

REFLECTIONS ON CAVEATING A PART OF LAND

This article discusses the issues on caveating a part of alienated land under the Malaysian National Land Code 1965 as a result of the Supreme Court decision in *Tan Heng Poh v Tan Boon Thong*.¹

I. INTRODUCTION

FOR many years the nagging but important question as to whether a person who claimed an interest in a part of alienated land might caveat that part or the whole land generated interesting controversies and discussions among judges, lawyers and academicians. “Alienated land” under section 5 of the National Land Code is defined to mean “any land (including any parcel of a sub-divided building in respect of which a registered title for the time being subsists” Judicial decisions had differed over the interpretation of section 166 of the Federated Malay States Land Code (Cap 138) (“the FMS Land Code”) and the amended section 322(1) of the National Land Code (“the Code”) until the Supreme Court decision in *Tan Heng Poh v Tan Boon Thong*.²

II. PRE-VANGEDASELAM SITUATION

To understand the issues better, it is useful to examine briefly the three cases decided before *N Vangedaselam v Mahadevan*.³ The first case, *Tee Chin Yong v Ernest Jeff*,⁴ was decided by Ismail Khan J (as he then was) under section 166 of the FMS Land Code, which was repealed by the Code with effect from 1 January 1966. Section 166 of the FMS Land Code read as follows:

166 The grantor of any instrument of trust or a beneficiary or a guardian or next friend of any minor beneficiary or a trustee or any person claiming title to or registrable interest in land may present a caveat

¹ [1992] 2 MLJ 1.

² *Ibid.*

³ [1976] 2 MLJ 161.

⁴ [1963] MLJ 118.

to the effect that such land shall not be transferred, charged or leased by the proprietor either:

- (a) absolutely, or
- (b) except in such manner and to such extent as in such caveat may be expressed, or
- (c) until notice shall have been served on the caveator, or
- (d) unless the transfer, charge, or lease be expressed to be subject to the claim of the caveator as expressed in such caveat, or
- (e) except subject to any conditions expressed in such caveat.

In the *Tee Chin Yong's* case, the plaintiff, who was the caveator, sued the defendant for specific performance of a contract for the sale to him of only a portion of the land in question in Seremban. It was submitted on behalf of the defendant that the plaintiff had no registrable interest in the land and therefore could not present any caveat. For the plaintiff, it was contended that he had an interest in the land arising out of his contract which gave him the right to present the caveat. The learned judge found it necessary to decide whether the interest claimed was caveatable or not. He proceeded to answer the question whether a person claiming interest in a specific portion of a piece of land was entitled to lodge a caveat over the whole land. He decided in the negative. The learned judge said:

It is quite clear that in respect of the remaining portion of the land he is not entitled to lodge any caveat whatsoever. I do not think that a caveat is divisible in the same way that certain clauses in a contract may in proper circumstances be severable from the rest. Therefore, if the caveats lodged by the plaintiffs were partially invalid such invalidity renders those caveats wholly null and void and of no effect. They should not have been registered in the first place because the Registrar of Titles had no authority outside the four walls of the Land Code.⁵

Some eleven years later in *Woo Yok Wan v Loo Pek Chee*,⁶ Ajaib Singh J (as he then was) had to decide the same question under the then section 322(1) of the Code which read as follows:

⁵ *Ibid*, at 119.

⁶ [1975] 1 MLJ 156.

322 Nature and effect of private caveats.

- (1) A caveat under this section shall be known as a “private caveat”, and –
 - (a) may be entered by the Registrar on the register document of title to any land at the instance of any of the persons or bodies specified in section 323;
 - (b) shall have the effect specified in sub-section (2) or (3), according as it is expressed to bind the land itself or merely a particular interest therein.

In this case the defendant was the registered proprietor of a piece of land in Seremban on which was erected a double-storey shophouse. By a written tenancy agreement, the defendant proprietor let out the front portion of the ground floor and a room at the rear of the shophouse to the plaintiff. As the shophouse was in a dangerous state of condition, the Town Council served an order on the defendant, prohibiting any person from entering or remaining in the shophouse. The defendant terminated the tenancy agreement and sold the shophouse, causing the plaintiff to enter a caveat against the whole land and to sue the defendant for specific performance. As a person aggrieved, the defendant applied to the High Court for removal of the caveat under section 327 of the Code. In deciding whether or not to remove the caveat, the learned judge followed *Tee Chin Yong's* case. He ordered the removal of the caveat and stated his opinion:

Under section 323(2) of the National Land Code a person wishing to apply for the entry of a caveat has to do so in a prescribed form specifying therein the nature of his claim and whether the caveat is to be expressed to bind the land or a particular interest only. A person whose interest extends only to a specific portion of a piece of land is not entitled to enter a caveat over the whole of the land.⁷

The third case was decided by Hashim Yeop A Sani J (as he then was) in *Pok Kew Chai v Yeoh Thian Seng*.⁸ In this case, the applicant took a lease of 10 years in respect of the ground floor of a two-storey shophouse, also in Seremban, erected on the land registered in the name of one Foo. Foo had charged it by way of security for a loan to Yeoh the 1st respondent, who had not become the registered proprietor of the land when he, as

⁷ *Ibid*, at 159-160.

⁸ [1975] 1 MLJ 220.

registered chargee, applied under section 326 of the Code to remove the applicant's private caveat entered on 2 January 1974 against the whole land on the ground that the applicant's interest was in respect of the ground floor only. The caveator had claimed a larger interest than his actual claim warranted. The learned judge followed *Tee Chin Yong's* case and *Zeno Ltd v Prefabricated Construction Co (Malaya)* and ordered the removal of the caveat.⁹ The *Woo Yok Wan* case decided earlier in the month in the same court was not cited by him.

III. POST-VANGEDASELAM SITUATION

It was in 1976 that the Federal Court of Malaysia (since replaced by the Supreme Court with effect from 1 January 1985)¹⁰ handed down the landmark decision in *N Vangedaselam v Mahadevan & Anor*,¹¹ overruling the three Seremban cases, *ie*, the *Tee Chin Yong* case decided under the repealed FMS Land Code, the *Woo Yok Wan* case and the *Pok Kew Chai* case, both of which were decided under the corresponding provisions of the Code. In the *Vangedaselam* case, the caveat affected 18,000 sq ft of a large piece of alienated land. The High Court ordered the caveat to be removed but on appeal, the Federal Court ordered the caveat restored pending disposal of the civil suit without, however, prohibiting any dealing in the land expressed to be subject to the claim of the caveator. Suffian LP disagreed with Ismail Khan J (as he then was) that a person claiming only a portion could not caveat the whole land under the FMS Land Code. The learned Lord President gave his opinion and reasons as follows:

I am of the opinion that under the above provisions you either caveat the whole land or not at all, that you caveat the whole land even if you claim only a portion of it and that if you caveat the whole land but claim only part of it, then you should comply with paragraph (d) of section 166. Thus in the circumstances in *Tee Chin Yong* you should state that the lands shall not be transferred, charged or leased by the proprietor unless the transfer, charge or lease is expressed to be subject to the claim of the caveator as expressed in the caveats. This should not embarrass the registered proprietor unduly, because under section 169 the registering authority may register any memorandum of transfer etc executed by the proprietor if it complies with the requirement of the caveat.¹²

⁹ [1967] 2 MLJ 107.

¹⁰ See [1985] 2 MLJ cxiii.

¹¹ [1976] 2 MLJ 161.

¹² *Ibid*, at 162.

It may be noted that the present Code does not provide for an instrument of dealing or application to be presented for registration or endorsement subject to a private caveat, as in section 166(d) of the FMS Land Code. However, the said instrument or application, accompanied by the written consent of the caveator, may be registered or endorsed with the caveat on the register as provided under section 322(5) of the Code which reads:

322(5) A private caveat shall not prohibit the registration or endorsement of any instrument or claim where –

- (a) the instrument was presented or the application for endorsement made by the person or body at whose instance the caveat was entered; or
- (b) the said instrument or application was accompanied by the consent in writing of that person or body to its registration or, as the case may be, to the making of the endorsement.

With reference to a claim on a part of the land under the Code, Suffian LP also disapproved of the decisions in *Woo Yok Wan* and *Pok Kew Chai*. The learned Lord President appeared to suggest that a particular interest in the whole land could be caveated. He said:

With respect, my construction of these provisions of the National Land Code is as follows. A person who claims a registrable interest in land wishes to enter a private caveat. He must according to sub-section (2) of section 323 apply by Form 19B. In that form (verified by a statutory declaration) he must specify the nature of the claim on which his application is based and whether the caveat is to be expressed to bind the land itself or a particular interest only. This means that if the registrable interest he claims relates to the whole land he should say so.¹³

IV. POST-AMENDMENT SITUATION

While land registries and offices were gradually getting used to the practice of caveating the whole land and limiting the effect of the caveat to the particular interest or portion claimed by the caveator under the *Vangedaselam* decision, some nine years thereafter Parliament brought about a far reaching amendment with effect from 25 March 1985 to section 322(1) by adding the following proviso at the end of it:

¹³ *Ibid*, at 163.

Provided that such a caveat shall not be capable of being entered in respect of part of the land.

The amendment does not, however, define what constitutes a part of the land and whether a person who is a co-registered proprietor of, say, a half or a quarter undivided share of a piece of alienated land is affected by the amendment.

The effect of the amendment was first reported to be observed by the Supreme Court in July 1985 in *Mosbert Berhad (In Liquidation) v Stella D'Cruz*¹⁴ where Seah SCJ, in referring to the amendment and the *Vangedaselam* case, said:

This amendment came into force on 25.3.85 and because of this, that part of the judgment of this Court dealing with the private caveat lodged by the respondent now seems to be of academic interest only.¹⁵

The first reported decision on the interpretation of the proviso to section 322(1) came from Shaikh Daud J in *Dato' Ong Kian Seng v Lim Kut Sheong @ Lim Tuck Fatt & 7 Ors.*¹⁶ His Lordship said:

It is very clear that on a true construction of the proviso, no one may caveat the whole land if he claims only a portion of it.¹⁷

On the effect of the proviso, the opinion of the learned judge is clear and unequivocal:

It is my view that by the new proviso the intention of the legislature is clear, one cannot caveat part of the land must mean that if one has an interest in part of the land one cannot caveat either that part or the whole land. In other words one cannot caveat the land at all.¹⁸

His Lordship considered himself bound by the Supreme Court decision in the *Mosbert* case in which Seah SCJ, in delivering the judgment of the Court, said:

It is plain that the caveat was intended to forbid the registration of any dealing affecting the whole land and was not confined to private

¹⁴ [1985] 2 MLJ 446.

¹⁵ *Ibid*, at 449.

¹⁶ [1992] 1 CLJ 409.

¹⁷ *Ibid*, at 411.

¹⁸ *Ibid*, at 412.

Lot No 460 only. In our opinion, the respondent was not entitled to lodge such a caveat when she is claiming a particular interest containing an area of approximately 6000 square feet therein.¹⁹

A few months after the *Dato' Ong* case, the Supreme Court consisting of Jemuri Serjan CJ (Borneo), Mohamed Azmi and Mohamed Yusoff SCJJ made the final pronouncement on the interpretation of the proviso to section 322(1) in *Tan Heng Poh v Tan Boon Thong & Ors*.²⁰ The decision of Shaikh Daud J was, however, not cited in the judgment of the Supreme Court. Commenting on the *Mosbert* case and the *Vangedaselam* case, Azmi SCJ, in delivering the judgment of the Supreme Court, said:

We took this to mean that as from 25 March 1985, no caveat could be entered by the registrar against any land where the caveator was interested in a specific portion of it even though the effect was expressly intended to be limited only to that specific portion.

In our view the new proviso in section 322(1) had indeed affected the judgment of the Federal Court in *N Vangedaselam v Mahadevan & Anor*. With the greatest of respect, the learned Lord President had correctly stated the law as it stood...²¹

There can be no doubt that the amendment had brought about a very significant change in the law, prohibiting the entry of a caveat on a part of the land. The position brought about by the amendment is clearly stated by Azmi SCJ:

The amendment has changed the law by expressly prohibiting the entry of a caveat in respect of a part of alienated land. The nature and effect of private caveats under section 322 is now subject to an omnibus proviso that, such a caveat shall not be capable of being entered in respect of a part of the land. Thus, notwithstanding the fact that a person can bring himself under one of the categories of persons under section 323(1) at whose instance a private caveat may be entered, the registrar is now prevented from entering a caveat whether expressly intended to bind the land or merely a particular interest therein, if the caveator's claim or interest under section 323(1) relates to only part of the land. In our opinion, this is the only reasonable interpretation of the new proviso. Any other interpretation would appear to make

¹⁹ [1985] 2 MLJ 446 at 448.

²⁰ [1992] 2 MLJ 1.

²¹ *Ibid*, at 8.

it meaningless, and inconsistent with the Torrens system of giving certainty and indefeasibility to registration of land title, save for fraud or misrepresentation in the transfer or registration itself.²²

These two decisions shattered the hopes of Mr RR Sethu for interim protections by private caveats. The learned writer said in his article:

Whatever hopes there were, were all shattered by two decisions, one at first instance and, the other, in the Supreme Court.²³

When the present writer wrote the article “Twenty-five Years of the Caveat System under the National Land Code”²⁴ (*Part I*), he did not have the benefit of considering those two “shattering” decisions. Before the decisions, there were various conflicting interpretations over the amendment. Many legal practitioners still continue after the amendment to caveat the whole land on behalf of their clients, whether individuals or financial institutions, where the interest relates to only a part of the land. It is the practitioner’s way of trying to find a solution within the Code to protect the interest of a purchaser, chargee, or assignee in part of the land by caveating the whole land until the caveatee or the person aggrieved comes to remove it under section 326 or 327 of the Code. Registrars of Titles and Land Administrators still accept applications for caveats for the whole land though the caveator is interested in only a part of it. In practice, if the land officer concerned sees in the application that the whole land is being sought to be caveated, he will enter the caveat as his function is purely administrative. He is not concerned with the merits of the claim.

V. PARTICULAR INTEREST

The judgment of Azmi SCJ of the Supreme Court did not shed any light on the meaning of “particular interest”. It would appear that after the amendment the caveat can still be expressed to bind a particular interest in land under section 322(1)(b) of the Code; but not as contemplated by Suffian LP in the pre-amendment *Vangedaselam* case where he explained the expression “particular interest” as follows:

With reference to the words italicized, in view of the phrase “upon the person ... in whom that interest is for the time being vested” in subsection (3) of section 324, I think they mean the particular interest

²² *Ibid*, at 8-9.

²³ “Private Caveats Emasculated” [1992] 2 MLJ xxv at xxxiii.

²⁴ [1991] SJLS 223.

of the registered proprietor, not as Ajaib Singh J seemed to think, the particular interest of the caveator. In the ordinary case a proprietor owns all the interest in his land, but this interest is divisible; thus in the instant case the caveatees owned (a) all the interest in Merah Estate excluding the portion claimed by the caveator, as well as (b) all the interest in that portion. The caveator, as it happens, claims not the caveatees' interest in the entire estate, but only his interest in the portion in question. In other words he claims a particular interest in the land. In that event when applying for entry of a caveat he should so state in Form 19B in paragraph 1, and in paragraph 2 he should give the grounds of his claim.

Thus in the instant case the caveator might have said in Form 19B that he applied for the entry of a caveat upon the title to Merah Estate, to be expressed to bind the particular interest described in the Schedule (the description to read something like this "title to, or a registrable interest in or a right to title or interest, in that portion approximately 18,000 sq ft in area comprising the tindal house now occupied by the caveator") on the ground that the deceased Mr Ratnavale had by written agreement dated December 22, 1966, undertaken in consideration for service rendered to give that portion free to the caveator....²⁵ [Emphasis added]

In view of the amendment, the learned Lord President's view of "particular interest" of 18,000 sq ft forming a part of the land is certainly now not capable of being bound by a private caveat. If a piece of alienated land is registered in the names of *A* and *B* as co-proprietors in a half individual share each, *A* or *B*, as registered co-proprietor, can sell his respective particular interest in the half undivided share to *C*. In this situation, it cannot be disputed that *A* or *B* alone does not own the whole land. Their shares are undivided and held under one title and each, unless the land is subdivided or partitioned, cannot say he owns a specific identifiable portion of the land. In one sense, since each of them does not own the whole land, each owns a part of the whole land, but with a significant difference from the unregistered 18,000 sq ft of land in the *Vangedaselam* case. The question now is: can *C* caveat the particular interest of *A* or *B* under section 322(1)(b) in the light of the amendment? I am inclined to answer in the positive for the following reasons: First, a distinction must be drawn between a registered undivided share in alienated land and a claim to an unregistered interest in, say, a few hundred or a few thousand square feet of part of the whole land, as in the *Vangedaselam* case, against which the amendment is targeted.

²⁵ [1976] 2 MLJ 161 at 163.

The amendment seems to reflect a new legislative policy of putting a stop to caveats on such an unregistered or non-registrable part of the land, not expressed as a fraction which indicates the size of the registered undivided share. Second, it may be noted that under section 205 and section 214(1)(a), the *whole*, but *not a part only* of any alienated land, and, under (b), the *whole* but *not a part only* of any undivided share in alienated land, shall be capable of transfer under the Code subject to the condition or restriction in interest imposed on the title. Since the undivided share of *A* or *B* is capable of being transferred and registered under the Code, there is no reason why this particular interest cannot be caveated as it appears to fall outside the intention of the amendment; otherwise the words “particular interest therein” appearing in section 322(1) (b) should be deleted by amendment.

After this article was written, my attention was drawn to the article of Dr Khaw Lake Tee in “Claims In Respect of Part of Land – Whether Capable of Being Protected by Caveats.”²⁶ Dr Khaw commented on the expression ‘particular interest’ at page 227:

From the above, it seems clear therefore that the phrase ‘particular interest’ means the interest of a lessee, sub-lessee or chargee, that is to say, where there is a claim to an interest which a lessee or a chargee has against the land, a caveat may be entered against that interest of the lessee or chargee. For instance, a sub-lessee may, pursuant to an agreement for a sub-lease, enter a caveat against the interest of the lessee in the land. Or a person or body taking a transfer of a lease or a charge may, pending registration, enter a caveat against the lease or charge.

As regards a caveat against the whole of the land with effect limited to part only, the learned writer continues at page 228:

On the other hand, there is nothing in the National Land Code which expressly prohibits the entry of such a caveat either, unless of course, the proviso to subsection (1) of section 322 is considered to have that effect. As stated, it is however doubtful that the proviso contains such a prohibitory effect. In the absence of any express prohibition, there is therefore no reason why the validity of such a caveat may not be upheld provided that the caveat is over the whole of the land and the interest sought to be bound is particularised.

In respect of caveating a particular interest, as understood to mean a particular interest of a half undivided share each of *A* and *B* as co-proprietors

²⁶ (1986) 13 JMCL 219.

which was discussed above, she and the present writer appear to share some similar views. If her expression “the interest sought to be bound is particularised” is meant or understood to mean an interest in the nature of the 18,000 sq ft in the *Vangedaselam* case, then the caveat will now not be capable of being entered or maintained under the amendment to section 322 and under the Supreme Court decision in the *Tan Heng Poh* case.

In the light of the amendment, the following passage of Lord Diplock in *Registrar of Titles, Johore v Temenggong Securities Ltd*²⁷ would appear to be too widely stated:

So the protection afforded by a private caveat is available to a claimant to any interest capable of subsisting in alienated land whether that interest is of a kind that is registrable or not....

The interest of a kind that is not registrable under section 214(1)(a) and (b) of the Code, like the 18,000 sq ft of land in the *Vangedaselam* case, cannot now be caveated.

VI. REMOVAL OF CAVEATS

Under section 326 of the Code, any person, typically a proprietor or chargee, whose registered interest is bound by a caveat may apply in Form 9 to the Registrar for its removal. While the person may also apply to the High Court for the removal of the caveat under section 327(1) as a person aggrieved by the existence of the caveat, section 326 is not available to a person who has no registered interest in the land. In the *Temenggong Securities*²⁸ case, Temenggong Securities Ltd, as purchaser, and its nominee, Tumbuk Estate Sdn Bhd, as transferee, successfully applied as persons aggrieved under section 327(1) for the removal of the Registrar’s caveat. The Code does not define the expression ‘person or body aggrieved’. A person or body aggrieved must be one who has suffered a legal grievance, whose legal or beneficial interest, right or title is affected adversely by the existence of a caveat or by a wrongful act of another.²⁹

In a very recent Johor Bahru High Court case, *Punca Klasik Sdn Bhd v Abdul Aziz & 19 Ors*,³⁰ the plaintiff purchased a piece of alienated land of 24 acres for M\$24 million in the township of Johor Bahru from the

²⁷ [1976] 2 MLJ 44 at 46.

²⁸ [1974] 2 MLJ 45 FC; [1976] 2 MLJ 44 PC.

²⁹ See *A-G of Gambia v Pierre Sarr N’jie* [1961] AC 617 at 634.

³⁰ [1994] 1 MLJ 136. In *Ismaga Bina Sdn Bhd v Govindasamy* [1994] 1 AMR 11: 594; T Selventhiranathan JC had the opportunity to consider the effects of the amendment and the *Tan Heng Poh* case. His Lordship came to the same conclusion.

trustees of the Alattas Estate pursuant to the terms of a court order. James Foong J said in his judgment of 24 October 1993:

One of the conditions for this sale was that the said property be sold without vacant possession and subject to all encumbrances which include caveats, interests, tenants and occupiers thereon.

There were 20 private caveats entered by the 20 defendants in the case against the whole of the land after the amendment had come into force. The learned judge said of the caveators' claims at page 140:

Their claims are virtually similar; that they are the beneficial owners of various parts of land in the said property which can be identified measuring from approximately 650 sq ft to 20,000 sq ft. These they claimed were purchased from the Trustees or beneficiaries of the said Alattas Estate long before the plaintiffs were successful in purchasing the said property.³¹

As a person aggrieved by the existence of the caveats, the plaintiff applied to court by originating motion under section 327(1) for their removal, relying principally on the amendment to section 322(1) of the Code and the *Tan Heng Poh* case. The issue before the court was whether in law the caveats should be removed. The defendants raised defences of non-grievance, estoppel and their prior equitable interest. The learned judge considered himself bound by the *Tan Heng Poh* case and was of the view that section 322(1) does not permit the defendants to caveat the land when their claims relate to parts of the land varying from a few hundred sq ft to 20,000 sq ft. He accordingly ordered the caveats removed.

An applicant for removal of a caveat sometimes encounters difficulty caused by problems of service of his application on the caveator either because the latter is dead or cannot be found. Substituted service or order for dispensation of service may be necessary. Only in cases where the caveator has clearly no right to enter private caveats will the court order them removed *ex parte* under section 327(1), *ie*, without serving the application for removal on the caveator or his legal personal representative. In the *Punca Klasik* case, the 14th defendant died after he entered his caveat and no legal personal representative had been appointed at the material time. The 17th defendant could not be served with the application before the hearing as he had moved. As they were in the same boat as the remaining 18 caveators, the court, after hearing full arguments from all counsel concerned, removed the two caveats *ex parte*. Section 327 reads as follows:

³¹ *Ibid*, at 140.

327 Removal of private caveats by the Court.

(1) Any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal, and the Court (acting, if the circumstances so require, *ex parte*) may make such order on the application as it may think just.

VII. CONSEQUENCES AND EFFECTS OF THE AMENDMENT

After the amendment and the *Tan Heng Poh* case, it is certain that if one claims any title to or any registrable interest in a part of alienated land, one cannot caveat the whole land or a part thereof. In other words, one has no caveatable interest at all in the land. The reasons for the amendment were not made clear in the bill. In the *Dato' Ong* case, Shaikh Daud J's explanation was that:

It is very clear that on a true construction of the proviso, no one may caveat the whole land if he claims only a portion of it, otherwise there could be a situation where a person claiming interest in a few hundred square feet comprising (sic) in a few thousand acres of land would be able to caveat the whole land thereby causing irreparable injury.³²

It is the intention of Parliament to prohibit entry of caveats on a part of the land like the 18,000 sq ft in the *Vangedaselam* case, such part being incapable of transfer under sections 205(1) and 214(1) of the Code. In *Tan Heng Poh's* case, the Supreme Court has made it clear that it is not the function of the court to amend defective caveats, and *Chng Sin Poey & Sons Sdn Bhd v Quek Lien Meng*,³³ in which the High Court amended the caveat, is no longer authority. Caveats which are defective in law must be removed by the court, without having to consider the balance of convenience enunciated in the Privy Council case of *Eng Mee Yong v Letchumanan*.³⁴

VIII. RESORT TO EQUITY

As "any parcel of a sub-divided building" comes under the definition of "alienated land" in section 5 of the Code, after the amendment, purchasers and their financiers as assignees of flats and condominium units under a strata title project will, much to their dismay, be prohibited from entering

³² *Dato' Ong Kian Seng v Lim Kut Sheong @ Lim Tuck Fatt & 7 Ors* [1992] 1 CLJ 409 at 411.

³³ [1979] 1 MLJ 98.

³⁴ [1979] 2 MLJ 212 at 215.

private caveats to protect their respective interests before the issue of individual strata titles. The same applies to housing project land which is pending sub-division approval and which has no individual titles, but these titles, unlike strata titles, are issued relatively fast so that end financing of individual purchasers secured by legal charges faces little or much less difficulty. Financing of strata title units pending issue of individual strata titles, however, continues to be strong, secured by loan agreements-cum-assignments, with the consent of the developer. So in a case of competing equities in respect of a strata title unit, the dispute will centre on the question of priorities. Priorities will be determined according to well established equitable principles, *ie*, everything being equal, the first in time prevails. In the absence of caveats and notice prior to the issue of individual strata titles, it will appear that the rights and interests of the parties will rank primarily according to the date of creation. The initial anxiety or fear caused by the amendment has not turned out to be as serious as imagined. The courts have come forward to protect the interest of an assignee, although the assignee did not enter a caveat to protect its interest while a competing intervenor entered a caveat against the land on which the building containing the disputed unit was erected.

The judgment of Lim Beng Choon J in *Bank of Tokyo Ltd v Mohd Zaini bin Arshad (Maria Pragasam, Intervenor)*,³⁵ has brought much needed comfort and protection to assignees (typically financiers). There the learned judge concluded that the Bank of Tokyo Ltd, which had financed the unit concerned and accepted an assignment as security, was an absolute assignee. Although the caveat was defective under the amendment, this point was never an issue in the case. In the event that Lim J was wrong in his conclusion, he went further to consider the crucial question of who had the better equity. What the learned judge said merits attention:

However, should I be held wrong in arriving at the aforesaid conclusion, I still need to consider the second question posed earlier, namely, which of the two parties has the better equity? In my search for an answer to this question I must bear in mind that at law, as in equity, the basic rule is that rights and interests primarily rank in order of creation. The doctrine of *qui prior est tempore potior est jure* – he who is earlier in time is stronger in law – will apply where the equities are equal and neither claimant has the legal estate: see *In re Samuel Allen & Sons Ltd*. An important qualification to the basic rule is the doctrine of the purchaser without notice. A subsequent purchaser must have no notice of the earlier equitable interest. From this doctrine, it is clear

³⁵ [1991] 3 MLJ 50.

that a subsequent purchaser is affected by notice of an equity when there is

- (i) actual notice: where the equity is within his own knowledge – see *Lloyd v Banks*³⁶ where it was held that a purchaser could not safely disregard information from any source if it was of such a nature that a reasonable man or man of business would act upon the information;
- (ii) constructive notice: where the equity would have come to his own knowledge if proper enquiries had been made and;
- (iii) imputed notice where his agent as such in the course of the transaction had actual or constructive notice of the equity – see *Reeves v Pope*.³⁷

Now in the present case, the assignment was executed on 8 December 1982 while the intervenor's assignment was executed on 17 November 1983 (see p 59 of the bundle of pleadings). There is also no doubt that the intervenor had actual notice of the bank assignment as manifested in the fifth recital of the intervenor sale and purchase agreement. What is more important is that, under cl 9 of the said agreement, the intervenor covenanted that should the defendant fail to pay to the plaintiff bank on or before 31 January 1984 such sums of money as shall be sufficient to redeem the said property pursuant to cl 4 hereof the purchaser (meaning the intervenor) shall settle the same with the bank and thereafter recover the same from the vendor (the defendant) as a debt due and owing by the vendor to the purchaser. Under such circumstances and bearing in mind the principles enumerated above, it is manifestly clear that plaintiff has an equity which, in my opinion, is better than that of the intervenor.³⁸

Failure to enter a caveat or entering one later in time does not necessarily mean that a purchaser of land will lose his equitable interest in the land, which will be converted to a legal interest upon registration of the transfer or charge, as the case may be. In the *Temenggong Securities* case, the purchaser and its nominee did not enter any caveat at all and their equity prevailed over the claim of the Government of Malaysia for income tax owing by the vendor. The Inland Revenue Department had caused a Registrar's

³⁶ (1868) LR 3 Ch App 488.

³⁷ [1914] 2 KB 284.

³⁸ [1991] 3 MLJ 50 at 55.

caveat to be entered against the land, and this caveat was ordered to be removed by the Federal Court and the Privy Council, and Temenggong's nominee eventually became the registered proprietor of the land free from encumbrances.

While the entry of a private caveat is intended to protect the existing interest or right of the caveator in the land in question, the caveat itself does not create a larger interest or right in land than what the caveator actually has. If the caveator has no interest or right at all in the land, he cannot create or acquire any interest by the entry of a caveat. If he has no such interest or right, there is nothing to protect by the caveat. In the well-known Australian High Court case of *Butler v Fairclough*,³⁹ Griffith CJ was considering the nature and effect of a caveat. The learned Chief Justice said:

The effect of these provisions is not to enlarge or add to the existing proprietary rights of the caveator upon which the caveat is founded, but to protect those rights, if he has any.⁴⁰

The Federal Court of Malaysia applied the *Butler* case in *United Malayan Banking Corporation Ltd v Goh Tuan Laye*⁴¹ in which, in the absence of caveats and registrations, the Federal Court found in favour of the appellant bank, which had possession of the documents of title.

In another Federal Court case of *Macon Engineers Sdn Bhd v Goh Hooi Yin*,⁴² Gill CJ (Malaya) said:

The effect of the caveat is that no instrument effecting the land can be registered while it is in force. The entry of the caveat does not make his claim or right either better or worse....⁴³

In *Ng Kheng Yeow v Chiah Ah Foo*,⁴⁴ the Malaysian Supreme Court held that "the entry of a private caveat by one party does not necessarily mean that he has better priority against another who has not as yet lodged one."⁴⁵ The court found in favour of the 4th respondent although his caveat was later in time than that of the appellant. In delivering the judgment of the court, Lee Hun Hoe CJ (Borneo) said:

³⁹ (1917) 23 CLR 78.

⁴⁰ *Ibid*, at 84.

⁴¹ [1976] 1 MLJ 169.

⁴² [1976] 2 MLJ 53.

⁴³ *Ibid*, at 55.

⁴⁴ [1987] 2 MLJ 330.

⁴⁵ *Ibid*, at 331.

The submission of the 4th respondent that he has better equity is well founded. He entered into the sale agreement with the vendors first. He had paid the full purchase price. The vendors had executed the Memorandum of Transfer in his favour. Also, most importantly the title deed is in his possession. He had become the beneficial owner. The only thing against him is that he entered the caveat later than the appellant. However, we are satisfied that on the facts he has the better equity.⁴⁶

On further reflection, the situation brought about by the amendment is not as gloomy as some have imagined it to be. With the protection given under Tun Suffian's decision in *Vangedaselam* taken away by statute, another simple and effective method should be devised for the protection of the interests of purchasers and assignees of strata title units before the individual strata titles are issued. Could it be possible that the parliamentary draftsman was so preoccupied with overruling Tun Suffian's decision that the draftsman overlooked the interests of strata title unit purchasers and assignees whose respective interests also need protection under the Code, just as the purchasers and chargees of property with sub-divided titles whose interests may be protected under the existing caveat system? The detailed method of protection is not the subject of this article. Perhaps one way to protect such interest in strata title units is to add a further proviso to the existing proviso to section 322(1) to the effect that the first proviso shall not apply to strata title project land duly approved by the appropriate authority for that purpose.

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⁴⁶ *Ibid*, at 332.

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