

THE SYSTEM OF PRIVATE CAVEATS IN MALAYSIA AND SINGAPORE: SOME REFLECTIONS

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This article undertakes a comparative study of the Malaysian and Singaporean systems of private caveats on the following three areas: the priority of unregistered interests, the entry of further caveats and the requirements to sustain a caveat. It seeks to determine the jurisdiction which best facilitates the policy objectives of the Torrens system of land registration in the three areas discussed.

I. INTRODUCTION

The rationale and principles underpinning the system of private caveats in both Malaysia and Singapore are substantially similar¹ in many respects, *e.g.*, in regard to the effect of entering caveats,² and the functions they serve.³ Nonetheless, there are significant differences between the two caveat systems as well. One difference relates to the priority of unregistered interests. Another pertains to the entry of further caveats. The requirements to sustain a caveat will also be considered. Each of these differences will be evaluated in turn to determine which jurisdiction offers a better approach in facilitating the policy objectives of the Torrens system of land registration.

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¹ See *Eng Mee Yong v. V Letchumanan* [1979] 2 M.L.J. 212 at 214 (P.C.) [*Eng Mee Yong*]; *United Overseas Finance Ltd. v. Mutu Jeras* [1989] 3 M.L.J. 20 at 23 (Sing. H.C.) [*Mutu Jeras*].

² See *Land Titles Act* (Cap. 157, 2004 Rev. Ed. Sing.), s. 115(2); *National Land Code 1965* (Act 56 of 1965, Malaysia), s. 322; *Sarawak Land Code* (Cap. 81), s. 175; *Sabah Land Ordinance* (Cap. 68), s. 116(3). See also *Macon Engineers Sdn. Bhd. v. Goh Hooi Yin* [1976] 2 M.L.J. 53 at 55 (F.C.) [*Macon Engineers*]; *Registrar of Titles, Johore v. Temenggong Securities Ltd.* [1976] 2 M.L.J. 44 at 46 (P.C.); *Woon Kim Poh v. Sa'amah bte Hj Kasim* [1987] 1 M.L.J. 400 at 402 (S.C.); *Alrich Development Pte. Ltd. v. Rafiq Jumabhoy* [1993] 1 S.L.R.(R.) 598 at paras. 36, 37 (C.A.) [*Alrich Development*]; *Cathay Theatres Pte. Ltd. v. LKM Investment Holdings Pte. Ltd.* [1998] 1 S.L.R.(R.) 234 at para. 32 (C.A.) [*Cathay Theatres*].

³ *City Development Ltd. v. Goh Yoke Hian* [1990] 1 S.L.R.(R.) 120 at para. 29 (H.C.); *EC Investment Holding Pte. Ltd. v. Ridout Residence Pte. Ltd.* [2011] 2 S.L.R. 232 at para. 156 (H.C.); *Cathay Theatres, ibid.* at paras. 31, 32; *Alrich Development, ibid.* at para. 37; *Upmarket Development Sdn. Bhd. v. Srieria Development Sdn. Bhd.* [2011] 4 M.L.J. 681 at para. 34 (F.C.) [*Upmarket Development*]; *Damodaran v. Vasudeva* [1974] 1 M.L.J. 128 at 129 (F.C.) [*Damodaran*]; *Wu Shu Chen v. Raja Zainal Abidin bin Raja Hussin* [1997] 2 M.L.J. 487 at 511 (C.A.) [*Wu Shu Chen*]; *Ng Kheng Yeow v. Chiah Ah Foo* [1987] 2 M.L.J. 330 at 331 (S.C.) [*Ng Kheng Yeow*]; *Chua Hee Hung v. QBE Supreme Insurance Bhd.* [1990] 1 M.L.J. 480 at 483 (S.C.).

II. PRIORITIES BETWEEN COMPETING UNREGISTERED INTERESTS

The position in Malaysia on this issue is governed not by legislation but by case law. The Malaysian courts have always resorted to the equitable principle of *qui prior est tempore, potior est jure* (he who is first in time has the strongest claim in law) and the prior claimant will maintain his priority if he has not by any act or omission induced the subsequent claimant to act to his detriment. As seen below, where the prior claimant has not given notice of his prior claim thereby inducing the subsequent claimant to act on the belief that there is no existing prior claim, the position of the prior claimant will be postponed to that of the subsequent claimant.

The entry of a caveat on the register is one way of giving notice of the existence of a prior claim. In *Zeno Ltd. v. Prefabricated Construction Co. (Malaya) Ltd.*,⁴ Raja Azlan Shah J. (as he then was) had this to say:

In my view the caveat establishes priority and the onus is therefore on the holder of a subsequent 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; *per* Parker J in *Crosbie-Hill v Sayer* [1908] 1 Ch. 866, 875.

There, the plaintiffs had granted a loan to the first defendants. The latter executed a mortgage and general charge, and as security deposited with the plaintiffs the title deed for the land of which the first defendants were the registered proprietors. The charge was never registered in the Land Office but the plaintiffs lodged a caveat in respect of the land. Subsequently, the second defendant, having registered a prohibitory order against the land, obtained an order for the sale of the land by public auction. The plaintiffs not having been repaid the loan, brought proceedings against both defendants. The High Court, relying on, *inter alia*, the Australian cases of *Abigail v. Lapin*⁵ and *Butler v. Fairclough*⁶ where the failure to enter a caveat was held to be fatal to the position of the claimant of the prior equity, ruled in favour of the plaintiffs as they had used the well-known method of protecting their prior interests by means of a caveat.

In *Bhagwan Singh & Co. Sdn. Bhd. v. Hock Hin Bros Sdn. Bhd.*,⁷ the respondent had purchased a plot of land from T, the registered proprietor. There was an oral agreement whereby the respondent and its successors-in-title would have a right of way over adjoining land (the servient land) owned by T. The latter subsequently sold the servient land to a developer company. In due course, the developer company sold to the applicant company a lot comprised in the servient land with a house to be

⁴ [1967] 2 M.L.J. 104 at 107 (F.C.).

⁵ [1934] A.C. 491 at 503-505 (P.C.) [*Lapin*] (equity of registered proprietors who had transferred their lands to the nominee of the creditor together with the certificates of title but had lodged no caveat, should be postponed to that of the mortgagee because the proprietors had armed their transferee with the power to deal with the lands as owner).

⁶ (1917) 23 C.L.R. 78 at 91, 92 (H.C.A.) (failure to enter a caveat constituted negligence so as to defeat the prior equity for it enabled the registered proprietor, “holding his certificate of title in his pocket to hawk the certificate around the town”, to obtain advances of money on the face of the clean certificate).

⁷ [1987] 1 M.L.J. 324 (H.C.).

erected thereon. The applicant company was unable to obtain a registrable transfer and successfully applied for the caveat entered by the respondent to be removed. On the issue of priority, the High Court noted that the caveat of the respondent was entered well after the applicant company had executed the sale and purchase agreement with the developer company on 30 July 1980. The court was of the opinion that had the respondent, at least, registered a caveat prior to that date, the applicant company would not have entered into the contract of sale and purchase and so would not have acted to its prejudice. Was the applicant company equally to blame as it also did not register a caveat in respect of its interest as purchaser under the sale and purchase agreement? The court was of the view that the omission was irrelevant for it could not possibly have caused the respondent to act to its prejudice. There could not have been an allegation to this effect since the rights which accrued to the applicant company were subsequent in point of time to those of the respondent. The court also found that when the respondent registered its caveat in 1983, it had prior knowledge of the applicant company's contending equity. Accordingly, the imposition of the caveat by the respondent when it already had knowledge of the contending equity did not improve its position.⁸ In the result, the failure on the part of the respondent to enter a caveat, amongst others, so as to give notice of their prior equity in the form of a registrable easement before the subsequent equity of the applicant company arose, was held to be fatal.

A similar result was reached in the subsequent Court of Appeal case of *Jasalam (M) Sdn. Bhd. v. Wong Koon Yee*.⁹ It concerned the competing unregistered interests of two purchasers of the same land. The respondent had executed a sale and purchase agreement in 1973 pertaining to a portion of the land for which he paid the full purchase price. The appellant purchased the land in 1996 but was unable to obtain registration in its name due to a caveat lodged by the respondent in 1997. In allowing the application of the appellant for the caveat to be removed, the court held that the respondent, although being the first in time in acquiring the equitable ownership to the said portion, had lost his priority by his indolence and omission to register his title to the portion or to enter a caveat within a reasonable time.¹⁰ The conduct of the respondent had caused prejudice to the appellant who, had it known about the respondent's equitable interest, might not have bought the land.

The approach taken in the above cases is to measure the conduct of the prior claimant by the standard of whether a caveat has been entered so as to give notice of the prior claim before a subsequent competing claim arises. It would seem that failure to do so would have amounted to negligent conduct on the part of the prior claimant. This may be contrasted with the approach taken in the cases discussed below where actual notice by way of the entry of a caveat on the register document of title is no longer the only way to give notice of a prior equitable claim. Hence,

⁸ *Ibid.* at 328. It is trite that the entry of a caveat in itself does not enhance the caveator's interest or claim to an interest in the land: see *Ng Kheng Yeow*, *supra* note 3 at 331; *Bank of Tokyo v. Mohd Zaini bin Arshad (Maria Pragasam, Intervener)* [1991] 3 M.L.J. 50 at 55 (H.C.); *Mercantile Bank Ltd. v. Official Assignee of the Property of How Han Teh* [1969] 2 M.L.J. 196 at 197 (H.C.); *Haroon v. Nik Mah* [1951] M.L.J. 209 at 211 (H.C.) [*Haroon*]; *Chin Cheng Hong v. Hameed* [1954] M.L.J. 169 at 170 (C.A.); *Macon Engineers*, *supra* note 2 at 55.

⁹ [2000] 3 M.L.J. 115.

¹⁰ *Ibid.* at 123.

where the holder of the subsequent equitable claim has actual knowledge of the prior equitable claim otherwise than by way of the entry of a caveat on the register, the priority of the first equitable claimant would still remain intact.

In *Haroon*,¹¹ the second respondent, who was the registered proprietor of the land concerned, sold it first to the applicant and then to the first respondent. Both purchasers were given a licence by the second respondent to go into occupation of the land. Subsequently, the applicant entered a caveat against the land which prevented the first respondent from registering her transfer. The applicant commenced proceedings claiming to be entitled to be registered as proprietor of the land. The High Court took the view that in the absence of any caveat or issue document of title, the only *indicium* of title which could be considered was that of *de facto* possession of the land. On the evidence, the court found that the applicant had never been in possession and that the first respondent had been in possession at all material times. As the court further observed:¹²

[W]here a purchaser under an agreement for sale of land does not impose a caveat to protect his interests, does not obtain possession of an issue copy document of title, and does not take physical possession of the land, he is guilty of gross negligence and his equity should be postponed to the equity of a later purchaser of the same land who has taken any one of those steps. On this ground... [the first respondent]'s equity should be preferred to [the applicant]'s...

The court further opined that while the failure to enter a caveat may be negligence and, in this respect, both parties were originally equally guilty, the entry of a caveat when the person imposing it already had knowledge of the contending equity would not necessarily improve his position. The court was satisfied that the applicant had in fact entered his caveat only because he knew that the first respondent was suing for specific performance and held that a caveat entered in those circumstances could not assist him given that the relative priorities of both parties had been settled long before the caveat was entered. The court ordered that the applicant's caveat be removed and that the transfer to the first respondent be registered.

In *Vallipuram Sivaguru v. Palaniappa Chetty*,¹³ G had deposited the issue document of title to his land with the first defendant-respondent as security for a loan. G subsequently sold the same land to X by misrepresenting that the issue document of title was lost. X then lodged a caveat against the land. G died shortly thereafter. The following year, the first defendant-respondent lodged a caveat claiming a lien over the land. Later, X sold the land to the plaintiff-appellant. In due course, the land was transmitted to the second defendant-respondent as administrator of G's estate. It was argued by the plaintiff-appellant that by failing to register his caveat earlier, the first defendant-respondent had been negligent and lost his priority. In rejecting the argument, the Court of Appeal noted that by the deposit with him of the issue document of title, the first defendant-respondent acquired the right to create a lien over the land, a right which he could exercise at any time. The court distinguished *Lapin*¹⁴ on the ground that in the instant case, the first defendant-respondent had not

¹¹ *Supra* note 8.

¹² *Ibid.* at 211.

¹³ [1937] M.L.J. 59 (C.A.) [*Vallipuram Sivaguru*].

¹⁴ *Supra* note 5.

parted with the *indicia* of title but had instead retained possession of it throughout and that it remained open to him to register his caveat at any time. Thus, the first defendant-respondent had done nothing to forfeit his priority.¹⁵ In the court's opinion, X took the risk of paying his money without obtaining the document of title, and the plaintiff-appellant who did the same, could not blame the first defendant-respondent. Both neglected the most elementary precaution when they purchased the land. In fact, when the plaintiff-appellant paid his money, the first defendant-respondent's caveat was already on the register, a circumstance which would in itself deprive the plaintiff-appellant of any merits.

That the entry of a caveat is not the sole means by which notice may be given can also be seen in the decision of the Federal Court in *United Malayan Banking Corporation Bhd. v. Goh Tuan Laye*.¹⁶ To secure the overdraft granted to the firm, three partners of the firm deposited with the appellant documents of title relating to their lands. Subsequently, the owners executed agreements of sale agreeing to sell the lands to the respondents who paid in full the balance of the purchase price. Later, when the firm did not pay the whole or part of the amount of the overdraft, the appellant obtained judgment in default against the firm followed by a writ of seizure and sale, and prohibitory orders relating to these lands. The respondents' applications to set aside the prohibitory orders were granted by the High Court and the appellant appealed. In allowing the appeal, the Federal Court noted that the respondents became equitable owners of the lands later in time than when the documents of title were deposited with the appellant. The court further noted that the appellant had not caveated the lands to protect its interest. However, the appellant was not at fault as it was prohibited by law, *i.e.* s. 3(2) of the *Kelantan Land Settlement Ordinance 1955*,¹⁷ from doing so. In any event, the law is clear—possession of the titles gave the appellant an equitable interest in the lands, which was not affected by the absence of a caveat, as a caveat in itself did not create an interest but merely gave notice to the world of the presence of an interest belonging to someone other than the registered proprietor.¹⁸ In the circumstances, the appellant was not in any way guilty of any act or omission which had or might have had the effect of inducing the respondents to act to their prejudice. The court was of the view that if the appellant had been allowed by law to caveat its lien, no doubt it would have done so but it was not so allowed. The appellant had therefore done all it could to protect its interest by taking possession of the documents of title.¹⁹

As seen from the discussion of the cases above, it would appear that the position now is that notice of a prior claim may be actual or constructive, and a prior claimant may maintain his priority by way of giving constructive notice of his claim, such as by taking possession of the land or the issue document of title thereto even though there is a failure to enter a caveat on the register.²⁰ It is respectfully submitted that this position is not tenable as it is not in tandem with the policy objectives of the Torrens

¹⁵ *Vallipuram Sivaguru*, *supra* note 13 at 63.

¹⁶ [1976] 1 M.L.J. 169 [*Goh Tuan Laye*].

¹⁷ Act 460, Malaysia.

¹⁸ *Ibid.* at 170.

¹⁹ *Ibid.* at 171. See also *Standard Chartered Bank v. Yap Sing Yoke* [1989] 2 M.L.J. 49 at 54 (H.C.).

²⁰ See also *Syed Ibrahim bin Syed Abdul Rahman v. Liew Su Chin* [1984] 1 M.L.J. 160 (F.C.); *Mosbert Bhd. (in liquidation) v. Chatib bin Kari* [1985] 1 M.L.J. 162 (F.C.).

system of land registration embodied in Peninsular Malaysia's *National Land Code* and the *Sarawak Land Code*.²¹

Among the cardinal principles employed in the Torrens system are the mirror and curtain principles.²² The former ensures that what is reflected on the register shows the actual state of affairs pertaining to the status of the land concerned. Following from this, the latter principle does away with the need to go behind the register, that is, to investigate the title. They embody the principle that the register is everything²³ which, in turn, provides for, *inter alia*, simplicity in land dealings, a hallmark of the Torrens system. By allowing constructive notice to apply such that actual notice by way of the entry of a caveat on the register is not the sole means to give notice of a prior equitable claim, it will not suffice just to rely on the register. Instead, it is incumbent on, *e.g.*, a purchaser to go behind the register to investigate, lest he or she does not acquire priority for the title or interest concerned. Hence, the register is no longer everything as one has to go behind it to investigate. This is both cumbersome and time-consuming, and goes against the high value placed on transparency in land dealings in the Torrens system.

In *Eng Mee Yong*, Lord Diplock, in delivering the judgment of the Privy Council, stated the rationale for having the system of caveats in the *National Land Code*²⁴ as follows:²⁵

The Torrens system of land registration and conveyancing as applied in Malaya by the National Land Code, has as one of its principal objects to give certainty to title to land and registrable interests in land... The system of private caveats is substituted for the equitable doctrine of notice in English *land law*.

There is much to be said about the objection to apply the doctrine of constructive notice in this area of Malaysian land law. Its application leads to insecurity and uncertainty of title and interests acquired by an innocent third-party purchaser in the mistaken belief that the registered proprietor has an unencumbered title. Failure to caveat would, thus, jeopardise one of the aims of the Malaysian Torrens system, namely, to maintain the conclusiveness of the register and this would in turn give rise to uncertainty and insecurity of title and interests in land dealings. It is obvious that the indiscriminate application of this doctrine will undermine the role which the system of caveats is designed to play in this regard.²⁶ Hence, the application of

²¹ The *Sabah Land Ordinance*, *supra* note 2, embodies a modified Torrens system of land registration which does not confer indefeasibility of title or interests in land which is a feature of central importance in the Torrens system of land registration. See the Sabah case of *Sabindo Nusantara Sdn. Bhd. v. Majlis Perbandaran Tawau* [2011] 8 M.L.J. 653 at para. 15 (H.C.).

²² See Douglas J. Whalan, *The Torrens System in Australia* (Sydney: Law Book Co., 1982) at 82, 361; G.W. Hinde & D.W. McMorland, *Butterworths Land Law in New Zealand*, 2nd ed. (Wellington: Butterworths, 1997) at 64, 65.

²³ See *Waimiha Sawmilling Co. Ltd. v. Waione Timber Co. Ltd.* [1926] A.C. 101 at 106 (P.C.) [*Waimiha Sawmilling*]; *Fels v. Knowles* [1907] 26 N.Z.L.R. 604 at 620 (C.A.) [*Knowles*]; *Tai Lee Finance Co. Sdn. Bhd. v. Official Assignee* [1983] 1 M.L.J. 81 at 84 (F.C.) [*Tai Lee Finance*]; *Wong Kok Chin v. Mah Ten Kui Joseph* [1992] 1 S.L.R.(R.) 894 at para. 7 (C.A.); *Abbey National Building Society v. Cann* [1991] 1 A.C. 56 at 78 (H.L.) [*Abbey National Building Society*].

²⁴ For that matter, the *Sarawak Land Code*, *supra* note 2 as well.

²⁵ *Eng Mee Yong*, *supra* note 1 at 214 [emphasis added].

²⁶ That the application of the equitable doctrine of notice in English land law to Malaysian land law has in fact been criticised in a number of earlier cases, see generally the Federal Court cases of *Doshi*

the equitable doctrine of notice should not be permitted as it is inconsistent with the policy objectives of the Malaysian Torrens system.²⁷

Further, given that the equitable doctrine of notice is categorically stated by Lord Diplock to be part of English *land* law, s. 6 of the *Civil Law Act*²⁸ would prohibit the application of the doctrine to the Malaysian Torrens system. Section 6, which also applies to Sarawak²⁹ and Sabah, reads:

Nothing in this Part^[30] shall be taken to introduce into Malaysia or any of the States comprised therein any part of the law of England relating to the tenure or conveyance or assurance of or succession to any immovable property or any estate, right or interest therein.

In no uncertain terms, s. 6 prohibits the application of equitable doctrines relating to the English land tenure system in Malaysia.

The Privy Council had on a later occasion in *United Malayan Banking Corporation Bhd. v. Pemungut Hasil Tanah, Kota Tinggi*³¹ exhorted to the same effect as follows:³²

The National Land Code is a complete and comprehensive code of law governing the tenure of land in Malaysia and the incidents of it, as well as other important matters affecting land there, and there is no room for the importation of any rules of English law in that field except in so far as the Code itself may expressly provide for this.

In fact, very early on in *Haji Abdul Rahman v. Mohamed Hassan*,³³ Lord Dunedin, in delivering the judgment of the Privy Council, had this to say of the then-Selangor *Registration of Titles Regulation*³⁴ which was modelled on the Torrens system of land registration:³⁵

It seems to their Lordships that the learned judges... have been too much swayed by the doctrines of English equity, and not paid sufficient attention to the fact that they were here dealing with a totally different land law, namely a system of registration of title contained in a codifying enactment...

The effect of Lord Dunedin's speech is that the system of registration of title and land dealings contained in a codifying enactment does not permit the application of the doctrines of equity relating to English land tenure to land matters in Malaysia.

v. Yeoh Tiong Lay [1975] 1 M.L.J. 85 at 88 and *Tai Lee Finance*, *supra* note 23 at 84, and the Court of Appeal case of *Ong Tin v. The Seremban Motor Garage* (1917) 1 F.M.S.L.R. 308 at 314. See also Judith Sihombing, *National Land Code: A Commentary*, looseleaf (Kuala Lumpur: LexisNexis, 2013) vol. 3 at XXV, paras. 876-900.

²⁷ The only exception that may be made is where the entry of a caveat is prohibited by law as in *Goh Tuan Laye*, *supra* note 16, discussed above.

²⁸ Act 67 of 1956, Malaysia.

²⁹ See also s. 133 of the *Sarawak Land Code*, *supra* note 2, which provides for the doctrine of notice not to apply.

³⁰ That is Part II (General) which provides for the reception of English common law, rules of equity and statutes of general application in Malaysia pursuant to ss. 3 and 5 of the *Civil Law Act*, *supra* note 28, in the circumstances specified therein.

³¹ [1984] 2 M.L.J. 87 [*Pemungut Hasil Tanah*].

³² *Ibid.* at 91.

³³ [1917] A.C. 209 (P.C.) [*Haji Abdul Rahman*].

³⁴ Act IV of 1891.

³⁵ *Haji Abdul Rahman*, *supra* note 33 at 216.

Bearing in mind that the *National Land Code* is a complete and comprehensive code of law governing the tenure of land in Peninsular Malaysia and the prohibition contained in s. 6 of the *Civil Law Act*, to allow the continued application of the equitable doctrine of notice would only serve to further erode the policy objectives of the Malaysian Torrens system as noted above.

The position in Singapore on the issue of priority of unregistered interests is dealt with by legislation which is much neater as it provides for simplicity and certainty in land dealings. Under the *Land Titles Act*, “[e]xcept in the case of fraud, the entry of a caveat protecting an unregistered interest in land... shall give that interest priority over any other unregistered interest not so protected at the time when the caveat was entered.”³⁶ Further, “[k]nowledge of the existence of an unregistered interest which has not been protected by a caveat shall not of itself be imputed as fraud.”³⁷

The *Land Titles Act*,³⁸ thus, provides for caveated interests to take priority over uncaveated interests and for an interest which was caveated earlier to take priority over one which was caveated later. It is clear that the Torrens system rewards the diligent as was aptly observed by Chan Sek Keong C.J. in the recent Court of Appeal case of *United Overseas Bank Ltd. v. Bebe bte Mohammad*:³⁹

[T]he LTA in introducing the Torrens system was designed to simplify land dealings and to give finality to the title of the registered proprietor.

...

[T]he LTA provides a statutory framework to enable... owners [holding unregistered interests in registered land] to protect their interests by lodging caveats against the registered title. If they fail to do so, as a result of which their interests are overridden by that of the registered proprietor, they have only themselves to blame.

In the earlier case of *Mutu Jeras*,⁴⁰ Chan J. (as he then was) had also remarked to the same effect when dealing with, *inter alia*, the then-equivalent provision under the *Land Titles Act* which provided for priority by entry of caveats:⁴¹

The object of s 41(1) and s 104(1) of the LTA⁴² is to put in place a system of caveats in substitution for the equitable doctrine of notice... The Torrens system, like equity, aids the diligent and not the indolent.

Given the judicial precedent, such that it is probably too late in the day to argue before the courts in Malaysia for the non-application of the equitable doctrine of

³⁶ *Land Titles Act*, *supra* note 2, s. 49(1). See also *Bank of China v. First National Bank of Boston* [1992] 1 S.L.R.(R.) 441 (C.A.) which dealt with the then-equivalent, s. 41 of the *Land Titles Act* (Cap. 157, 1985 Rev. Ed. Sing.).

³⁷ *Ibid.*, s. 49(2). See also Tang Hang Wu & Kelvin F.K. Low, eds., *Tan Sook Yee's Principles of Singapore Land Law*, 3rd ed. (Singapore: LexisNexis, 2009) at 360, 361; John Baalman, *The Singapore Torrens System: Being a Commentary on the Land Titles Ordinance, 1956 of the State of Singapore* (Singapore: Government Printer, 1961) at 95, 96.

³⁸ Priority by entry of caveats can also be seen in British Columbia's *Land Title Act*, R.S.B.C. 1996, c. 250, s. 31 and Alberta's *Land Titles Act*, R.S.A. 2000, c. L-4, s. 147.

³⁹ [2006] 4 S.L.R.(R.) 884 at paras. 92, 96 [*Bebe*].

⁴⁰ *Supra* note 1. See also Tang & Low, *supra* note 37 at 360, 361; W.J.M. Ricquier, *Land Law*, 4th ed. (Singapore: LexisNexis, 2010) at 156.

⁴¹ *Mutu Jeras*, *ibid.* at 23.

⁴² See now ss. 49(1), 115(1) of the *Land Titles Act*, *supra* note 2 respectively.

notice, legislation would be necessary to provide for priority solely by order of entry of caveats.

III. ENTRY OF FURTHER CAVEATS

Under the *National Land Code*, a private caveat shall lapse at the expiry of six years from the time from which it took effect if not sooner withdrawn or removed.⁴³ The Federal Court in the recent case of *Taipan Focus Sdn. Bhd. v. Tunku Mudzaffar bin Tunku Mustapha*⁴⁴ held that a court has no power to extend a private caveat beyond its statutory lifespan of six years. In addition, “the entry of a further caveat in respect of the land or interest in question [which] is based on the like claim as that on which the former one was based” is statutorily prohibited.⁴⁵ This prohibition applies where the court has ordered the removal of the earlier caveat⁴⁶ or has refused an application for its extension,⁴⁷ or where the Registrar has removed the earlier caveat as specified.⁴⁸

It would appear that there is a further prohibition provided by case law. In *Damodaran*,⁴⁹ the respondent entered a caveat against the land of the applicant who applied for it to be removed. A notice of intended removal of the caveat was duly served on the respondent. Before the removal of the first caveat, the respondent made a second application for entry of another caveat on precisely the same ground and over the same land. The respondent claimed to be the unregistered co-owner of the land. The issue before the High Court was whether it was proper for two caveats to be issued at the instance of the same caveator on the same land and on precisely the same grounds.

The High Court noted that under the *National Land Code*, once an application has been made for removal of a caveat and a notice of it is served by the Registrar upon the caveator, the former will remove the caveat on the expiry of the period of one month as specified in the notice unless the latter obtains a court order for its extension under s. 326(2). The court was of the view that the respondent on receipt of notice of the intention for the intended removal of the caveat from the Registrar should have applied to the court for its extension. Instead of doing so, he applied for and obtained another caveat when the first caveat was still in existence. In the opinion of the court, the object of s. 326(2) points to the existence of a caveat which it allows to be extended by order of court from time to time. It does not speak of a recreation as to allow the issue of another caveat on or before the expiry of the existing one. This is because once a caveat had lapsed and a memorial thereof is made by the registering authority, it is extinguished forever and the court has no power to revive,

⁴³ Section 328(1).

⁴⁴ [2011] 1 M.L.J. 441 at para. 58.

⁴⁵ *National Land Code*, *supra* note 2, s. 329(2). Under s. 181 of the *Sarawak Land Code*, *supra* note 2, when any caveat has lapsed, it shall not be lawful for the Registrar to receive any second caveat, affecting the same land, estate or interest, by the same person or in respect of the same right and for the same cause, except by order of the High Court.

⁴⁶ *National Land Code*, *ibid.*, ss. 327, 329(2).

⁴⁷ *Ibid.*, ss. 326(2), 329(2).

⁴⁸ *I.e.* where no court order is served on the Registrar extending the earlier caveat before the expiry of two months from the date of service of the notice of intended removal in Form 19C: *ibid.*, ss. 326(3), 329(2).

⁴⁹ *Supra* note 3.

renew or continue a caveat after its lapse. In other words, the extinction is final and irrevocable.⁵⁰

The court construed the statutory prohibition⁵¹ on the entry of further caveats mentioned above as allowing for a further caveat to be entered provided it is based on different grounds from the earlier caveat and after the earlier caveat has ceased to exist. In its concluding remarks, the court observed thus:⁵²

[C]onstruing the relevant provisions of the Code as a whole as regards the subject, the only natural and logical construction that can be given... is that they do not envisage the issue of a caveat when one is still in existence and the more so, on the same grounds. To construe otherwise will contravene the real intention of Parliament and tend to oust the jurisdiction and power of the court under s 326 which arise in this case. If the law is allowed to be circumvented by recognising the second caveat, the result will undoubtedly be an overlapping of caveats on the same land, on the same ground and by the same caveator.

However, in regard to the lapsing of a caveat at the expiry of its lifespan of six years, the right to enter a fresh caveat is still available to the caveator even where the fresh caveat is based on the same ground as that on which the earlier one was based if it is for the *bona fide* purpose of protecting the caveator's interest in respect of the same land. The entry of the fresh caveat is not statutorily prohibited.⁵³ In *Thevathason v. Kwong Joon*,⁵⁴ the defendant had entered into an agreement with a developer for the purchase of a plot of land on which a dwelling house was to be built. The defendant paid \$6,500 as a deposit and a further sum of \$350 as additional payment for improvement on the house lot. The developer contracted to build the dwelling house and hand over vacant possession but the house was never built. In the meantime, the developer charged the land to the plaintiff. The defendant lodged a caveat against the land to protect his interest therein as a purchaser. Upon the expiry of the first caveat, the defendant lodged yet another caveat. In applying for the defendant's caveat to be removed, the plaintiff submitted that no further caveats could be filed in respect of the same subject matter by the same applicant after his original caveat had lapsed at the expiry of six years from the time from which it took effect.

In dismissing the plaintiff's application, L.C. Vohrah J. explained thus:⁵⁵

I did not think that... [the] authorities which were cited... to support the proposition that a second caveat may not be entered at the instance of the same applicant in respect of the same land and on precisely the same grounds under the National Land Code 1965 in any way prohibited the entering of a fresh caveat even after the lapse of the first caveat based on a different ground or even on the same grounds if it is for the *bona fide* purpose of protecting the caveator's interest in respect of the same land. It was my judgment that if a contrary view was taken there

⁵⁰ See also *KI Muhiudeen Rawther v. KEP Abdul Kassim* [1959] M.L.J. 257 (F.C.).

⁵¹ *National Land Code*, *supra* note 2, s. 329(2).

⁵² *Damodaran*, *supra* note 3 at 130.

⁵³ See *National Land Code*, *supra* note 2, s. 329(2).

⁵⁴ [1990] 3 M.L.J. 49 (H.C.) [*Thevathason*].

⁵⁵ *Ibid.* at 51.

would be no way in which a caveator like the defendant who had already filed his action could protect his existing interest pending resolution of his dispute by the court. It seemed to me that s 328(1) merely provided for the normal longevity of a private caveat and envisaged a time frame within which the caveator should take action to realize his existing interest; it did not exist to extinguish his right to further protection of that interest if he had taken positive action, as was done in the present case, to realize it.

Similarly, a caveator who has entered an earlier caveat which he subsequently withdrew voluntarily⁵⁶ is not prevented from entering a fresh caveat if it is not an abuse of the caveat procedure. Further, the above prohibition does not apply in this instance.

Given that the decided case law will no doubt provide guidance on the entry of second caveats, there will still be no continuity in protection for the interest concerned from the time the earlier caveat took effect till when the further caveat is entered. This is because the earlier caveat which has lapsed cannot be revived by the court as its lifespan has expired and with it goes the protection afforded by the earlier caveat. The protection for the interest concerned will only commence from the time the further, *i.e.* fresh, caveat takes effect. As is trite, the central feature of the Torrens system is that no interest in land can be legally created until after registration is effected. Thus, the possibility of a subsequent claim to a registrable interest therein being registered, thereby defeating the prior claim to a registrable interest in the same land, is very real. It does not help that *Thevathason* offers no continuity in protection for the prior claimant's interest.

It is respectfully submitted that the decision in *Damodaran* cannot be taken as authority for the proposition that a fresh caveat based on the same ground is not permitted in respect of the same land where an earlier caveat entered by the same caveator is still in existence. So long as it is entered *bona fide* and its entry is not statutorily prohibited, a fresh caveat entered just immediately before the expiry of the six-year lifespan of an earlier caveat should be permitted. Otherwise, a competing interest may be registered in the interim period following the lapse of the earlier caveat and before the entry of the fresh caveat. The factual matrix in *Damodaran* is different as there was an abuse of the caveat procedure in that the caveator should have applied to have the merits of his caveat determined by the court rather than going by way of a fresh caveat. Although the entry of the fresh caveat in *Damodaran* did not come within the statutory prohibition, the court can still prohibit its entry as there was an abuse of the caveat procedure.

In this regard, the position in Singapore is much more straightforward and neat. The *Land Titles Act* provides for the extension of an earlier caveat by the Registrar before it lapses⁵⁷ by way of the lodgment by the caveator of an extension of caveat

⁵⁶ See *National Land Code*, *supra* note 2, s. 325.

⁵⁷ Under s. 121(1)(b) of the Singapore *Land Titles Act*, *supra* note 2, the lifespan of a caveat is five years from the date of lodgment unless it has been extended. Automatic lapsing after five years, which is based on the principle that a caveat is intended to be only a temporary form of relief, will prevent the land-register from becoming cluttered up with stale or defunct claims: see Baalman, *supra* note 37 at 206.

based on the same ground(s) and for successive five-year periods provided the interest protected by the first caveat exists.⁵⁸

While there is decided case law on the entry of second caveats, there does not appear to be any provision in the *National Land Code* which permits the administrative extension of an earlier caveat before it lapses. Having regard to the *Land Titles Act*, the existence of such a provision would provide certainty and help to alleviate the possible hardship that may arise. Otherwise, there is the disadvantage that the time which the fresh caveat takes effect is not related back to the time of the earlier caveat so as to be able to continue to prohibit the registration of dealings effected after the earlier caveat took effect but before the entry of the fresh caveat. In this regard, a provision similar to the Singapore *Land Titles Act* would be helpful.

Under s. 121 of the *Land Titles Act*, failure to extend an earlier caveat such that it lapses will not prevent the lodgment of a fresh caveat in respect of the same matter.⁵⁹ However, any priority conferred on the unregistered interest by the earlier caveat shall be lost⁶⁰ and, in the absence of any competing claims protected by caveats, the priority conferred by the fresh caveat will commence from its entry. The same applies where the caveator, upon receipt of a notice from the Registrar of his intention to register a dealing prohibited by the caveat, did not apply to the court for its extension such that the caveat lapses at the expiration of the stated period of 30 days (or of such further period as the court may direct) from the date of the service of the notice given.⁶¹ In this instance, however, any further caveat lodged in respect of the same estate or interest in land claimed under that lapsed caveat and purporting to be based on the same facts as the lapsed caveat has no effect unless the caveator has obtained leave of the court to lodge the further caveat.⁶² This is to prevent abuse of the caveat procedure as the merits of the earlier caveat have yet to be pronounced by the court.

A closely related issue is whether a similar statutory prohibition⁶³ as that discussed in the immediately preceding paragraph should apply under s. 127, *i.e.* after an earlier caveat has been removed by the Registrar following the lodgment of a statutory declaration by a caveatee that the caveat was entered “vexatiously or frivolously or not in good faith”.⁶⁴ That this provision⁶⁵ “is directed primarily against eccentric

⁵⁸ *Land Titles Act*, *supra* note 2, s. 122. For a case decided before the present procedure was made available, see *Mutu Jeras*, *supra* note 1 which highlighted the difficulties faced then. See also Tan Sook Yee, “Caveats and Priorities—Pandora’s Box” [1990] 3 M.L.J. xvii.

⁵⁹ *Land Titles Act*, *ibid.*, ss. 121(1)(b), 121(6). The same should apply where the caveator withdraws his earlier caveat pursuant to s. 126 and subsequent events make it imperative that a fresh caveat affecting the same land or interest therein be entered by the same caveator in respect of the original claim. So long as the entry of the fresh caveat does not amount to an abuse of the caveat procedure, its entry should be permitted albeit on the same ground and in respect of the same matter. In Australia and New Zealand, the restriction on entry of successive caveats varies: see *Real Property Act 1900* (N.S.W.), s. 740; *Transfer of Land Act 1958* (Vic.), s. 91(4); *Land Title Act 1994* (Qld.), s. 129; *Land Transfer Act 1952* (N.Z.), 1952/52, s. 148.

⁶⁰ *Land Titles Act*, *ibid.*, s. 49(5).

⁶¹ *Ibid.*, ss. 121(1)(a), 121(6), 49(5).

⁶² *Ibid.*, s. 121(7). The court order or an office copy has to accompany the further caveat when it is lodged with the Registrar.

⁶³ *Ibid.*, s. 121(7).

⁶⁴ *Ibid.*, s. 127(2).

⁶⁵ *Ibid.*

individuals whose claim to land is only imaginary”⁶⁶ testifies to the fact that there can arise situations involving abuse of the caveat procedure in this instance. The caveator, when notified by the Registrar of his intention to remove the caveat, may take no action to obtain a court order extending his caveat or furnish the Registrar with satisfactory evidence to show that his caveat ought not to be cancelled. Upon the cancellation of the caveat by the Registrar and to frustrate the attempts of the registered proprietor of the land to sell the land to potential buyers, the caveator lodges a similar caveat. In doing so, he is abusing the caveat procedure and avoiding the merits of his caveat being determined by the court or by the Registrar under the *Land Titles Act*. It is trite that the Registrar acts in a purely administrative manner in the matter of the lodgment of a caveat by the caveator and is not concerned to consider whether or not the caveator’s claim is justified.⁶⁷ A stalemate may arise if the caveator were to resort to such tactics repeatedly whenever he is notified by the Registrar of the impending cancellation of his caveat. To prevent such abuse of the caveat procedure, there is much to be said for having a similar prohibition⁶⁸ such that a further caveat in respect of the same matter is permitted only with the leave of the court. With such a statutory prohibition in place, it would indirectly put pressure on the caveator to have the merits of his caveat determined by the court or the Registrar.

Such a prohibition may seem unnecessary as the caveatee can always proceed by court action to have such further caveats set aside. But that is precisely the point—why should a caveatee be made to go to court when a potential abuse situation can be easily tackled by a statutory provision?⁶⁹ For situations not covered by the prohibition, the court has jurisdiction to decide whether the lodgment of such further caveats is an abuse of the caveat procedure.⁷⁰ However, the fact that the court has jurisdiction to deal with cases of abuse of the caveat procedure should not prevent legislative intervention in situations which are warranted, such that it is not necessary for the matter to go before the court in light of the legislative mandate. In a situation where the caveator decides to remain idle after being given 30 days to obtain relief from the court or Registrar, his inaction would suggest that he has no good grounds for continuing the caveat. Accordingly, a further similar caveat should not be allowed to be lodged after the cancellation of the earlier caveat. While one may argue that the liability to pay compensation for wrongfully lodging caveats⁷¹

⁶⁶ See Baalman, *supra* note 37 at 208.

⁶⁷ *Land Titles Act*, *supra* note 2, s. 117(5). This is because of the role which the caveat is designed to play in the Torrens system, namely, for the interim protection of claims to interests in land that are alleged by the caveator but not yet proved. It is for this reason as observed by Lord Diplock in *Eng Mee Yong*, *supra* note 1 at 214, that:

[U]nless there were some speedy procedure open to the registered proprietor to get the caveat set aside in cases where the caveator’s claim is baseless or frivolous or vexatious, the Torrens system of land registration and conveyancing, so far from giving certainty to title to land in Malaya, would leave the registered proprietor in a more precarious position as respects his powers of disposition of his land than an unregistered proprietor under English law.

⁶⁸ See *Land Titles Act*, *supra* note 2, s. 121(7).

⁶⁹ Note also the earlier observation of Baalman, *supra* note 37 at 208.

⁷⁰ As seen earlier, the court would intervene in a proper case to prevent the misuse of the caveat procedure by the lodgment of vexatious successive caveats even where there is no statutory prohibition: see *Damodaran*, *supra* note 3.

⁷¹ See s. 128. In any event, to succeed in a claim for compensation for wrongful entry of caveat, it is necessary to show that the pecuniary loss sustained is attributable to the wrongful or vexatious lodgment

is sufficient deterrence, that there is the prohibition in s. 121(7) of the *Land Titles Act* discussed above testifies to the need for a substantially similar prohibition where s. 127 of the same Act is concerned.

IV. REQUIREMENTS TO SUSTAIN A CAVEAT

In determining whether a caveat should remain, the court has likened the caveator's position to that of an applicant for an interlocutory injunction. In the Privy Council case of *Eng Mee Yong*,⁷² Lord Diplock had this to say:⁷³

The caveat under the Torrens system has often been likened to a statutory injunction of an interlocutory nature restraining the caveatee from dealing with the land pending the determination by the court of the caveator's claim to title to the land... Their Lordships accept this as an apt analogy...

...

The guiding principle in granting an interlocutory injunction is the balance of convenience... but before any question of balance of convenience can arise the party seeking the injunction must satisfy the court that his claim is neither frivolous nor vexatious; in other words that the evidence before the court discloses that there is a serious question to be tried. *American Cyanamid v Ethicon Ltd* [1975] AC 396.

This is the nature of the onus that lies upon the caveator in an application by the caveatee... for removal of a caveat: he must first satisfy the court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried; and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the action, by preventing the caveatee from disposing of his land to some third party.

Thus, pending the substantive trial of the caveator's claim, the caveator must prove that his claim does raise a serious question to be tried and that on the balance of convenience, it would be better to maintain the *status quo* until the trial of the action by allowing the caveat to remain.⁷⁴ No question of balance of convenience to allow the caveat to remain will arise at all where the caveator is not even able to satisfy the court in the very first place that his claim does raise a serious question to be tried.

of the caveat. Merely showing that the caveat was lodged wrongfully or vexatiously without also proving that it resulted in the pecuniary loss suffered is insufficient.

⁷² *Supra* note 1.

⁷³ *Ibid.* at 214, 215.

⁷⁴ Provided the caveator has satisfied the first requirement, the balance of convenience will in the normal way and in the absence of any special circumstances be in favour of leaving the caveat in existence until the proceedings, brought and prosecuted timeously by the caveator, for, e.g., specific performance of a contract of sale which he alleges, have been tried: see *Eng Mee Yong*, *supra* note 1 at 215. Where proceedings have not been brought and prosecuted timeously by the caveator or where the caveator's claim can be satisfied by an alternative claim for damages, the balance of convenience will not be in favour of maintaining the *status quo* until the trial of the action: see *Hock Seng Mining Sdn. Bhd. v. Datuk Setia Hj Abdul Ghani bin Ali* [1992] 1 C.L.J. 379 at 383, 384 (H.C.).

These principles laid down in *Eng Mee Yong* have been consistently followed in both Malaysia and Singapore.⁷⁵

Before the decision in *Eng Mee Yong*, the traditional approach in dealing with an application for removal of a private caveat under the *National Land Code* was that laid down by the Federal Court in *Macon Engineers*.⁷⁶ Under this approach, the first question to ask is whether the caveator has a caveatable interest. If the answer to that question is in the negative, then the caveat must be removed. However, if the answer is in the affirmative, then the caveator must show that his claim is not frivolous or vexatious. As can be seen, this approach does not consider the question of balance of convenience.

In recent years, Malaysian courts have further refined the principles laid down in *Eng Mee Yong*. In the Supreme Court case of *Kumpulan Sua Betong Sdn. Bhd. v. Dataran Segar Sdn. Bhd.*,⁷⁷ it was laid down that it is more efficacious to apply both the traditional approach adopted in *Macon Engineers* and Lord Diplock's guidelines as stated in *Eng Mee Yong*. The effect of the approach laid down in *Kumpulan Sua Betong Sdn. Bhd.* is that the caveator must first establish that he has a caveatable interest in the land and having done so, he must then go on to show that his claim does raise a serious question to be tried and that on a balance of convenience, the caveat ought to remain.⁷⁸ The approach in *Kumpulan* was reiterated by the Court of Appeal in the recent case of *Luggage Distributors (M) Sdn. Bhd. v. Tan Hor Teng*.⁷⁹ As clarified in *Luggage Distributors*, the three-stage test is to be dealt with as follows:⁸⁰

The first stage is the examination of the grounds expressed in the application for the caveat. If it appears that the grounds stated therein are *insufficient in law* to support a caveat, then *cadit quaestio*, and the caveat must be removed without the necessity of going any further.

...

The matter does not come to an end once the caveator satisfies the court that his claim as expressed in the application in Form 19B amounts in law to a caveatable interest. He must go on to show, in appropriate cases, that, based on the affidavits filed, his claim discloses a serious question meriting a trial. This then is the second stage. The degree of proof that has to be offered will, of course, vary from case

⁷⁵ See *Zemine Development Sdn. Bhd. v. Hong Kong Realty Sdn. Bhd.* [2011] 4 M.L.J. 466 (C.A.); *Upmarket Development supra* note 3; *Wu Shu Chen, supra* note 3; *Su Meu Ging v. Philip Yong Khiam Poon* [1988] 3 M.L.J. 86 (S.C.); *Leong Sze Hian v. Teo Ai Choo* [1987] 2 M.L.J. 275 (Sing. C.A.) [*Leong Sze Hian C.A.*]; *Société Générale v. Good Property Land Development Pte. Ltd.* [1989] 1 S.L.R.(R.) 27 (H.C.) [*Société Générale*]; *Ow Chor Seng v. Tjinta Pte. Ltd. (in liquidation)* [1994] 3 S.L.R.(R.) 536 (H.C.) [*Ow Chor Seng*].

⁷⁶ *Supra* note 2 at 54, 58.

⁷⁷ [1992] 1 M.L.J. 263 at 270 [*Kumpulan*].

⁷⁸ This approach has, in fact, been laid down by the Federal Court in the earlier case of *Wong Kuan Tan v. Gambut Development Sdn. Bhd.* [1984] 2 M.L.J. 113 at 115 [*Wong Kuan Tan*].

⁷⁹ [1995] 1 M.L.J. 719 [*Luggage Distributors*]. See also *Murugappa Chettiar Lakshmanan v. Lee Teck Mook* [1995] 1 M.L.J. 782 at 788, 789 (C.A.) [*Murugappa Chettiar Lakshmanan*]; *Soon Seng Co. Sdn. Bhd. v. Toko Palayakat Jamal (M) Sdn. Bhd. (formerly known as Abdul Jamal Trading Sdn. Bhd.)* [1999] 5 M.L.J. 75 at 82 (H.C.) [*Soon Seng*].

⁸⁰ *Ibid.* at 741-743.

to case... At this the second stage the court is more concerned with matters of evidence and proof offered to support the caveator's claim.

...

The third stage is arrived at only after the first two hurdles have been crossed by the caveator. Here the question to be asked relates to the balance of justice, or what Lord Diplock termed in *Eng Mee Yong* as 'the balance of convenience'.

It is only upon satisfying these three stages of curial scrutiny that a caveat may be permitted to remain. That this should be so is only logical; for it is a serious matter to caveat a person's property, and unless a case is properly made out, a caveat ought not to be permitted to remain on the register a moment longer than is absolutely necessary.

It seems logical in the first stage of the test that the caveator must first satisfy the court that he has a caveatable interest in the land. Only if he has such an interest can he qualify to lodge a caveat.⁸¹ Accordingly, unless this requirement is satisfied, there is no necessity to go further and the caveat must be removed.⁸²

As for the second stage of the test, although a caveator may, in his application for the entry of a caveat, show a *prima facie* caveatable interest in the property in question, he may fail to adduce satisfactory evidence at the hearing of the application for its removal so that the judge would be entitled to hold that the claim in support of the caveat has not been made out and that there is therefore no serious question to be tried.⁸³

The third stage of the test determines the direction in which the balance should tilt. The balance of convenience will in the normal way and in the absence of any special circumstances be in favour of leaving the caveat in existence until proceedings, brought and prosecuted timeously by the caveator, have been tried.⁸⁴

The first stage of the test in *Luggage Distributors* may appear to be superfluous. The approach in *Eng Mee Yong* in placing emphasis on the existence of serious questions to be tried must, of necessity, demand a consideration of the nature and basis of the claim to the right to caveat and the ultimate object is to determine whether a caveator has a caveatable interest so as to maintain his caveat.

Nevertheless, there is much to be said for the refinement of the first requirement laid down in *Eng Mee Yong*. The first stage of the test in *Luggage Distributors* clearly necessitates a consideration of the issue of caveatable interest distinct from the issue of whether the caveator's claim has raised a serious question to be tried. Any claim to a caveatable interest that is asserted "must be minutely inquired into"⁸⁵ and this is to be undertaken by an examination of the grounds expressed in the application in Form 19B for a caveat. Thus, the court has to examine the caveat itself, that is, to look into Form 19B and the reasons stated therein for imposing the caveat. If

⁸¹ *Wong Kuan Tan*, *supra* note 78 at 115, 116.

⁸² *Affin Bank Bhd. v. Mahanbir Singh a/l Manmohon Singh* [2008] 7 M.L.J. 14 at para. 11 (H.C.) [*Affin Bank Bhd.*]; *NKR Arunasalam Chettiar a/l Karuppan Chettiar v. Goh Yew Jing* [1999] 6 M.L.J. 202 at 210 (H.C.) [*NKR Arunasalam*].

⁸³ *Million Group Credit Sdn. Bhd. v. Lee Shoo Khoon* [1986] 1 M.L.J. 315 (F.C.).

⁸⁴ *Eng Mee Yong*, *supra* note 1 at 215.

⁸⁵ See the Supreme Court case of *Kumpulan*, *supra* note 77.

no caveatable interest is shown, the caveat ought to be removed without the need to consider the remaining two stages.⁸⁶

That the issue of caveatable interest is distinct from the question of whether the caveator's claim has raised a serious question to be tried may be seen in the explanation of the High Court in *Sharifah Mastura bte Tuanku Ibrahim v. Wan Aziz Ibrahim*:⁸⁷

A serious issue to be tried in an action is only relevant when considering whether a proper and valid caveat ought to be removed pending the disposal of the action relating to the caveat. Having a serious issue to be tried in a pending action does not clothe a person with a caveatable interest over land.

For example, a claim to a tenancy exempt from registration may raise a serious question to be tried but a claim to such an interest, which is itself exempt from or incapable of registration under the *National Land Code*, is not caveatable thereunder.⁸⁸ Conversely, the caveator may have a caveatable interest in the land but the circumstances may be such that his claim does not raise a serious question to be tried. For example, as can be seen from the decided cases, inordinate delay in entering a caveat and instituting the action to assert a claim to an interest in the land without reasonable explanations for the delay would result in the claim being deemed vexatious and thus not raising any serious questions to be tried.⁸⁹

The dichotomy between the issue of caveatable interest and that of raising a serious question to be tried was blurred in *J Raju v. Kwong Yik Bank Bhd.*⁹⁰ The Supreme Court had stated that "[the appellant] would have a caveatable interest if he could satisfy the court that his claim to the interest in the property would raise a serious question to be tried. See *Eng Mee Yong & Ors v V Letchumanan*."⁹¹

The Supreme Court seemed to equate raising a serious question to be tried with having a caveatable interest. It is respectfully submitted that this need not necessarily be so and that these two issues should be dealt with independently of each other as a finding in favour of one of the issues does not necessarily mean that the other would, as a matter of course, also be satisfied. *Eng Mee Yong*, which was cited by the court, certainly did not lay down such a proposition of law. In fact, the Privy Council did consider whether the caveator did have a caveatable interest in the land. Where the right affected is not caveatable, the more appropriate remedy may be to seek an injunction against the other party where it would be just to restrain him from prejudicing the right in question pending the trial of the action.⁹²

⁸⁶ See *Soon Seng*, *supra* note 79; *Affin Bank Bhd.*, *supra* note 82.

⁸⁷ [1993] 3 M.L.J. 231 at 237.

⁸⁸ Rights arising under a tenancy exempt from registration may instead be protected against subsequent dealings by way of an endorsement made on the register document of title to the land thereby affected: see *National Land Code*, *supra* note 2, s. 316(1).

⁸⁹ See *e.g.*, *Syed Hussein bin Salim Alattas v. Syarifah Rughayah bte Idros* [1994] 1 C.L.J. 151 at 154 (H.C.); *NKR Arunasalam*, *supra* note 82 213; *Plimmer Bros v. St. Maur* [1907] 26 N.Z.L.R. 294 at 296, 297 (S.C.).

⁹⁰ [1994] 2 M.L.J. 408 (S.C.).

⁹¹ *Ibid.* at 417.

⁹² See *e.g.*, *Tan Lay Soon v. Kam Mah Theatre Sdn. Bhd. (Malayan United Finance Bhd., Intervener)* [1992] 2 M.L.J. 434 at 445 (H.C.); *Foo Poh Sang v. Yuen Lum Sdn. Bhd. (Asia Commercial Finance (M) Bhd., Intervener)* [1989] 1 M.L.J. 373 (H.C.). It may, however, be noted that the remedy of applying

A survey of the cases⁹³ reveals that not all of the Singapore courts have regard to the requirement of caveatable interest when considering applications for removal of caveats.⁹⁴ Even for those that do,⁹⁵ most do not at the outset make it clear, as in *Luggage Distributors*, that this is the first requirement in a three-stage inquiry that must be considered. For the sake of clarity and to provide a more structured and uniformed approach, it may be worth considering doing so in future cases so that one can discern, at a glance, the requisite requirements that must be satisfied to permit a caveat to remain. This additional refinement of the first guiding principle in *Eng Mee Yong* will help to remove any ambiguity and confusion that may arise when dealing with the issue of caveatable interest and the existence of serious questions to be tried.

It may be noted that the test laid down in *Luggage Distributors* has its genesis in an earlier decision of the Federal Court⁹⁶ and has since been followed in other Malaysian decisions.⁹⁷

V. CONCLUSION

Given that the Torrens system is designed to provide simplicity and certainty in land dealings,⁹⁸ the order of entry of caveats should be the sole means to determine priority of unregistered interests.⁹⁹ This is especially so for the Malaysian Torrens system as s. 6 of the *Civil Law Act* categorically prohibits the application of English land law thereto which the equitable doctrine of notice is a part of.¹⁰⁰ Priority based on the entry of caveats will also go to ensure the conclusiveness of the register, *i.e.* the register is everything,¹⁰¹ in this regard, and accords with the high value placed on transparency in the Torrens system. As a central feature of the Torrens system is that registration confers a legal interest in land, a person with a prior claim must enter a

for an injunction is clearly not as speedy and simple as the remedy of applying for the entry of a private caveat.

⁹³ See *e.g.*, the High Court's decision in *Teo Ai Choo v. Leong Sze Hian* [1982] 2 M.L.J. 12 and that of the Court of Appeal in *Leong Sze Hian C.A.*, *supra* note 75, and *Ow Chor Seng*, *supra* note 75.

⁹⁴ Australia and New Zealand adopt the traditional two-stage test laid down in *Eng Mee Yong*, *supra* note 1: see *e.g.*, *Allam Homes v. Vocata* [2003] NSWSC 628; *Gippsreal Pty Ltd. v. Registrar of Titles* (2007) 20 V.R. 157 (C.A.); *Ridge v. Incentive Programmes Ltd. (In Liquidation)* (1985) Q. Conv. R. 54-172; *Pacific Homes Ltd. v. Consolidated Joineries Ltd.* [1996] 2 N.Z.L.R. 652 (C.A.). See also Peter J. Butt, *Land Law*, 6th ed. (Sydney: Thomson Lawbook Co., 2010) at 775-778; Lee Aitken, "Many Shabby Manoeuvres": Caveats in the Real World" (2003) 41(7) New South Wales Law Society Journal 52.

⁹⁵ See *e.g.*, *Société Générale*, *supra* note 75; *Tan Cheow Gek v. Gimly Holdings Pte. Ltd.* [1992] 2 S.L.R.(R.) 240 (H.C.); *Alrich Development*, *supra* note 2; *Sim Kwang Mui Ivy v. Goh Peng Khim* [1994] 2 S.L.R.(R.) 814 (H.C.). Cf. *Lim Kaling v. Hangchi Valerie* [2003] 2 S.L.R.(R.) 377 at para. 11 (H.C.), referring to the Malaysian case of *Murugappa Chettiar Lakshmanan*, *supra* note 79, among others.

⁹⁶ *Wong Kuan Tan*, *supra* note 78. See also the Supreme Court case of *Kumpulan*, *supra* note 77.

⁹⁷ See *e.g.*, *Murugappa Chettiar Lakshmanan*, *supra* note 79; *NKR Arunasalam*, *supra* note 82; *Soon Seng*, *supra* note 79; *Affin Bank Bhd.*, *supra* note 82; *Lau Hock Lai v. On bin Hj Abdullah* [2010] 9 M.L.J. 376 (H.C.); *Tanjung Rhu Land Sdn. Bhd. v. Mamlaka Langkawi Sdn. Bhd. (previously known as MAS Hotels & Boutique Sdn. Bhd.)* [2010] 8 M.L.J. 514 (H.C.).

⁹⁸ See *Bebe*, *supra* note 39 at para. 92; *Eng Mee Yong*, *supra* note 1 at 214.

⁹⁹ Exceptions may be made for cases such as *Goh Tuan Laye*, *supra* note 16, noted above.

¹⁰⁰ *Eng Mee Yong*, *supra* note 1 at 214. See also, generally, *Pemungut Hasil Tanah*, *supra* note 31 at 91; *Haji Abdul Rahman*, *supra* note 33 at 216.

¹⁰¹ See *Waimiha Sawmilling*, *supra* note 23 at 106; *Knowles*, *supra* note 23 at 620; *Tai Lee Finance*, *supra* note 23 at 84; *Abbey National Building Society*, *supra* note 23 at 78.

caveat to restrain any further dealings with the land in question lest his unregistered interest be defeated by the registration of a subsequent claimant's interest. Thus, it is vital to have in place a mechanism for extending the lifespan of an earlier caveat before it lapses so as to ensure continuity of protection for the interest of the prior claimant. Abuse of the caveat procedure by entry of successive caveats in respect of the same matter should not be permitted as it interferes with the right of a registered proprietor to deal with his land as he wishes. Otherwise, a caveator can avoid the merits of his caveat being determined by the court or Registrar, as the case may be, given that the Registrar acts in a purely administrative manner in the lodgment of a caveat. A refinement of the guidelines to sustain a caveat laid down in *Eng Mee Yong* as discussed above is warranted to remove any confusion that may arise when dealing with the issue of caveatable interest and the existence of serious questions to be tried. As the court in *Luggage Distributors* aptly put it, "it is a serious matter to caveat a person's property, and unless a case is properly made out, a caveat ought not to be permitted to remain on the register a moment longer than is absolutely necessary."¹⁰²

¹⁰² *Supra* note 79 at 743.