

THE LAND CODE — EXTENSION OF THE LIFE OF A CAVEAT

Does the Court possess jurisdiction to extend the life of a caveat after its lapse under the Land Code?

This was the neat but difficult issue which came before Ong J. in *K.I. Muhiudeen Rawther v. K.E.P. Abdul Kassim*.¹ This was an application for extension of time under s.172 of the Land Code but differed from the ordinary run of applications in that it came up for hearing 19 days after the caveat had lapsed. This was how it happened. On May 1, 1959, the applicant lodged a caveat against two pieces of land registered in the names of the respondents as proprietors, claiming a beneficial interest therein. On June 29, 1959 the applicant was served with a notice in accordance with s.171(1) of the Land Code, which required that the caveat be withdrawn within 21 days, and stated that after the lapse of 21 days from that date of service the Registrar of Titles would remove the said caveat and record its discharge unless he should have been previously served with an order of the Court extending the time as provided in the Land Code. The applicant filed his application under s.172 on July 13, but the summons was issued returnable on July 23 before the Registrar in Chambers. On the day of hearing, the Senior Assistant Registrar could not deal with the application for two reasons: first, the 21 days had lapsed on July 20; and secondly, an order under s.172 could only be made by a Judge. The matter came before Ong J. in Chambers.

Ong J. dismissed the application on the ground that “Nowhere in Part XIII, nor elsewhere in the Land Code, do I find any provision giving the Court power to revive, renew or continue a caveat after its lapse. The extinction is in my view final and irrevocable. It is not within the inherent jurisdiction of the Court to make orders which go beyond the limits of the powers expressly given to it by statute and that proposition is self-evident.”²

Ong J. was faced with the difficulty of having to explain away the case of *Chow E Wah v. Registrar of Titles*³ which counsel for the applicant cited as authority for the proposition that the Judge had jurisdiction to make the order sought. In that case the facts were similar. The application came up for hearing three days after the lapse of the caveat, but Russell J. made the order for extension of time as prayed. The learned Judge on making this order was aware of the lapse of the caveat but was not aware that the caveat had been noted as discharged by the Registrar of Titles in accordance with the provisions of s.171 and s.174. The Registrar of Titles referred the matter to the Court and Briggs J. held that s.174 was mandatory on the Registrar of Titles and ordered him to register the Order of Court. Briggs J.

1. (1959) 25 M.L.J. 257.

2. *Ibid.* at 258.

3. (1948-49) M.L.J. Supp. 114.

also decided that the registration of the order of Court was effective to revive, renew or continue the caveat on the ground that if the Court could not do this after discharge, extremely inconvenient consequences would follow. On appeal, the decision of Briggs J. was affirmed except for that part of his order which declared that the order of Russell J. had the effect of reviving, renewing or continuing the caveat. One of the grounds of the appeal was that Russell J. had no jurisdiction to make the order. To this the Court of Appeal said:⁴ "Russell J. clearly had jurisdiction to make the order in the sense that the parties were properly before him upon a matter in respect of which he had power to adjudicate and, in view of the mandatory provisions of s.174 of the Land Code, the Registrar of Titles had no authority to refuse to register it on presentation."

Whatever the Court of Appeal decided, it was clearly binding on Ong J. But the question was 'What did the Court of Appeal decide?' Ong J. was of the opinion that what the Court of Appeal decided was that under s.174 the proper registering authority was bound to make a memorial on the register of an order of Court. The opinion of the Court of Appeal that Russell J. did have jurisdiction formed no part of the ratio decidendi and therefore was not binding on him. This way of looking at *Chow E Wah v. Registrar of Titles*⁵ left Ong J. free to decide whether the Court itself had jurisdiction to extend the operative effect of the caveat, or, to put it in another way, whether the jurisdiction of the Court was ousted by the extinction of the caveat. His Lordship decided that the Court had no jurisdiction to make the order. His reasoning seems to be as follows: jurisdiction upon a matter in which a judge had power to adjudicate is to be distinguished from the powers given to the judge under the Land Code. Jurisdiction and power are not terms which are synonymous and interchangeable — *Lee Lee Cheng v. Seow Peng Kwang*.⁶ Section 171 is mandatory on the registering authority to remove the caveat after 21 days of the service of notice unless, before the expiry of the period, he shall have been served with an order of Court extending the time. Therefore once the caveat has lapsed and a memorial is made by the registering authority it is extinguished forever. The Court becomes *functus* in the matter, unless the Land Code itself has provided for the contrary. The Land Code does not so provide and it is not within the inherent jurisdiction of the Court to make orders which go beyond the limits of the powers expressly given to it by statute.

In *Chow E Wah v. Registrar of Titles*⁷ Briggs J. was very much disturbed by the inconvenient consequences which would follow if he decided otherwise,⁸ but Ong J. was not moved by this consideration. In his view, no argument *ab inconvenienti* or on the ground of injustice that may arise can justify any construction modifying the strict interpretation of s.171, the terms of which are perfectly clear. His lordship had two other answers to this argument: first, the legislature has seen fit to lay down the period of 21 days as reasonably sufficient for the caveator to make his application for extension of time under s.172. Secondly, the assistance of the Court

4. *Ibid.* at p. 121.

5. (1948-49) M.L.J. Supp. 114.

6. (1960) 26 M.L.J. 1; in discussing s.47 of the Courts Ordinance and the Second Schedule thereto, Thomson C.J. said: "It is axiomatic that when different words are used in a statute they refer to different things and this is particularly so where different words are, as here, used repeatedly. This leads to the view that in the Ordinance there is a distinction between the jurisdiction of a Court and its powers, and this suggests that the word 'jurisdiction' is used to denote the types of subject matter which the Court may deal with and in relation to which it may exercise its powers. It cannot exercise its powers in matters over which, by reason of their nature or by reason of extraterritoriality, it has no jurisdiction. On the other hand, in dealing with matters over which it has jurisdiction, it cannot exceed its powers."

7. (1948-49) M.L.J. Supp. 114.

8. At p. 117, he says: "The Land Code makes no provision for registration of an injunction or a *lis pendens*. A caveat has to do the work of all. A caveator whose rights were uncontestable would be unable to protect them in any effective way, although his failure to obtain an extension of time might be due to unavoidable accident, or even to his ability to obtain a date from the hearing of his application."

may always be invoked to preserve the status quo by injunction on a proper case being made out.⁹

The last point concerns the scope of s.240 of the Land Code. In *Chow E Wah's* case,¹⁰ Briggs J. was of the view that the powers conferred by s.240 were not limited to ordering changes in the register necessitated by a final determination of all the rights of the parties *inter se*, and that where a caveat had lapsed, the Court would have power to order its revival under that section even if there were no longer any jurisdiction under s.172. However, in *Muhiudeen Rawther's* case, Ong J. disagreed. In his view, the section was confined to directions giving effect to a final judgment or order of the Court, and had no application to interlocutory matters. Where powers have been given expressly, the section cannot be interpreted so as to enlarge those powers: *generales specialibus non derogant*.¹¹ To sum up, the present state of the law is as follows:

- (a) The extinction of a caveat under s.171(1) is final and irrevocable, and no Court has jurisdiction to make an order for an extension of time under s.172 or s.240 of the Land Code — *K.I. Muhiudeen Rawther v. K.E.P. Abdul Kassim*;¹²
- (b) The Court has jurisdiction to make an order for the extension of time under s.172, or, in the alternative, under s.240 of the Land Code — *Chow E Wah v. Registrar of Titles* (Briggs J. and *obiter dictum* in the Court of Appeal);¹³
- (c) Under s.174 of the Land Code, the proper registering authority is bound to make a memorial on the register of an order of Court, whether or not such order is *ex facie* outside jurisdiction — *Chow E Wah v. Titles* (C.A.).

Propositions (a) and (b) conflict, but as both are first instance decisions, a future Court is left with a free hand to decide either way. It is submitted that proposition (a) is the better one. In the field of land law it seems preferable to have certainty rather than uncertainty in dealings with land. The lodging of a caveat has two effects: first, the caveator asserts a claim to an unregistered interest; and secondly, he places an obstacle in the path of subsequent dealings. It is a blot on the title and tends seriously to hamper the registered proprietor in negotiations for the sale, mortgage or lease of the land. The caveator should not be allowed to continue thus to interfere with the rights of the registered proprietor unless he can proceed to establish his rights promptly.¹⁴ A period of 21 days is given to the caveator to apply to Court to extend the life of the caveat and if he does not do so in time, the extinction should be regarded as final and irrevocable. This view of the matter seems to give the best effect to the policy of land registration under the Land Code.

Proposition (c) is doubtful. It is submitted that it only applies to an order of Court which is *ex facie* within jurisdiction. Although it may be argued that the duty of the Registrar to register an order of Court is purely ministerial, we are still faced with the stronger argument that an order of a Court, which, in the first place, it has no jurisdiction to make, is not an order which the Registrar can register. It is not merely that the Court has decided wrongly in law in a matter within its jurisdiction and that the Court of Appeal has confirmed the position. It is a case of a Court assuming jurisdiction which it does not possess. In fact, *Chow E Wah's* case was decided on the basis that Russell J. had jurisdiction to make the order.

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9. It should be noticed that an injunction, operating *in personam*, is not as effective as a caveat in giving notice to the whole world of the caveator's claim to or in the lands, and may be completely ineffectual to prevent a disposal of the land so as to defend the claimant.

10. (1948-49) M.L.J. Supp. 114, at p. 117.

11. (1959) 25 M.L.J. 257, at p. 258.

12. (1959) 25 M.L.J. 257.

13. (1948-49) M.L.J. Supp. 114 and 121.

14. See, *In re Thompson* (1887) 5 N.Z.L.R. 52; *Butler v. Fairclough* (1917) 23 C.L.R. 78.