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Requirement of a Pre-existing Interest to Support a Caveat Under the Land Titles Act

The Asiatic Enterprises (Pte) Ltd v *United Overseas Bank Ltd*[1]

IN *Asiatic Enterprises* the Court of Appeal revisited the question of the nature of the interest required to support the lodging of a caveat under section 115 of the Land Titles Act.[2] The case concerned a somewhat unusual security device.[3] The bank offered the company various banking facilities on standard terms which included in clause 10 the following provisions:

> On the occurrence of any of the following events of default (i) the Bank [the respondent] shall cease to be under any further commitment to you [the appellant] and all outstandings under the entire credit line ('the Outstandings') shall become due and payable immediately; (ii) the Bank shall, in addition to the rights set out herein, be entitled (as equitable chargee) to attach the Outstandings to any property of yours (whether real or personal) and to lodge a caveat against any real property that may now or hereafter be registered in your name whether singly or jointly ...

The events of default included "the breach [of] any term of this Agreement including failure to pay any amount due under this Agreement on the due date or on demand, if so payable".

The company failed to pay the bank certain amounts due under the agreement and when the company did not meet the bank's demand for repayment of all outstanding sums, the bank lodged caveats against certain properties of the company. The bank obtained an order enforcing its equitable

1 [2000] 1 SLR 300 ("*Asiatic Enterprises*").

2 Cap 157, 1994 Rev Ed. For a general discussion of this issue, see Tan, *Principles of Singapore Land Law* (1994), at 191-196.

3 For further discussion of this aspect of the case, see Lee Eng Beng, "Invisible and Springing Security Interests in Corporate Insolvency Law", (2000) 12 SAcLJ 210; Victor CS Yeo, "No Security for the Unsecured Creditor" (2000) 12 SAcLJ 218.

charge against the properties by sale, and this order formed the subject of the present appeal.

Clause 10 sets out a security arrangement which clearly has certain similarities to a floating charge. However, a floating charge is not a future security; it is a present security, which presently affects all the assets of the company expressed to be included in it. Nevertheless, a floating charge does not specifically affect any item comprised in the security until some event occurs which causes the charge to crystallise into a fixed security.[4] By way of contrast, clause 10 appears to contemplate the creation of a future security interest. No charge is created at the time the parties agree to the standard terms. It is only when one of the events of default occurs that the bank becomes entitled to "attach the Outstandings to any property ... and to lodge a caveat".

Security arrangements virtually identical to those set out in clause 10 have been considered in recent years by the Australian courts.[5] The analysis generally adopted is that until default there is no entitlement to attach the debt to any property of the borrower. Hence at the outset there is no charge or agreement to charge any property of the borrower. On default an entitlement accrues to the lender, but at that stage there is still no charge or agreement to charge. Although the voluntary attaching of a debt to the property normally requires some act by its owner, the clause contemplates that an act of the lender will have this effect. The clause should therefore be construed as an attempt to confer on the lender a power which can be exercised on default and which will then give rise to an equitable charge.[6]

The difficulty with clauses such as clause 10 in the present case is that they do not make it clear how the lender may exercise its power to impose an equitable charge on the property of the borrower. As LP Thean JA, delivering the judgment of the court, said:

4 *Evans* v *Rival Granite Quarries Ltd* [1910] 2 KB 979, at 999, *per* Buckley LJ.

5 See *Murphy* v *Wright,* (1992) NSW Conv R 55-652; *Troncone* v *Aliperti* (1994) 6 BPR 97455 (p 13,291); *Crampton* v *French* (1995) V Conv R 54-529; *Chiodo* v *Murphy* [1995] V Conv R 54-531; *Wilson* v *Graham* (1997) (unreported). See also Butt, "Bootstrap Caveats" (1994) 68 ALJ 752.

6 See in particular the judgment of Handley JA in *Murphy* v *Wright, supra,* note 5. Handley JA spoke of the lender having an "option" which when exercised will create an equitable charge over the subject property. However, as LP Thean JA pointed out in *Asiatic Enterprises, supra,* note 1, at 311-312, clause 10 does not give the bank an option in the sense in which that word is normally understood. It is therefore submitted that the bank's entitlement to charge the property of the debtor is best characterised as a power.

> [T]he respondent [bank] is entitled by unilateral action to create or impose a charge on any property of the appellant. However, the mechanism for creating or imposing such a charge has not been specifically provided for in that clause. That being so, the respondent can only have available to it such mechanism as the law provides. For example, if the respondent happens to have in its possession any funds or movable assets of the appellant, it could assert its right over them and appropriate them as security for the [amount] outstanding then due.

Arrangements such as clause 10 expressly grant the lender the right to lodge a caveat over the debtor's land. Although the Australian cases have acknowledged the existence of the difficulties stated above, they have accepted that the action of the lender in lodging a caveat in relation to Torrens system land creates an equitable charge over that property. Since "equity looks to the intent rather than the form", no particular procedure is needed to create an equitable charge.[7] Although it may seem an unorthodox practice, the view taken by the Australian cases is that equity will enforce the agreement of the parties that the lodging of a caveat by the lender should create a charge over the borrower's land.[8]

It is possible to object that a caveat does not create a property interest. It is simply a mechanism to protect an interest which the caveator already has. If so, clause 10 cannot be effective to create a charge because it only authorises the lender to lodge a caveat and does not itself grant the lender any estate or interest in the land. This point was answered by Mahoney JA in *Troncone* v *Aliperti*[9] in the following words:

> It is a fundamental principle of construction that "Whoever grants a thing is deemed also to grant that without which the grant itself would be of no effect" *(Cuicunque aliquis quid concedit concedere videtur et id sine quo res ipsa esse non potuit): Broome's Legal Maxims* (9th ed) p 307. The principle is said to go back at least to Shepherds Touchstone 89.

7 As Romer J said in *Cradock* v *Scottish Provident Institution* (1893) 69 LT 380, 382, "To constitute a charge in equity by deed or writing it is not necessary that any general words of charge should be used. It is sufficient if the court can fairly gather from the instrument an intention by the parties that the property therein referred to should constitute a security."

8 For a contrary view, see Goode, *Legal Problems of Credit and Security* (2nd ed, 1988), at 30-31.

9 *Supra,* note 5, at 13,292.

> A caveat cannot be entered against land unless the caveator has the relevant proprietary interest in the land: see Real Property Act 1900, section 74F(1) ("a legal or equitable estate or interest in land"). Therefore, unless there be evident an intention to the contrary, the grant to the creditors of an authority to lodge a caveat on the relevant property carried with it by implication such an estate or interest in land as was necessary to enable that authority to be exercised.

In *Asiatic Enterprises* the Singapore Court of Appeal considered the above analysis at some length. However, in the end it was held that the caveats had not been validly lodged. LP Thean JA said that in the context of the Land Titles Act it was not conceptually possible to treat the act of lodging a caveat as an appropriate mechanism for creating a charge on the land held under the Act. The reason for this was because "the wording of section 115(1) of the Land Titles Act ... indicates that the caveator must ... have a *pre-existing* claim of an estate or interest in land which supports the caveat."[10] (emphasis added)

If, however, the Australian analysis of the effect of clause 10 is accepted, it should be easy for drafters of contracts to overcome the difficulties resulting from *Asiatic Enterprises.* The problem is that one must have a pre-existing claim of an estate or interest to support the caveat. One should then provide in the contract for the equitable charge to arise at an earlier stage. One could, for example, provide that on the occurrence of one of the events of default, an authorised officer of the bank may sign a document stating that certain properties of the borrower should be charged to the bank. The contract should go on to state that those properties will then stand charged in equity to the bank, and the bank shall be entitled to lodge caveats against those properties to protect its interest.

Returning to *Asiatic Enterprises* itself, it seems unfortunate that the commercial expectations of the parties were defeated by the technicalities of the Torrens system. Section 115(1) of the Land Titles Act provides:

> Any person claiming an interest[11] in land (whether or not the land has been brought under the provisions of this Act), or any person otherwise authorised by this Act or any other written law to do so, may lodge with the Registrar a caveat in the approved form ...

[10] *Supra,* note 1, at 312.

[11] In section 4 of the Act "interest" is defined simply as "any interest in land recognised as such by law, and includes an estate in land".

Section 74F(1) of the New South Wales Real Property Act 1900 contains similar language. It provides:

> Any person who, by virtue of any unregistered dealing or by devolution of law or otherwise, claims to be entitled to a legal or equitable estate or interest in land under the provisions of this Act may lodge with the Registrar-General a caveat prohibiting the recording of any dealing affecting the estate or interest to which the person claims to be entitled.

In *Wilson* v *Graham*[12] Santow J had to consider an agreement similar to that in *Asiatic Enterprises*. He said,[13]

> [T]he registration of the caveat was essential to create the equitable charge. It gives rise to this apparent dilemma. If the registration of a caveat pre-supposes a prior interest in land, could that interest be created by the very act of registering the caveat? If to register a caveat there must be a pre-existing interest in land, the answer would have to be no. But the answer must, by implication, be that the interest can arise simultaneously with registration.

The Singapore Act speaks of the caveator "claiming" an interest, whereas the New South Wales legislation uses the expression "claims to be entitled" to an interest. This does not seem to be a significant difference. Certainly the Singapore provision can be interpreted so as to demand a pre-existing interest. On the other hand, someone who claims that he will have an interest in the land simultaneously with lodgement of the caveat can fairly be said to be already "claiming" an interest when he lodges the caveat. On a plain reading of the section both constructions seem to be equally plausible and it is difficult to see what policy reasons there might be in favour of limiting section 115(1) to pre-existing interests. It is submitted therefore that it was not necessary for the court in *Asiatic Enterprises* to place a restrictive meaning on the language of section 115(1). As a matter of policy, Torrens system statutes should be interpreted so as to facilitate land transactions and not so as to place unnecessary obstacles in the path of business people and their legal advisers.

[12] *Supra,* note 5.
[13] *Ibid,* at 4-5 of the Lexis transcript.

Even if one adopts the view that section 115(1) demands a pre-existing interest in land, it is submitted that in *Asiatic Enterprises* the bank did indeed have such an interest. The situation is clearly analogous to the familiar case of an option to purchase land. Once the purchaser exercises the option in accordance with its terms, the vendor and the purchaser are bound by an ordinary contract of sale. During the option period the purchaser has an equitable interest in the land simply because he has the power to give rise to an ordinary contract of sale by exercising the option.[14] This equitable interest is sufficient to enable him to lodge a caveat during the option period, in other words, before he exercises the option.[15]

By parity of reasoning once an event of default had occurred under clause 10 in the present case, the bank had the power to charge the company's land by lodging a caveat. It follows that as from the occurrence of an event of default, the bank had an equitable interest in the company's lands and should have been able to lodge a caveat to protect its interest. Of course, this equitable interest is not the same as the equitable charge which will arise pursuant to the contract once the caveat is lodged. By the same token, however, the equitable interest that exists during the option period is not identical to that which arises once the option is exercised and a contract of sale and purchase comes into effect. This need not, however, cause a problem in relation to the drafting of the form of the caveat.

In *Alrich Development Pte Ltd* v *Rafiq Jumabhoy*[16] the Court of Appeal refused to take an overly technical approach to the question of what particulars need to be set out in the form of the caveat. Warren LH Khoo J said:[17]

> All these considerations lead us to the view that it is not necessary to state in a caveat in exhaustive detail either the estate and interest claimed or the ground of claim. So long as the terms of the caveat give a fair indication of what estate or interest the caveator claims and the ground of his claim, that is all that is required for the purpose of notifying it.
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> While the requirement of the Act of an accurate description should always be followed, the court should not be astute to find fault with the terms of a caveat so long as they are not positively misleading and the interests of others are not prejudiced.

[14] *Re Button's Lease* [1964] Ch 263, 271; *Mountford* v *Scott* [1975] Ch 258.
[15] *Eng Bee Properties Pte Ltd* v *Lee Foong Fatt* [1993] 3 SLR 837.
[16] [1993] 2 SLR 446.
[17] *Supra,* note 16, at 453.

As the case of *Alrich Development Pte Ltd* v *Rafiq Jumabhoy* shows, the Court of Appeal has been prepared in the past to interpret the Land Titles Act to make it accord with its objectives and has eschewed an overly technical approach.[18] It is a cause of some regret that this more liberal approach did not prevail in the recent case of *Asiatic Enterprises.*

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[18] Ironically enough it was the New South Wales cases which insisted on a strict and meticulous description of the estate or interest claimed in the caveat. See, *eg, Palmer* v *Wiley* (1906) 23 WN(NSW) 90; *Re Jones* (1935) 35 SR(NSW) 560. The Singapore Court of Appeal considered this approach and expressly rejected it in *Alrich Development Pte Ltd* v *Rafiq Jumabhoy, supra,* note 16, at 450-453.

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