence could make an appropriate order. Section 109(2) does not prescribe any time period within which the applicant or registered proprietor should invoke the jurisdiction of court upon getting the notice from the registrar. But, the summons would obviously prescribe a date on which the caveator should attend court and show cause why the caveat should not be removed. If the caveator does not respond he runs the risk of an order being made against him *ex parte*. If there is any question of right or title to the land the proceedings should take the form of a civil trial.

[43] Therefore a caveatee could challenge a caveat either under section 109 or 110. Under section 109 the decision to remove the caveat or otherwise lies with court whereas it lies with the Registrar under section 110(1). A decision under section 109 is a judicial decision whereas a decision section 110 (1) is an administrative decision. Judicial review may have been more appropriate to challenge a decision section 110 (1) but the same may be achieved by way of a declaratory action as well. Be that as it may, the legislature cannot be taken to have intended to create an easier path for a caveatee under Section 110

to have a caveat removed while providing for a more rigorous but balanced scheme under section 109.

- [44] I believe that there should be a level playing field for both parties under either of the sections they are called upon to act. Thus there is no justification to give a liberal interpretation of section 110(1) as sought by the Appellants to the words 'date of service' to the point of equating it to 'date of posting'. I think that both sections should be read with section 2(5) of the Interpretation Act and the court should approach both sections in the manner as already discussed above in the light of judicial precedents.

Application of the law to the facts of the case

- [45] In the appeal before us it is common ground that the twenty-one days' notice as required by section 110(1) of the Land Transfer Act sent on 17 March 2005 by registered post to the caveator had been received by the caveator's solicitors on 30.03.2005. The caveat was removed by the Registrar on 12 April 2005 after the lapse of 21 day period on the basis that the notice is deemed to have been served on the 17 March. In fact 24 days had lapsed since 17 March when the caveat was removed. However, if the time is counted from 30 March, 12 days had passed by the 12 April and the caveator was left with only 09 days to take steps under section 110(3) of the Land Transfer Act. Though the Second Respondent had lodged a caveat on 18 April 2005 it had been rejected by the Registrar on the basis that the said property had already been transferred on the 12 April.
- [46] Therefore I am of the view that in view of the unqualified admission on the part of the Appellants that the caveator had in fact received the notice sent by registered post under section 110(1) only on the 30 March the presumption under the second part of section 2(5) of the Interpretation Act was no longer applicable to determine the date of service. The Registrar then could not have denied the 21 days allowed by section 110(1) to the caveator on the basis of having applied the postal rule. Therefore the 21 days' time period should have started to run from the 30 March and the caveator had time at least till 20th

April to take steps under section 110 (1). Thus, clearly the removal of the caveat on the 12 April 2005 was contrary to section 110(1) and has no force or avail in law.

Is the postal rule applicable?

[47] The Appellants relied heavily on the postal rule to justify the removal of the caveat on 12 April 2005. I shall now deal with that argument. The postal rule or the mail box rule was developed in the area of law of contracts. To constitute a valid and a binding contract the main ingredients required are an offer and an acceptance of that offer. In common law countries acceptance of an offer takes place when the acceptance is communicated to the offeror by the offeree. The postal rule is an exception to this general rule where acceptance becomes effective as soon as the letter of acceptance is posted. One rationale for the Rule is that the post office is the implied agent of the offeror and the receipt of the acceptance by the post office is regarded as receipt by the offeror. The postal rule was established in a series of cases namely Adams v Lindsell [1818] B & Ald 681, Household Fire Insurance Company v Grant [1879] 4 Ex D 216, Henthorn v Fraser [1892] 2 Ch 27 and Dunlop v Higgins [1948] 1 HLC 381. The postal rule applies only to acceptance and does not apply to other contractual letters or instantaneous forms of communications such as telex Entores Ltd. Miles Far East Corporation [1955] 2 QB 327 or telephone or fax. Civil Law countries do not follow the postal rule.

[48] By no stretch of imagination can one say that the postal rule applies to the 21 days' notice under section 110(1) of the Land Transfer Act which is the matter in dispute before this Court. To apply the postal rule the said notice by the Registrar should be considered an acceptance. There cannot be an acceptance without an offer. No offer had been made by the caveator for the Registrar to accept. Thus I am of the view that the argument based on the postal rule cannot be sustained and the Learned High Court Judge was right in rejecting the applicability of the postal rule to the facts of the instant case.

Appellants' authorities

- [49] To be fair by both parties, I think I should deal with the decisions cited to us in support of their respective positions. The statement in the High Court of Fiji Case of **Raghwan Construction Company Ltd v Endeavour Youth Co-operative Society** (supra) that if an application is sent by post to the address shown and adequate time has passed the court would presume it was duly served, should be regarded as relevant only with regard to the fact of service under the first part of section 2(5) of the Interpretation Act. In any event the High Court has not considered section 2(5) in its judgment. **A/S Catherineholm v Norequirement Trading Ltd** (supra) was concerned with the fact of service which is not in dispute in the instant case and not with the time of service which is the point of contest here. In **Cooper v Scott-Farnell** (supra) at the time the summons arrived the defendant had gone abroad and did not receive the same and the court held that there had been proper service of summons as it was addressed to and delivered at the correct address. However the judgment was later set aside subject to cost as it appeared that the defendant had no knowledge of the process in time and the Court of Appeal affirmed the setting aside of the judgment by the county judge. **Rossi's case** (supra) was followed in **Cooper's case**. In **Moody v Godstone RDC** (supra) the appellant had purportedly signed the certificate of delivery but denied the service of the enforcement notice on him and the Court of Appeal said that there is no vital element that the enforcement notice has to be served by or at a particular date and therefore the second limb in section 26 of the Interpretation Act cannot be invoked.

- [50] However where receipt of the notice is an essential element such as in section 110(1) of the Land Transfer Act, Parker LJ's interpretation of section 26 of the Interpretation Act in **Rossi's case** would apply.

Respondents' authorities

- [51] In **Raghwan Construction Company Ltd v Endeavour Youth Co-operative Society** (supra) the High Court of Fiji said *inter alia* that the Registrar can only remove a caveat on the expiry of 21 days after service of the notice and not from the date of notice and 21

days should be counted from the day next after service by virtue of section 51(a) of the Interpretation Act. However the court had not considered section 2(5) of the Interpretation Act. I think the High Court has got it right on section 51(a) but seems to insist on the actual service of notice as *sine qua non* which does not represent the correct position of law on the question of service of notice as adverted to above. **Holwell Securities Ltd. V Hughes** (supra) is an English contract case where the original offer clearly stipulated the method by which acceptance was to take place superseding the postal rule, and the court held that the postal acceptance rule cannot apply when there are express terms in the offer specifying that acceptance must reach the offeror. Thus the pronouncements therein are not applicable to the matter before us. In **Anganu v Dayawanti** (supra) the High Court of Fiji has quoted from **ANZ v Maharaj** (supra), an unreported decision of the Fiji Court of Appeal for the purported statement on section 110(1) that the removal of a caveat by the registrar takes effect "after the lapse of 21 days from the date of service, not 21 days from the date it was given." The ruling in **ANZ** case which seems to have completely excluded any presumed service of notice suffers from the non-consideration of section 2(5) of the Interpretation Act and relevant decisions. Thus both decisions cannot be said to reflect the relevant position of law accurately.

Concluding remarks

- [52] I am aware that the Registrar has no control over the process of delivery of the notice except sending it by registered post. He seems to be affording more than 21 days (in fact 24 days) to the caveator since the date of posting the notice before a caveat is removed. In the ordinary course of things this practice cannot be criticised. Unexplained and belated delivery of the notice as in the instant case does not lie with him. On the other hand the Land Transfer Act does not contain any specific provisions as to what remedies a caveator can resort to in the case of a premature removal of the caveat on the basis of presumed service. Nor does the said Act permit the Registrar to reverse a removal effected upon the lapse of 21 days on a presumed service of notice when the actual service is proved to have been effected on a different date by the caveator. Currently there is no provision for the Registrar to hold an inquiry as wrongly assumed by the High Court Judge. It would have been desirable had the Land Transfer Act contained provisions dealing with such eventualities which may obviate the long drawn litigation

involving the Registrar. However, these are matters for the legislature to consider and if it thinks fit, to remedy in due course. At present only a court of law could reverse such a removal.

- [53] I have also observed that the caveator and/or her solicitors have not even informed the Registrar of the belated receipt of the notice during the 09 days left before the caveat was removed. Thus the High Court Judge's conclusion that the Registrar is liable for the damages caused to the plaintiff as a result of the cancellation of caveat seems premature. Whether the Registrar is liable on the facts of this case for damages and if so, how much are matters to be decided at the trial. The Respondents' claims and the relief sought include declarations and orders which if granted, would undo the removal of the caveat being challenged and the *status quo* would be restored.

Determination on the issue of law


- [54] Therefore I am of the view that to say that the date of service is the date of posting as adverted to by the Appellants is wrong. Similarly, to say that the date of service is always the date of actual service is also erroneous and the High Court Judge has erred in this respect. Both views do not reflect the correct position of law. My view is that under the Land Transfer Act the receipt of notice under section 110(1) by the caveator is essential, for otherwise he or she cannot act under section 110(3) and take steps within 21 days of service of notice to have the time extended beyond 21 days. However, when the Registrar furnishes evidence of posting of the notice by registered post the service is deemed to have been effected and the fact of service is presumed under the first limb of section 2(5) of the Interpretation Act read with section 110(1) and 176 (1) of the Land Transfer Act. Under the second limb of section 2(5) concerning the time of service, the service is deemed to have been effected at the time at which the envelope would be delivered in the ordinary course of post in the absence of any proof to the contrary, the burden of proof of which is on the caveator. Therefore ordinarily 21 days would run from the date of presumed service. If the caveator proves that he or she did not receive the notice at the time at which the envelope would have been delivered in the ordinary course of post but on a different date, the second limb of section 2(5) of the Interpretation Act becomes

applicable and the date of service would be the actual date of service and 21 days would run from that date.


- [55] Therefore I hold that the removal of the caveat by the Registrar on 12 April 2005 is invalid in law and liable to be set aside. I also hold that the High Court Judge's final conclusion on the validity of the removal of the caveat was right but grounded on wrong reasons.

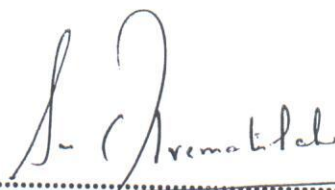
The Orders of the Court are:

1. *The appeal is dismissed and the judgment of the High Court is affirmed.*
2. *No cost is awarded in view of the matters of law involved in the appeal.*


.....
Hon. Justice W. Calanchini
PRESIDENT, COURT OF APPEAL




.....
Hon. Justice E. Basnayake
JUSTICE OF APPEAL


.....
Hon. Justice C. Prematilaka
JUSTICE OF APPEAL