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[2002] 2 MLJ 718

## MOK YONG KONG & ANOR v MOK YONG CHUAN

**COURT OF APPEAL (KUALA LUMPUR)**  
**GOPAL SRI RAM, ABDUL KADIR SULAIMAN AND ALAUDDIN JJCA**  
**CIVIL APPEAL NO J-02-179 OF 2000**  
**20 February 2002**

*Land Law -- Restraint on dealings -- Caveat -- Application to remove caveat -- Allegation against previous owner, not current title holder -- Whether caveat could be lodged against registered owner against whom no claim to title or interest was made -- Whether Court of Appeal could interfere with decision of High Court in allowing caveat to remain -- National Land Code 1965 s 323(1)*

The respondent 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 1975, he transferred his 1/3 share to his brother, the first appellant. 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. On 3 May 1997 the subject property was transferred to the second appellant. Subsequently on 2 June 1997, the respondent lodged a caveat. This appeal was directed against the order of the High Court dismissing the appellants' application to remove the respondent's caveats.

**Held**, allowing the appeal:

- (1) There was no allegation whatsoever made against the second appellant, the registered proprietor of the subject property at the material time the respondent's caveat was lodged. The caveat was liable to be removed on this ground alone, as being frivolous and vexatious. It was axiomatic that there could not be a caveat lodged against a registered proprietor of land against whom no credible claim to title or interest was made in accordance with s 323(1) of the National Land Code 1965. A caveator must be held to the grounds he alleged in his application in Form 19B when lodging his caveat (see pp 721H-722A); *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng* [1995] 1 MLJ 719, *Murugappa Chettiar Lakshmanan v Lee Teck Mook* [1995] 1 MLJ 782, and *Goh Paik Swan v Ng Choo Lum* [1996] 3 MLJ 437 followed.
- (2) The decision whether to remove a caveat was one within the province of the judge. This court would not interfere with the exercise of such discretion save where injustice occurred; such as where the judge had taken into account irrelevant considerations or failed to take into account relevant considerations, or had asked himself or herself the wrong questions or has misdirected himself or herself on the correct principles of law. The present appeal

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came within the exceptional cases or circumstances in which an appellate court may interfere (see p 723D-E).

### **Bahasa Malaysia summary**

Responden, sehingga 1975, merupakan pemilik berdaftar 1/3 bahagian tanah yang tidak dibahagikan dalam tiga bidang tanah yang dipegang di bawah EMR 697 untuk Lot 1823, EMR 703 untuk Lot 1829 dan EMR 712 untuk Lot 1838, semuanya terletak di Mukim Senai/Kulai di Johor ('hartanah tersebut'). Pada tahun 1975, responden telah memindahkan 1/3 bahagian beliau kepada abang beliau, perayu pertama. Pemindahan ini dibuat mengikut satu perjanjian atau persefahaman di antara kedua-dua adik-beradik tersebut. Di bawah perjanjian tersebut, 1/3 bahagian tersebut akan dipindahkan kembali kepada responden setelah hartanah tersebut telah digunakan untuk mengutip derma. Pada 3 Mei 1997, hartanah tersebut telah dipindahkan kepada perayu kedua. Setelah itu, pada 2 Jun 1997, responden telah memasukkan satu kaveat. Rayuan ini adalah terhadap perintah Mahkamah Tinggi dalam menolak permohonan pemohon-pemohon tersebut untuk membatalkan kaveat tersebut.

**Diputuskan**, membenarkan rayuan tersebut:

- (1) Tiada dakwaan yang dibuat terhadap perayu kedua, pemilik berdaftar hartanah tersebut semasa kaveat responden dimasukkan. Kaveat tersebut boleh dikeluarkan di atas alasan ini sendiri, kerana ia remeh dan menyusahkan. Tidak dapat disangkal bahawa tiada kaveat yang boleh dimasukkan terhadap pemilik berdaftar di mana tiada tuntutan yang munasabah terhadap hakmilik atau kepentingan dibuat mengikut s 323(1) Kanun Tanah Negara 1965 ('KTN'). Seorang pengkaveat mesti terikat kepada sebarang alasan yang beliau telah dakwa di dalam permohonan beliau dalam Borang 19B semasa beliau memasukkan kaveat beliau (lihat ms 721H-722A); *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng* [1995] 1 MLJ 719, *Murugappa Chettiar Lakshmanan v Lee Teck Mook* [1995] 1 MLJ 782, dan *Goh Paik Swan v Ng Choo Lum* [1996] 3 MLJ 437 diikut.
- (2) Keputusan untuk mengeluarkan kaveat adalah dalam bidang kuasa hakim. Mahkamah ini tidak akan campur tangan dalam penggunaan budi bicara tersebut kecuali jika berlaku ketidakadilan; seperti di mana hakim telah mengambil kira pertimbangan yang tidak relevan atau gagal mengambil kira pertimbangan yang relevan, atau telah menanya diri beliau soalan yang salah atau telah salah arahkan diri beliau akan prinsip-prinsip undang-undang yang betul. Rayaun ini termasuk ke dalam golongan kes-kes atau keadaan yang khas di mana suatu mahkamah rayuan boleh campur tangan (lihat ms 723D-E.)

[2002] 2 MLJ 718 at 720

### **Notes**

For cases on caveats, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3015-3312.

### **Cases referred to**

*Goh Paik Swan v Ng Choo Lum* [1996] 3 MLJ 437

*Hadmor Productions Ltd v Hamilton* [1982] 1 All ER 1042

*Lian Keow Sdn Bhd v Overseas Credit Finance (M) Bhd* [1982] 2 MLJ 162

*Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719

*Maxwell v Keun* [1927] All ER Rep 335

*Murugappa Chettiar Lakshmanan v Lee Teck Mook* [1995] 1 MLJ 782

### **Legislation referred to**

National Land Code 1965 s 323(1)

**Appeal from**

Petition No 24-239 of 1998(2) (High Court, Johor Bahru)

*Jerald Gomez (Yeo Yang Poh with him) (Ong & Ong)* for the appellants.

*C Kumareson (Saga & Kumar)* for the respondent.

**GOPAL SRI RAM JCA (DELIVERING ORAL 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 summarize his submissions as follows:

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

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 a 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 first appellant. According to the respondent, this transfer was done pursuant to an agreement or understanding between

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the brothers. Under that agreement or understanding, the 1/3 share was to be retransferred to the respondent after the subject property has been used to raise funds.

Nothing appears to have happened until May 1997. On 3 May 1997, the subject property was transferred to the second 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):

(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 first 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.

(4) Whereas the said land has been charged to Bank Bumiputra Malaysia Bhd Kota Bharu Branch in 1979 for the purpose of securing the overdraft facility of RM300,000 and the previous co-proprietor had handed over RM100,000 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 and several attempts by the previous co-proprietor to redeem the said land, instead the present proprietor lodged a private caveat against the said land.

(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 paid to the present proprietor for the development purpose.

(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.

(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.

It is to be noted at once, and this is important, that there is no allegation whatsoever made against the second 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

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credible claim to title or interest is made in accordance with s 323(1) of the National Land Code 1965 ('the NLC').

Mr Kumareson, 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 & Anor* [1995] 1 MLJ 719, *Murugappa Chettiar Lakshmanan v Lee Teck Mook* [1995] 1 MLJ 782, and *Goh Paik Swan v Ng Choo Lum* [1996] 3 MLJ 437 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 of the NLC will be defeated. Caveators could then enter caveats on entirely frivolous and vexatious grounds 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* as follows (at p 80):

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.

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 retransfer 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 second 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.

The statutory declaration in support of the respondent's application for entry of his caveats does not reveal any allegation of fraud against the second 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)

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relates entirely to 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.

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 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.

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 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.

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] 2 MLJ 162, 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 (at p 165 of the report):

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

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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.

*Appeal allowed.*

Reported by Peter Ling