

## OF CAVEATS AND CHARGING ORDERS

### *Bank of China v. The First National Bank of Boston*<sup>1</sup>

#### *Introduction*

THE Torrens system of land registration has been with us since 1956 but some of the features are still being worked out. This is significant because though the Torrens system has been adopted by different jurisdictions, there are differences in the form it has taken either in the wording of the statutes that embody it or in the application by the courts. In the area of caveats different jurisdictions employing the Torrens systems have adopted different positions on the issue of priorities of unregistered interests. One view is the total exclusion of the general rule of priority, that between two equitable interests where the equities are equal, the first in time prevails.<sup>2</sup> Another view permits the application of the general rule of priority in limited circumstances.<sup>3</sup> The recent decision of *Bank of China v. The First National Bank of Boston* which has dealt with a number of aspects relating to caveats is therefore of interest.

#### *Facts*

The case involved two banks with competing claims to a piece of property. H. and S.<sup>4</sup> were debtors of both banks. Bank of China, the plaintiff, had granted overdraft facilities to the debtors against an equitable mortgage of a number of pieces of property, among which was the property in question. The equitable mortgage was created by the agreement of H. who signed a confirmation of the deposit of the certificate of title in respect of the property in the possession of the plaintiff. A caveat was lodged by the plaintiff on 3 July 1980 and it lapsed on 3 July 1985.<sup>5</sup>

The same debtors were brought to court by the defendants, the First National Bank of Boston, and judgment was issued against them. A

<sup>1</sup> [1988] 3 M.L.J. 401.

<sup>2</sup> For example, the states of Alberta and Manitoba in Canada; see V. DiCatri, *Thorn's Canadian Torrens Systems* (2nd ed. 1962, Burroughs) pp. 653-670; and S.Y. Wong, *Tenure and Dealings in the Malay States* (1975 Singapore University Press) p. 467.

<sup>3</sup> For example, Malaysia and Australia; see Woodman & Nettle, *The Torrens System In New South Wales* (1985, The Law Book Company) pp. 524-531 *et seq.*; K.F. Wong, *Private Caveats: Entry, Extension, Removal and Appeals* (1980 Malayan Law Journal) pp. 43 *et seq.*; and Sinnadurai, *The Sale and Purchase of Real Property in Malaysia* (Butterworths 1984) pp. 469 *et seq.*

<sup>4</sup> Gojo Hartono and Anitawati Sustanto (H. and S. respectively).

<sup>5</sup> Under section 109(l)(b) of the Land Titles Act, Cap. 157, 1985 Ed., a caveat lapses and ceases to affect land at the expiration of five years from the date of its lodgement.

charging order was made by order *nisi* dated 30 November 1985 against the property belonging to H. and a caveat was lodged in respect of the property by the defendant on 2 December 1985 claiming as chargees of the property. The order absolute imposing the charge was granted on 22 January 1986. The plaintiff presumably having realised that they had overlooked renewing their caveat, lodged a fresh caveat on 25 February 1986. Meanwhile the defendant took steps to sell the property charged and the plaintiff commenced action in court.

### *Parties' Arguments*

The plaintiffs arguments in the originating summons were reproduced by Lai J. in his judgment.<sup>6</sup> The plaintiff sought various declarations. First, it sought a declaration that the defendant's caveat was wrongfully lodged as it was improper and bad in law. In support of the application for this declaration, the plaintiff argued that the charging order was not a caveatable interest under the Act. Second, a declaration was sought that the defendant's interest claimed in his caveat was rendered ineffective because it was based on the defendant being a chargee by virtue of the order *nisi* and this had been superseded by the making of the order absolute. The defendant, according to the plaintiff, ought to have lodged a caveat in respect of the interest under the order absolute. Three other declarations were also sought by the plaintiff. Two of these declarations were in respect of a sale of the property: that in the event of a sale, the sale was to be subject to the plaintiffs interest as equitable mortgagee, and that in the event of a sale the plaintiff was entitled to the proceeds as equitable mortgagee. The other declaration sought was that the charging order was defective because the defendant had failed to disclose his knowledge of the plaintiffs notice.

The plaintiffs arguments that it had a prior interest to the defendant's depended on the application of two principles. The first principle was the principle of general law of *nemo dat*, in particular that the defendant as a judgment creditor in execution could only take the interest which the debtor possessed in the property. The plaintiff supported this with section 117 of the Land Titles Act, Cap. 157, 1985 Ed. (L.T.A.) which deals with the sale of land in pursuance of writs. Section 117 states that the interest of the judgment creditor was the interest belonging to the judgment debtor at the date of the writ. The second principle was the equitable principle of *qui prior est tempore potior est jure*; that as between competing and unregistered claims "he who is first in time prevails". In reply the defendant argued that section 41(1) governed all questions of priorities as between parties who were claiming under unregistered interests. It was contended that the two principles were of no application if section 41 applied. The defendant submitted that the two principles were inconsistent with the L.T.A. and repealed by section 3. As to section 117, the defendant argued that Part XII of the L.T.A., to which section 117 belongs, did not apply, and that a writ of seizure and sale, the subject-matter of section 117, could no longer be issued over immovable property under the L.T.A.

<sup>6</sup> See *Bank of China*, above, n. 1, p. 402-3.

In alleging that the defendant's caveat was bad in law, the plaintiff argued that the charging order was not a caveatable interest. The defendant, on the other hand, contended that on the interpretation of section 18(2)(d) of the Supreme Court of Judicature Act<sup>7</sup> read with Order 50 rule 1 of the Rules of Supreme Court 1970, a charging order gave rise to a judicial charge and hence was a caveatable interest. The defendant also pointed to *Brereton v. Edwards*<sup>8</sup> to show that the charging order takes effect from the order *nisi* and hence the argument that it has become stale once the order absolute was made was invalid. As for the plaintiff's argument that the defendant ought to have disclosed its knowledge of the plaintiff's interest, the defendant argued that since priority was determined by section 41 the plaintiff's claim was subsequent and there was no non-disclosure of any relevant fact.

### Decision

Lai Kew Chai J. agreed with all the defendant's arguments. He agreed that the two principles relied on by the plaintiff did not apply under the L.T.A. and that the priority between the parties was based on section 41.<sup>9</sup> He also agreed with the defendant's arguments that the charging order was a judicial charge and a caveatable interest from the time of the order *nisi*.<sup>10</sup> He held that the defendant had a charge which upon lodgement of the caveat took priority over the uncaveated interest of the plaintiff as an equitable mortgagee.<sup>11</sup>

### Comments

The decision is significant on two counts. First, it dealt with the applicability of the *nemo dot* principle and the equitable principle of priority on the basis of priority in time under the L.T.A. Second, the decision that a charging order gives rise to a judicial charge, which is a caveatable interest, at the time of the order *nisi*.

### *The General Rule of Priority: "first in time prevails"*

The applicability of the general rule of priority under the L.T.A. was not discussed by the Singapore courts until *Bank of Canton*. The earlier decision of *Re Tan Kiong Hwa*<sup>12</sup> did not address this matter but was more significant for the view that the withdrawal of a caveat took effect from the time of its registration rather than lodgement.<sup>13</sup> There were differing views taken in other jurisdictions which have implemented the Torrens System. Under the Australian Torrens System, for example, there is settled

<sup>7</sup> Cap. 322, 1985 Ed..

<sup>8</sup> (1888) 21 Q.B.D. 226.

<sup>9</sup> See *Bank of China*, above, n. 1, p. 404H.

<sup>10</sup> See *Bank of China*, above, n. 1, p. 405B-H.

<sup>11</sup> See *Bank of China*, above, n. 1, p. 405A.

<sup>12</sup> [1972] 1 M.L.J. 239.

<sup>13</sup> W.J.M. Ricquier, *Land Law* (Singapore Law Series, Butterworths 1985) p. 134.

law that the principles under English law relating to competing equitable interests still apply. The owner of an equitable interest does not gain priority by virtue of the lodgement of a caveat.<sup>14</sup> The owner of a prior equitable interest who fails to lodge a caveat to protect his interest may lose his priority.<sup>15</sup>

Under the Malaysian Torrens System which is embodied in the National Land Code, the principles at general law have a part to play in determining the priorities between an interest which has been caveated and one which is not. The Malaysian courts have followed the Australian position.<sup>16</sup> The position of priority between two competing equities is in the words of Raja Azlan Shah J. (as he then was) in *Zeno Ltd v. Prefabricated Construction Co. (Malaya) Ltd & Anor.*<sup>17</sup>

“In my view the caveat establishes equity to show facts which render it inequitable for the holder of a prior equity to insist as against him on that priority. Although priority in time is the ordinary test, in the final analysis where evidence discloses some act or omission on the part of the holder of a prior equity the rule that ‘who has the better equity’ applies; . . .”

On the other hand, in Canada the courts have dealt with the matter differently being of the view that the holder of an equitable interest who first lodges a caveat will gain a priority.<sup>18</sup>

In coming to his decision that the general rule of priority is excluded by section 41(1)(2) of the L.T.A., Lai J. has made the lodgement of a caveat the key to determining priority. This seems to be precisely what section 41 implies. Section 41 (3) provides that apart from fraud, the entry of a caveat gives priority to an unregistered interest in land. In his commentary, Baalman maintains the view that section 31, (presently section 41) repealed the settled law laid down by Australian courts under which the equitable principles were applied.<sup>19</sup> There is no provision similar to section 41 in the Australian Torrens System and the National Land Code of Malaysia. There is, therefore, no reason for the Singapore Torrens system to adopt the position taken in Australia and Malaysia. However, section 41 of the L.T.A. is more akin to the Canadian Torrens statutes in Alberta and Manitoba.<sup>20</sup> Lai J.’s decision is similar to the position adopted by one of the Canadian courts where it was held:<sup>21</sup>

“ . . . an unregistered instrument protected by a caveat claiming an estate or interest in land must, when the claim is established, be given its full effect, according to its tenor, regardless of any other unregis-

<sup>14</sup> Woodman and Grimes, *Baalman The Torrens System in New South Wales* (2nd ed. 1974, the Law Book Company Ltd.) p. 306; Woodman and Nettle, above, n. 3, p. 524/31-524/32.

<sup>15</sup> *Abigail v. Lupin* [1934] A.C. 491.

<sup>16</sup> S.Y. Wong, above, n. 2, p. 467.

<sup>17</sup> [1967] 2 M.L.J. 104, 107, upheld by the Federal Court in *Paramoo v. Zeno Ltd.* [1968] 2 M.L.J. 230.

<sup>18</sup> See S.Y. Wong, above, n. 2, p. 466.

<sup>19</sup> J. Baalman, *The Singapore Torrens System* (1961, Government of the State of Singapore) p. 96.

<sup>20</sup> E. Choo, “Caveats – 2 questions” (1987) 29 Mal. L.R. 219, p. 235 n. 60.

<sup>21</sup> *Clark v. Barrick* [1950] 1 D.L.R. 260, p. 279.

ed instrument, whether prior or subsequent, not protected by a caveat or protected by a caveat subsequent to the one first mentioned.”

Lai J.’s decision on the general rule of priority appears to be correct since section 41 is clearer than the provisions in Australia and Malaysia.

### *The Nemo Dat Principle*

His decision that the *nemo dat* principle is not applicable to the L.T.A. is on the other hand less palatable. The rejection of the *nemo dat* principle does not seem to be in line with the second limb of section 41(3) which states that nothing in the section gives any unregistered interest any greater effect than it may have under the instrument by which it was created. One would have thought that this part of the section gives rise to the interpretation that the caveat does not confer substantive rights but that the caveator’s interest is dependant on its nature and extent in general law; hence the *nemo dat* principle is applicable. This would be in line with the assertions that caveats operated as a kind of statutory injunction against registration not having the effect of making the existing rights or claims any better or worse.<sup>22</sup> It would also seem to be in line with the operation of the caveat machinery. The owner of an unregistrable interest may lodge a caveat. The Registrar of Land Titles does not examine the validity of the caveator’s interest unless someone challenges it by lodging a conflicting caveat or in the case of a caveatee by application to the Registrar under section 111. The caveator who has no interest should not have priority over the owner of a legitimate interest though his interest is not caveated. Likewise, the defendant’s interest as a judgment creditor should not be determined by the fact that he had lodged a caveat before the plaintiff, but depend on the interest possessed by the judgment debtor at the time he, as judgment creditor stepped into the judgment debtor’s shoes. If the judgment debtor’s interest is subject to another person’s claim, the judgment creditor should be similarly affected. However this principle was held not to apply as being inconsistent with section 41.

The decision need not have eliminated the *nemo dat* principle for it is not necessarily inconsistent with section 41. The priorities, as distinguished from the interests which the caveats represent, are determined by the lodgement of caveats but the interests should not be determined by the lodgement of caveats but according to effect of the instruments which created them. Surely the effect of the instruments would be subject to the general law and the *nemo dat* principle. Under the L.T.A., it is registration which confers title not the caveat.

An observation needs to be made about the basis of Lai J.’s decision on the two principles. Lai J.’s judgment was brief. After giving an account of the arguments of both parties he concluded thus — “In my opinion, counsel for the defendant is plainly correct and I reject the plaintiffs arguments.”<sup>23</sup> One is led to assume that he also agreed with the authorities cited by the defendant. The defendant had relied on sections 3, 40 and

<sup>22</sup> See S.Y. Wong, above, n. 2, p. 462; and E. Choo, above, n. 20, p. 220.

<sup>23</sup> *Bank of China*, above, n. 1, p. 404G-I

41 together with the decisions of *Fung Sin Wa v. Moi Chan Hen, Ng Boo Bee v. Khaw Joo Choe, Chung Khiaw Bank Ltd. v. United Overseas Bank Ltd.* and *Re Tan Kiong Hwa*<sup>24</sup> that the principle of *nemo dat* and *qui prior est tempore potior est jure* are inconsistent with the framework under the L.T.A. and repealed. However, it would appear that the basis of Lai J.'s decision lay more on the wording of the sections for the decisions referred to are not directly on the issue. The first three decisions were on the Registration of Deeds Act ("R.O.D.A.") and only point to an analogous position under the R.O.D.A. These decisions alone are of doubtful authority for the conclusion about priorities between unregistrable interests under the L.T.A. as the system of conveyancing under the R.O.D.A. is different and the wording of the provisions is not similar. The last decision of *Re Tan Kiong Hwa* did not conclusively decide the issue of priorities under the Torrens System because in arriving at the decision that the purchaser of the flat in that case had priority by virtue of having first filed a caveat, reference was made<sup>25</sup> to the Australian decision of *Butler v. Fairclough*<sup>26</sup> which is the leading Australian authority for the application of the equitable principles to the Torrens system.

#### *Charging Order as a Caveatable Interest*

The other significant aspect of the decision is it cleared up any doubt that a charging order is a caveatable interest. Lai J. held that a charging order at the point of the order gives rise to a judicial charge which is caveatable. The decision has also pointed out an area of the L.T.A. which may need to be amended if it is intended for charging orders to be subject to the L.T.A. under Part XII. It is apparent from the judgment that Lai J. agreed with the defendant's argument that Part XII does not apply to charging orders since a writ of seizure and sale could no longer be issued over immovable property.<sup>27</sup>

#### *Other Observations*

Although the decision has held that the two principles, *nemo dat* and the general rule of priority, are repealed by section 3, there are other matters about caveats that have not been dealt with. One such matter is whether the other principles at general law are applicable, for instance to deal with lacunae in the L.T.A.<sup>28</sup> Lai J.'s judgment has only shut the door to two principles.

Another matter which the decision did not discuss, because it did not occur on the facts of the case, is the priority of a second caveat if the plaintiff had renewed his first caveat on time instead of allowing it to lapse and the defendant had lodged his caveat before the plaintiff's second caveat.<sup>29</sup> If the defendant had caveated his interest on 3 June 1985 before

<sup>24</sup> [1987] S.S.L.R. 175, (1921) 14 S.S.L.R. 90, [1970] 1 M.L.J. 185, [1972] 1 M.L.J. 239 respectively.

<sup>25</sup> *Bank of China*, above, n. 1, p. 241.

<sup>26</sup> (1917) 13 C.L.R. 78.

<sup>27</sup> *Bank of China*, above, n. 1, pp. 404C and 405E.

<sup>28</sup> E. Choo, above, n. 20, p. 233-235 where she argued they should be applicable.

<sup>29</sup> See E. Choo, above, n. 20, p. 234.

the plaintiffs renewal on 3 July 1985, would the plaintiff have priority. According to section 109 the first caveat lapses on 3 July 1985, but the L.T.A. does not specify what is the effective date of the second caveat. If it is treated as an extension, the second caveat should continue the protection of the first caveat and have priority from the date of the lodgement of the first caveat; *ie.* 3 July 1980. If it is treated as a fresh caveat, it would be effective from the day it is lodged and the defendant would have priority.

Another matter, which is interesting but could not be addressed since it was not an issue, is the validity and effect of an extension of a caveat if the plaintiff had applied for an extension. The extension of a caveat is a means provided by the Registry of Land Titles<sup>30</sup> whereby a caveator may apply in advance for the extension of his existing caveat. This means is not provided for under the L.T.A. but is the practice of the Registry.

The decision in *Bank of China* has highlighted another aspect of the L.T.A. where change should be considered. Another category of caveats should be introduced to cater for long term interests which are not registrable. In *Bank of China* one instance of a long term interest can be seen in the form of the equitable mortgage which lasted beyond the five year life of the first caveat. It was unfortunate for the plaintiff to have fallen into the trap of the five year limit. The five year life of caveats is suitable for unregistrable interests such as the interests of purchasers of property which could, barring any delay, be registered within the time limit. However, equitable mortgages and trusts may need protection for more than five years. This problem does not arise in Australia and Canada<sup>31</sup> where the caveats are not limited to a life of five years. Instead the onus is on the caveator to establish his interest under the caveat within a specified period failing which the caveat will lapse and the caveator presumed to have abandoned his claim under the caveat. The provisions in the Australian and Canadian statutes operate in a similar fashion to section 109(1)(a) of the L.T.A.<sup>32</sup> The introduction of a perpetual caveat will be a solution to the trap which the five year limit now poses to long term interests and will not be a deviation from the cardinal principle that in the Torrens system that the register is everything.

### Conclusion

The decision in *Bank of China* has not clarified most of the other doubts relating to caveats in the Singapore Torrens system. It also serves as a reminder, unfortunate though it may be for the plaintiff, of the need to be cautious of the dates of lapsing of caveats. The current practice of the Registry of extending caveats is a solution available to those whose unregistrable interests may need protection beyond the five year period of each caveat. However, the legal effect of this was not referred to. The decision does point to a need for changes to be made to the L.T.A. not just in the area of Part XII but the possibility of a perpetual caveat for long term

<sup>30</sup> Form 29A; see E. Choo, above, n. 20, p. 231.

<sup>31</sup> See Woodman and Nettle, above, n. 3, p. 518; and V. DiCastri, above, n. 2, pp. 638-641.

<sup>32</sup> See E. Choo, above, n. 20, p. 234, n. 53.

equitable interests such as trusts. Perhaps the system of caveats could be modified to adopt features of the Australian and Canadian statutes where the caveats are not limited to a life of five years but provide that the caveats will lapse unless the caveator establishes his claim in court within a specified period.

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