

MOK YONG KONG & ANOR

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v.

MOK YONG CHUAN

COURT OF APPEAL, KUALA LUMPUR

b

GOPAL SRI RAM JCA

ABDUL KADIR SULAIMAN JCA

ALAUDDIN MOHD SHERIFF JCA

[CIVIL APPEAL NO: J-02-179-2000]

20 FEBRUARY 2002

c

LAND LAW: Caveat - Dismissal of application to remove - No allegation was made against current registered owner at material time when caveat was lodged - No reference to guidelines in Murugappa Chettiar Lakshmanan v. Lee Teck Mook for removal of caveat - Allegation of impropriety against registered owner, whether proved - Delay by caveator in commencing proceedings to enforce claim - Whether trial judge failed to take into account relevant considerations - Whether appeal against dismissal of application should be allowed - National Land Code, s. 323(1)

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The respondent was the registered proprietor of a 1/3 undivided share in three pieces of land ('the subject property'). He transferred the said share to his brother, the first appellant, allegedly on the understanding that it was to be re-transferred to him after the subject property was used to raise funds. Subsequently, the subject property was transferred to the second appellant and the respondent lodged a caveat. The appellants applied to the High Court to remove the caveat but the application was dismissed by the learned judge. Hence, the appellants' appeal to this court on the ground that the learned judge failed to take into account relevant considerations when dismissing the said application.

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Held:

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Per Gopal Sri Ram JCA

[1] There was no allegation made against the second appellant, the registered proprietor of the subject property, at the material time the respondent lodged the caveat. The caveat was liable to be removed on this ground alone, as being frivolous and vexatious. There cannot be a caveat lodged against a registered proprietor of land against whom no credible claim or title is made in accordance with s. 323(1) National Land Code. Further, the affidavits filed in the caveat proceedings was

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- a* insufficient to sustain the caveat. A caveator must be held to the grounds he alleges in his application in Form 19B when lodging his caveat. (pp 620 g-i & 621 a-b)
- b* [2] A court hearing an application for the removal of a caveat has to go through the three stages set out in *Murugappa Chettiar Lakshmanan v. Lee Teck Mook*. A perusal of the judgment of the learned judge revealed that there was no reference to any of the stages therein save the one that required serious questions to be established. (p 621 c-e)
- c* [3] The caveat was lodged on 2 June 1997. There was a first suit filed by the respondent against the appellants on 1 June 1998 and a second suit filed on 5 March 1999. The first suit raised allegations of fraud against both appellants. The second suit made a claim for the re-transfer of the 1/3 share in the subject property but did not make any allegation of impropriety against the second appellant. (p 621 f-g)
- d* [4] Fraud is a serious thing and should not be alleged save in the clearest of cases. The statutory declaration in support of the respondent's application for entry of the caveat did not reveal any allegations of fraud against the second appellant. Further, the delay between the date of the caveat and the dates of filing the two suits amounted to 12 months and 21 months respectively. However, as the first suit related entirely to a different subject matter, the relevant period of delay was the period between the date of caveat and the date of filing the second suit, namely, a delay of 21 months. (pp 621 h & 622 a-b)
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- f* [5] There were merits in the complaints raised by the appellants. The learned judge misappreciated the facts. Most of her reasons were related to allegations pleaded in the first suit between the parties and she overlooked the fact that the caveat had nothing to do with that first suit. Further, the omission to take the application through the steps required by law and the omission to consider the delay between the date of caveat and the second suit amounted to non-directions which had seriously prejudiced the appellants. This was a fit and proper case for this court to review and reconsider the application that was before the learned judge. (p 622 c-d)
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- h* [*Appeal allowed.*]
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[Bahasa Malaysia Translation Of Headnotes]

Responden adalah pemilik berdaftar 1/3 bahagian tiga bidang tanah ('tanah tersebut'). Dia memindahmilik bahagiannya kepada abangnya, perayu pertama, atas persetujuan bahawa ianya akan dipindahmilik semula selepas tanah tersebut digunakan untuk mendapatkan sumber kewangan. Kemudian, tanah tersebut telah dipindahmilik kepada perayu kedua dan responden memasukkan kaveat. Perayu-perayu memohon ke Mahkamah Tinggi untuk mengeluarkan kaveat tersebut tetapi permohonan tersebut telah ditolak oleh hakim yang bijaksana. Maka, rayuan perayu kepada mahkamah ini berdasarkan alasan bahawa hakim yang bijaksana gagal mengambilkira pertimbangan-pertimbangan relevan apabila beliau menolak permohonan tersebut.

Diputuskan:**Oleh Gopal Sri Ram HMR**

[1] Tiada dakwaan dibuat terhadap perayu kedua, pemilik berdaftar tanah tersebut, pada masa material responden memasukkan kaveat tersebut. Kaveat tersebut boleh dikeluarkan atas alasan tersebut sebagai remeh dan menyusahkan. Kaveat tidak boleh dimasukkan terhadap pemilik berdaftar sesuatu tanah tanpa sebarang tuntutan yang sah berikutan s. 323(1) Kanun Tanah Negara. Seterusnya, affidavit-affidavit yang difailkan di dalam prosiding kaveat tersebut tidak mencukupi bagi mempertahankan kaveat tersebut. Seorang pengkaveat mestilah tetap dengan alasan-alasan yang didakwanya di dalam permohonan Borang 19B apabila memasukkan kaveatnya.

[2] Perbicaraan mahkamah bagi permohonan mengeluarkan sesuatu kaveat perlu melalui tiga peringkat yang dinyatakan dalam kes *Murugappa Chettiar Lakshmanan v. Lee Teck Mook*. Penelitian keputusan hakim yang bijaksana mendedahkan bahawa tiada rujukan yang dibuat kepada mana-mana peringkat tersebut kecuali yang memerlukan persoalan-persoalan yang serius untuk ditetapkan.

[3] Kaveat tersebut telah dimasukkan pada 2 Jun 1997. Ada satu guaman pertama yang difailkan oleh responden terhadap perayu-perayu pada 1 Jun 1998 dan guaman kedua yang difailkan pada 5 Mac 1999. Guaman pertama mengandungi dakwaan fraud terhadap kedua-kedua perayu. Guaman kedua menuntut pindahmilik semula 1/3 bahagian tanah tersebut tetapi tidak mendakwa kelakuan salah perayu kedua.

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- a* [4] Fraud adalah sesuatu yang serius dan tidak boleh didakwa kecuali di dalam kes-kes yang ternyata. Akuan statutori menyokong permohonan responden untuk memasukkan kaveat tidak menimbulkan apa-apa dakwaan fraud terhadap perayu kedua. Seterusnya, kelewatan di antara tarikh kaveat dan tarikh pemfailan kedua-dua guaman adalah 12 bulan dan 21 bulan masing-masing.
- b* Bagaimanapun, memandangkan guaman pertama berkaitan sepenuhnya kepada perkara yang berlainan, tempoh kelewatan yang relevan adalah masa di antara tarikh kaveat dan tarikh pemfailan guaman kedua, iaitu kelewatan selama 21 bulan.
- c* [5] Terdapat beberapa merit di dalam aduan-aduan yang ditimbulkan oleh perayu-perayu. Hakim yang bijaksana tersalah ambil kira fakta-fakta tersebut. Kebanyakan alasan-alasan beliau hanya berkaitan dengan dakwaan-dakwaan yang dihidkan di dalam guaman pertama dan beliau tidak mengendahkan fakta bahawa kaveat tersebut tidak mempunyai apa-apa kaitan dengan guaman pertama.
- d* Seterusnya, peninggalan untuk membawa permohonan tersebut melalui langkah-langkah yang diperlukan oleh undang-undang dan peninggalan untuk mempertimbangkan kelewatan di antara tarikh kaveat dan guaman kedua menjadi salah arah yang secara serius memprejudiskan perayu-perayu. Ini adalah suatu kes yang sesuai dan sempurna untuk dikaji semula oleh mahkamah ini dan untuk menimbang semula permohonan yang telah dibawa kepada hakim yang bijaksana.
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[Rayuan dibenarkan.]

Case(s) referred to:

- f* *Goh Paik Swan v. Ng Choo Lum* [1997] 1 CLJ 77 (*refd*)
Hadmor Productions Ltd v. Hamilton [1982] 1 All ER 1042 (*refd*)
Lian Keow Sdn Bhd v. Overseas Credit Finance (M) Bhd [1982] CLJ 350; [1982] CLJ (Rep) 182 (*refd*)
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng [1995] 2 CLJ 713 (*refd*)
Maxwell v. Keun [1927] All ER Rep 335 (*refd*)
Murugappa Chettiar Lakshmanan v. Lee Teck Mook [1995] 2 CLJ 545 (*refd*)

g **Legislation referred to:**

National Land Code, s. 323(1)

For the appellants - Jerald Gomez (Yeo Yang Poh); M/s Ong & Ong

For the respondent - C Kumareson; M/s Saga & Kumar

- h* [Appeal from High Court, Johor Bahru; Originating Summons No: 24-239-1998(2)]

Reported by Usha Thiagarajah

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JUDGMENT
(oral)

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Gopal Sri Ram JCA (delivering the judgment of the court):

This appeal is directed against the order of the High Court dismissing the appellants' application to remove the respondent's caveats. In brief three grounds are advanced in support of the appeal. We do not think that we will do any injustice to Mr. Gomez, counsel for the appellants, if we summarise his submissions as follows:

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(a) First, that the learned judge failed to judicially appreciate the facts relevant to the respondent's claim to have a caveat lodged against the lands in question.

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(b) Second, that the learned judge misdirected herself as to the proper approach to be adopted when hearing an application of this sort.

(c) Third, that the learned judge did not attach any or any sufficient weight to the delay by the respondent in commencing proceedings to enforce his claim under the caveats.

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The facts which form the basis of this appeal are not in serious dispute. According to the respondent, and this is not denied by the appellants, he was until 1975 the registered proprietor of 1/3 undivided share in three pieces of land held under EMR 697 for Lot 1823, EMR 703 for Lot 1829 and EMR 712 for Lot 1838 all situated in the Mukim of Senai/Kulai in the State of Johor ("the subject property"). In that year (1975), he transferred his 1/3 share to his brother, the 1st appellant. According to the respondent, this transfer was done pursuant to an agreement or understanding between the brothers. Under that agreement or understanding, the 1/3 share was to be re-transferred to the respondent after the subject property has been used to raise funds.

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Nothing appears to have happened until May 1997. On 3 May 1997 the subject property was transferred to the 2nd appellant. Then on 2 June 1997, the respondent lodged a caveat. Since his counsel Mr. Kumareson has resisted this appeal on the basis that the grounds set out by his client in his application in Form 19B are sufficient, it is best that we reproduce the allegations relied upon therein. This is what the statutory declaration dated 31 May 1997 (affirmed by the respondent's solicitor) says in the relevant paragraphs (in the original language used by its deponent and without correction of its linguistic errors):

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a (3) Whereas by an Agreement and arrangement made in 1975, (hereinafter called "the Agreement") between the previous co-proprietor (ie, the Respondent) and the present Proprietor (ie, the 1st Appellant), the previous co-proprietor agreed to transfer 1/3 of his shares to the present Proprietor on condition that the present proprietor could arrange finance facilities by financing the said land to any Finance institution (hereinafter called "the chargee") and the present proprietor shall transfer back the 1/3 of his shares to the previous co-proprietor upon the payment of redemption sum by the previous co-proprietor to the chargee.

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c (4) Whereas the said land has been charged to Bank Bumiputra Malaysia Berhad Kota Bharu Branch in 1979 for the purpose of securing the overdraft facility of Ringgit Malaysia Three Hundred Thousand Ringgit (RM300,000-00) and the previous co-proprietor had handover RM100,000-00 to the present proprietor. In 1991, the previous co-proprietor had on several occasion applied to redeem the said land from the chargee. However the present Proprietor refused to transfer back the 1/3 of the shares despite the agreement and payment of RM100,000-00 and several attempt by the previous co-proprietor to redeem the said land, instead the present proprietor lodge private caveat against the said land.

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e (5) Whereas in 1997, through the land search made by the previous co-proprietor, the said land has been caveated by SAKAE CORPORATION SDN. BHD. in consideration of RM65,000-00 paid to the present proprietor for the Development purpose.

f (6) By the above reasons, I have advised the previous co-proprietor to lodge a caveat against the said land to protect the interest of the previous co-proprietor pending the legal proceeding to be taken against the present proprietor.

g (7) I have prepared the application for entry of the said private caveat and I make this Statutory Declaration in support of my client's said application.

h It is to be noted at once; and this is important; that there is no allegation whatsoever made against the 2nd appellant, the registered proprietor of the subject property at the material time the respondent's caveat was lodged. In our judgment, the caveat is liable to be removed on this ground alone, as being frivolous and vexatious. It is axiomatic that there cannot be a caveat lodged against a registered proprietor of land against whom no credible claim to title or interest is made in accordance with s. 323(1) of the National Land Code 1965.

i Mr. Kumareson of counsel for the respondent however argues that the affidavits filed in the caveat proceedings before the learned judge raise sufficient grounds to sustain the caveats. But this in our judgment is insufficient. The judgments of this court in *Luggage Distributors (M) Sdn Bhd*

v. Tan Hor Teng [1995] 2 CLJ 713, *Murugappa Chettiar Lakshmanan v. Lee Teck Mook* [1995] 2 CLJ 545, and *Goh Paik Swan v. Ng Choo Lum* [1997] 1 CLJ 77 sufficiently establish the proposition that a caveator must be held to the grounds he alleges in his application in Form 19B when lodging his caveat. Were it otherwise, the policy of the legislature in enacting s. 323 will be defeated. Caveators could then enter caveats on grounds entirely frivolous and vexatious and then purport to sustain such caveats on other grounds when the hapless landowner attempts to remove them. That cannot be the law. That is not the law.

A court hearing an application for the removal of a caveat has to go through three stages. These stages are set out in *Murugappa Chettiar Lakshmanan (supra)* as follows:

First, whether the respondent, on the material set out by him in his application under s. 323(1) of the Code, has disclosed a caveatable interest. Secondly, if he has established a caveatable interest, then, whether the evidence he produced before the learned judicial commissioner in support of his claim to that caveatable interest discloses a serious question to be tried. Lastly, if the first two questions are resolved in the respondent's favour, then, whether the balance of convenience, or more appropriately, the balance of justice, lies in favour of the caveat remaining on the register pending the disposal of his suit. (see pp. 550 of the report)

A perusal of the judgment of the learned judge reveals that there is no reference to any of these stages save perhaps the one that requires serious questions to be established.

The final ground of complaint is one of delay. As we said a moment ago, the caveat was lodged on 2 June 1997; the first suit (No. 22-289-1998) was filed on 1 June 1998 and the second suit (No. 22-135-1999) was filed on 5 March 1999. The first suit (No. 22-289-1998) raises allegations of fraud against both appellants. The second suit (No. 22-135-1999) makes a claim for the re-transfer of the 1/3 share in the subject property. However, the statement of claim in the second suit does not make any allegation of impropriety against the 2nd appellant.

Fraud is a serious thing. It should not be alleged save in the clearest of cases. The usual practice in this country is for solicitors to take a statutory declaration from the client setting out the particulars of fraud, in order to protect themselves were it to turn out in the trial that the allegations were baseless.

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- a* The statutory declaration in support of the respondent's application for entry of his caveats does not reveal any allegation of fraud against the 2nd appellant. Further, the delay between the date of the caveats and the dates of filing of the respective two suits amounted to 12 months and 21 months respectively. But we must add a rider. The first suit (No. 22-289-1998) relates entirely to
- b* a different subject matter, namely the respondent's alleged right to the other 2/3 undivided share in the subject property. It has nothing whatsoever to do with the claim made in the caveat. Hence, the relevant period of delay is the period between the date of caveat and the date of filing of the second suit (No. 22-135-1999); namely a delay of 21 months.
- c* Having carefully read the judgment of the learned judge, we are satisfied that there are merits in the complaints raised by the appellants before us. It appears that the learned judge misappreciated the facts. She overlooked that the caveat had nothing to do with the first suit (No. 22-289-1998); while most of her reasons are related to the allegations pleaded in that suit. Further, the omission
- d* to take the application through the steps required by law and the omission to consider the delay between the date of the caveat and the second suit (No. 22-135-1999) amount to non-directions which have seriously prejudiced the appellants. This is accordingly a fit and proper case for this court to review and reconsider the application that was before the learned judge.
- e* We say that because it is trite that the decision whether to remove a caveat is one within the province of the judge. This court will not interfere with the exercise of such discretion save where injustice occurs (*Maxwell v. Keun* [1927] All ER Rep 335; see especially the speech of Lord Atkin); such as
- f* where the judge has taken into account irrelevant considerations or failed to take into account relevant considerations, or has asked himself or herself the wrong questions or has misdirected himself or herself on the correct principles of law. The present appeal comes, as appears from the discussion of the arguments we have gone through hereinbefore, within the exceptional cases or circumstances in which an appellate court may interfere.
- g* Having looked at the materials before the learned judge afresh, we are entitled now to exercise our discretion: see *Hadmor Productions Ltd v. Hamilton* [1982] 1 All ER 1042, per Lord Diplock; an approach which has been adopted and applied by our (then) Federal Court in the case of *Lian Keow Sdn Bhd v. Overseas Credit Finance (M) Bhd* [1982] CLJ 350; [1982] CLJ (Rep) 182
- h* where Salleh Abas FJ (as he then was) had the following to say concerning the power of an appellate court when reviewing the exercise of discretion by the court below in relation to the granting or refusal of an injunction:
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Although the function of an appellate court with regard to the exercise of discretion by a judge in granting or refusing an interlocutory injunction is one of review only and we must defer to the judge's decision in the matter, we however feel justified in this case in overruling the decision of the court below because we are of the opinion that the learned judge's exercise of discretion in setting aside the interlocutory injunction and order previously made by Anuar J was based upon a misunderstanding of the law and the facts before him (see Lord Diplock in *Hadmor Productions Ltd & Ors v. Hamilton & Anor*). Such misunderstanding led him to take into consideration questions which ought not to be considered as they are not justified by the facts in this case.

For the reasons already given, we are satisfied upon such a review that there is merit in this appeal. The appeal is accordingly allowed. The caveats are ordered to be removed forthwith, the deposit is to be refunded to the appellants, and the respondent must bear the costs in this court and in the court below. The claim for damages by the appellants is remitted to the senior assistant registrar of the High Court at Johor Bahru, to be assessed.

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