Privy Council Appeal No. 25 of 1977

Eng Mee Yong (f) and others – – – – – *Appellants*

v.

V. Letchumanan s/o Velayutham – – – – – *Respondent*

FROM

THE FEDERAL COURT OF MALAYSIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 4TH APRIL 1979

Present at the Hearing:

LORD DIPLOCK
LORD MORRIS OF BORTH-Y-GEST
LORD HAILSHAM OF SAINT MARYLEBONE
LORD EDMUND-DAVIES
LORD FRASER OF TULLYBELTON

[*Delivered by* LORD DIPLOCK]

This is an appeal from a judgment of the Federal Court of Malaysia in proceedings brought in the High Court in Malaya at Seremban under s. 327(1) of the National Land Code, and claiming the removal of a private caveat which had been entered on the register document of title to land under s. 322 of the Code.

The applicants in the High Court (" the Caveatees ") were the registered proprietors of the land which is situated in the Ampangan District of Seremban. The respondent in the High Court (" the Caveator ") was the person at whose instance a caveat was entered on the register document of title to the land, on 9 November 1974. The caveat was expressed to bind the land itself to the extent of a whole share. The Caveatees had applied to the Registrar on 6 January 1975 for removal of the caveat under s. 326(1) of the Code; but the Registrar was unable to serve notice of intended removal on the Caveator as he could not be found. The Caveatees were thus driven to proceed *ex parte* under s. 327(1) for an order for the removal of the caveat. This they did on 26 August 1975: their application was supported by a joint affidavit of the Caveatees. The case came on for hearing before Ajaib Singh J. in the High Court on 10 November 1975. Shortly before that, the Caveator had appeared and on 4 November had filed an affidavit in which he asserted a right to the title in the land under a contract of sale made between him and the Caveatees. Shortly before the date of his affidavit he had issued a writ claiming specific performance of this contract.

The learned judge granted the Caveatees' application and ordered the removal of the caveat. He gave his reasons for judgment on 5 February 1976. The Caveator appealed to the Federal Court on a number of

grounds to which their Lordships will have to advert later. The appeal was heard on 7 September 1976. It was allowed, and the order for removal of the caveat set aside. From this judgment and order of the Federal Court appeal is now brought to His Majesty the Yang di-Pertuan Agong.

Although the facts of the instant case are peculiar to itself the appeal raises a question of law of more general importance as to the principles applicable to the exercise by the High Court of its jurisdiction under ss. 326 and 327 of the National Land Code. Their Lordships will deal with this general question first before turning to the consequence of applying those principles to the facts of the instant case.

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. Since the instant case is concerned with title to the land itself their Lordships will confine their remarks to this, though similar principles apply to other registrable interests. By s. 340 the title of any person to land of which he is registered as proprietor is indefeasible except in cases of fraud, forgery or illegality, and even in such cases a *bona fide* purchaser for value can safely deal with the registered proprietor and will acquire from him an indefeasible registered title.

The system of private caveats is substituted for the equitable doctrine of notice in English land law. By s. 322(2) the effect of entry of a caveat expressed to bind the land itself is to prevent any registered disposition of the land except with the caveator's consent until the caveat is removed. This is a very grave curtailment of the rights of the proprietor, yet it can be imposed at the instance of anyone who makes a claim to title to the land, however baseless that claim may turn out to be. By s. 324 the Registrar is required to act in an administrative capacity only; he is not concerned with the validity of the claim on which the caveat purports to be based. If the document is in the correct form he must enter the caveat on the register and leave the registered proprietor to secure its removal and to claim compensation from the caveator for any damage he has suffered by reason of the entry of the caveat having been obtained by the caveator without reasonable cause.

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, in an ordinary action brought by the caveator against the caveatee for that purpose. Their Lordships accept this as an apt analogy with its corrollary that caveats are available, in appropriate cases, for the interim protection of rights to title to land or registrable interest in land that are alleged by the caveator but not yet proved. Nevertheless their Lordships would point out that the issue of a caveat differs from the grant of an interlocutory injunction in that it is issued *ex parte* by the Registrar acting in an administrative capacity without the intervention of the court and is wholly unsupported by any evidence at all. Unless 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.

Under the National Land Code there are alternative procedures for the removal of a caveat at the instance of the caveatee. Under s. 326 the caveatee may apply to the Registrar for its removal and the Registrar

provided he is able to serve the caveator with notice of the application (as he was not in the instant case), is required to remove the caveat from the Register at the expiry of one month from the date of such notice, unless the caveator applies successfully to the court for an extension of the period for which the caveat shall remain on the register.

As was pointed out by the Federal Court in *Nanyang Development* (1966) *Sdn. Bhd. v. How Swee Poh* [1970] 1 M.L.J. 145, it is the caveator who is the applicant in proceedings brought under s. 326(2), and it is for him to begin and to satisfy the court that there are sufficient grounds in fact and law for continuing the caveat in force after the month has elapsed. This in their Lordships' view is plainly right. What constitute sufficient grounds they will discuss later after examining the alternative procedure open to the caveatee under s. 327.

Whereas the procedure under s. 326 for obtaining the removal of a caveat is available only to the caveatee, the procedure for applying directly to the court for an order of removal is available not only to the caveatee but also to any other person aggrieved by the existence of the caveat—typically a purchaser to whom the registered proprietor has contracted to sell the land but the sale has not yet been completed by a proper instrument of transfer duly registered. In their Lordships' view a distinction must be drawn between cases where the applicant is the registered proprietor of the land (*i.e.* the caveatee) and cases where the applicant is some other person who claims a right to an interest in it. In the former case the caveatee can rely upon his registered title as *prima facie* evidence of his unfettered right to deal with the land as he pleases; it is for the caveator to satisfy the court that there are sufficient grounds in fact and law for continuing in force a caveat which prevents him from doing so. So where, as in the instant case, the only parties to an application under s. 327 are caveatee and caveator there is no difference between what the caveator must establish to obtain an extension of the caveat under s. 326 and what he must establish to defeat the caveatee's application for removal of the caveat under s. 327.

It is otherwise when the applicant under s. 327 is someone other than the caveatee. He has no registered title to rely upon as *prima facie* evidence of his interest in the land. It is for him to begin by satisfying the court that there are sufficient grounds in fact and law for treating him as a person claiming such an interest in the land as would, if it were established, make him aggrieved by the existence of the caveat.

So far their Lordships have deliberately refrained from speaking of "onus of proof". It is an expression which, if it is used in relation to proceedings which are interlocutory in their legal character, is liable to lead to confusion. Their Lordships have already noted the analogy between the effect of a caveat and that of an interlocutory injunction obtained by the plaintiff in an action for specific performance of a contract for the sale of land restraining the vendor in whom the legal title is vested from entering into any disposition of the land pending the trial of the action. The court's power to grant an interlocutory injunction in such an action is discretionary. It may be granted in all cases in which it appears to the court to be just and convenient to do so. Similarly in s. 327 it is provided that "the court . . . may make such order on the application as it may think just". The guiding principle in granting an interlocutory injunction is the balance of convenience; there is no requirement that before an interlocutory injunction is granted the plaintiff should satisfy the court that there is a "probability", a "*prima facie* case" or a "strong *prima facie* case" that if the action goes to trial he will succeed; 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] A.C. 396.

This is the nature of the onus that lies upon the caveator in an application by the caveatee under s. 327 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.

In so far as the *Nanyang Development* case might be understood as suggesting that in proceedings under s. 326 or s. 327 the caveator in order to maintain his caveat must satisfy the court that on the balance of probabilities his claim will succeed, it puts the burden on the caveator of satisfying the first requirement too high. On the other hand if *Kasivisvanathan Chettiar v. Pereira* [1976] 2 M.L.J. 110 might be understood as suggesting that the first requirement would be satisfied by the facts that (i) the caveator had commenced proceedings against the caveatee to enforce his claim to an interest in the land, coupled with (ii) his bare assertion in an affidavit that he was entitled to that interest unsupported by any disclosure and verification upon oath of the facts upon which his claim was based, this would put the burden on the caveator too low.

In the case of a refusal by the vendor to complete a contract for the sale of land the normal remedy of the purchaser as plaintiff in an action is an order for specific performance of the contract; and in the absence of special circumstances, if it were shown that the vendor threatened to dispose of the land while the action was still pending, the balance of convenience would be in favour of granting an interlocutory injunction to prevent his doing so, provided that the plaintiff would be in a position to satisfy his undertaking as to damages if the action should fail at trial. So too in an application by the caveator under s. 327 for removal of a caveat, once the caveatee has met the first requirement of satisfying the court that the claim on which his caveat is based does raise a serious question to be tried, the balance of convenience would 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, for specific performance of the contract of sale which he alleges had been tried.

This may be why in the Malaysian cases about applications under s. 327 to which their Lordships have been referred there does not appear to have been any reference to balance of convenience. They are concerned with what, if anything, the caveator has to prove in order to resist the caveatee's application for removal of the caveat. In the instant case too the learned High Court judge never reached the question of the balance of convenience. He concluded that the statements in the caveator's affidavit about the contract for the sale of the land which he claimed to be still subsisting were so vague, equivocal and inconsistent with the contemporary documents as to lack credibility and that they did not satisfy him that there was any serious question to be tried.

Their Lordships must therefore turn to the evidence that was before the High Court on the hearing of the application, bearing in mind that if there appears to be any conflict of evidence which is not on the face of it implausible, such a conflict ought not to be disposed of on affidavit evidence only. It leaves a serious question to be tried.

The land that is in question in the instant case had been the subject of a formal written contract of sale between the Caveatees as vendors and the Caveator as purchaser, drawn up by their respective solicitors and dated 28 June 1974 ("the Sale Agreement"). The price was $827,656 and this was payable as to $97,765 by way of deposit and part payment of the purchase price on the execution of the agreement (Clause 1); as to a further $30,000 in part payment of the purchase price on 29 July 1974 (Clause 2); and, as to the balance of $699,890 on 28 September 1974 (Clause 3). It was expressly provided that time was to be of the essence of each of the clauses providing for such payments and that in default of punctual payment of the balance due under Clause 3 the previous payments under Clauses 1 and 2 were to be forfeited. The Caveator duly paid, or was credited in account with, the deposit and paid the instalment of the purchase price due on 29 July 1974: but he defaulted on the payment of the balance of $699,890 due on 28 September 1974. On 30 September the Caveatees gave notice to the Caveator and his solicitors terminating the contract for breach by the Caveator of the condition in Clause 3 and claiming to forfeit the deposit and instalments of the purchase price which had been already paid under Clauses 1 and 2 and totalled $127,765.

These were the facts deposed to in the joint affidavit of the Caveatees filed in support of their application of 26 August 1975 for an order for removal of the caveat. Copies of the Sale Agreement and the letters terminating it were exhibited. So was a copy of a letter from the Caveator's to the Caveatees' solicitors dated 25 October 1974 in which among other things it was said:

> "Our client states that he and your clients have orally agreed for an extension of two months beyond the 28 day of September 1974 for the completion of the purchase.
>
> . . . .
>
> Our said client states that he would complete the purchase on or before the agreed extended date of 28th November, 1974".

The Caveatees in their affidavit denied that any such agreement for an extension of time for payment had been reached; they also averred that the Caveator had not made any attempt to complete the purchase at any time.

As appears from the recitals to the Sale Agreement, this was not the first agreement between the parties for sale of that particular area of land. There had been a former agreement dated 16 December 1973 of which a copy is exhibited to the Caveator's affidavit of 4 November 1975. That former agreement was in substantially the same terms as the Sale Agreement save that the total purchase price was $777,656, the deposit and first instalment of the purchase price payable on execution of the former agreement was $20,000, the next instalment was payable on 16 January 1974 and amounted to $57,765, while the balance of $699,890 was payable on 16 June 1974. Time was made the essence of all the clauses relating to payment and in default of punctual payment of the balance there was provision for forfeiture of the instalments already paid.

As appears from his own affidavit the Caveator did default in payment on 16 June 1974 of the balance of the purchase price under the former agreement. He sought from the Caveatees an extension of three months in which to find the $699,890; but this was refused and the Caveatees claimed to exercise their right to forfeit the instalments of $77,765 which had already been paid. The matter was compromised by the parties entering into the Sale Agreement of 28 June 1974. Instead of being forfeited, the sum of $77,765 was credited to the initial deposit of $97,765 under Clause 1 of the new agreement, the price of the land was increased by $50,000, and the date for payment of the balance of the new purchase

price was 28 September 1974, a little more than three months later than under the former agreement. The former agreement was referred to in the recitals to the Sale Agreement. It was there stated that the Vendors and the Purchaser had mutually agreed to terminate it.

The affidavit of the Caveator bears several indicia of "swearing by the book". For instance, it starts off by referring to the former agreement of 16 December 1973, of which it says:

> "This agreement was not specifically cancelled or withdrawn by any subsequent agreement in writing",

despite the incontrovertible fact that the mutual agreement of the parties to determine it is recited in the Sale Agreement itself. The affidavit then goes on to say that the Caveator agreed to purchase the land for the purpose of developing it in association with some unidentified Third Party from whom he was to receive "certain payments". The principal assertion in the first part of the affidavit is that the Sale Agreement does not contain all the terms agreed between the parties but that some of them were oral; though there is no indication as to when, where or even between whom any oral agreement is alleged to have been made. The oral terms are variously expressed as "time should not be of the essence", "the [Caveatees] would grant me all the time needed to arrange for the development of the property in question in association with a Third Party", and "the time mentioned in the [Sale] Agreement was not to be enforced at all". These alleged oral terms are in flat contradiction to the terms of the written agreement. In their Lordships' view evidence of them is inadmissible under ss. 91 and 92 of the Evidence Ordinance, 1950; but that they should have been put forward at all throws some light upon the credence to be attached to statements made by the Caveator in his affidavit. It defies belief that the Caveatees would have agreed to wait for the $699,890 balance of the purchase price for an indefinite period and without bearing interest until some unspecified third party had agreed to join with the Caveator in developing the property and had made to the Caveator "certain payments" of an unspecified amount. It likewise strains credibility that if there had been any such oral agreement no mention of it should have been made by the Caveator's solicitors when the Caveatees claimed to terminate the Sale Agreement on 30 September 1974.

The learned judge was, in their Lordships' view, justified in rejecting the allegations in this part of the Caveator's affidavit as insufficient to disclose that there was any serious question to be tried as to whether any agreement for the sale of the land by the Caveatees to the Caveator was still subsisting at the date of the hearing of the application.

The next matter relied upon in the Caveator's affidavit is that to the knowledge of the parties the land could not be developed until an access road had been constructed across some adjoining State land. In January 1974, during the currency of the former agreement, the Caveatees, pursuant to its terms, had co-operated in applying for permission to construct the approach road under s. 390 of the National Land Code. According to his affidavit the Caveator at some date that he does not specify embarked on the construction of the road but did not complete it until May 1975. He alleges that the Caveatees actively encouraged him to spend money on the road but does not state that any such encouragement was given to him to do so after he had defaulted on the payment due on 28 September 1974, when the contract was terminated by the Caveatees. He contends that because by building the approach road he has enhanced the value of the Caveatees' land they are estopped from denying his interest in it. Their Lordships can see no legal basis here on

which to found an estoppel. The learned judge did not refer to it in his judgment and although the point was mentioned in the Caveator's Memorandum of Appeal to the Federal Court it was, very sensibly, abandoned at the hearing of the appeal.

The Caveator's affidavit also contains oblique and scattered references to an alleged agreement to extend for two months until 28 November 1974 the date for payment of the balance of the purchase price. It is first referred to in a subordinate clause in which it is said that the Caveatees purported to terminate the agreement "notwithstanding that they had agreed to grant what has been described as an 'extension of time' for a period of two months from the 28th September, 1974". There is nothing to indicate how, when, where and between whom the agreement was made or what were its terms and what was the consideration for it. The omission of any of these particulars was despite the fact that in their affidavit to which the Caveator was replying the Caveatees had sworn that they had never entered into such an agreement. Later there is a reference to the Caveatees "having first agreed and later refused an extension" but without specifying what is the refusal that is relied on; and finally it is said that it was "the refusal for an 'extension' [that] was unreasonable and unlawful bearing in mind all the circumstances of the case". The suggestion that there was any such agreement is inconsistent with the Caveator's earlier assertions in the affidavit that it had been agreed from the outset that the date of payment was to be deferred until the "Third Party" had provided the Caveator with the necessary funds; while if one turns to the contemporaneous correspondence it is difficult to reconcile it with the existence before 28 September 1974 of any agreement to extend the time for payment. On 14 October 1974 the Caveator's solicitors returned to the Caveatees' solicitors the issue document of title to the land—an action quite inconsistent with the time for completion not having expired by then. It was not until after this, on 25 October 1974, that any reference was made to any agreement for an extension of time for payment. That reference was in terms consistent with an agreement giving the Caveator another two months to find the money having been reached after the notice of termination had been received. Furthermore the Caveator never attempted to comply with its provisions by tendering the balance of the purchase price on or before the 28 November 1974 or at all.

In the face of these vague, self-contradictory and implausible assertions on the part of the Caveator, the learned judge accepted the sworn denial of the Caveatees that they had ever agreed to any extension of the time of payment beyond 28 September 1974. Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be. In making such order on the application as he "may think just" the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient *prima facie* plausibility to merit further investigation as to their truth. Since this is a matter upon which the opinions of individual judges may reasonably differ, an appellate court ought not to interfere with the judge's exercise of his discretion under s. 327 of the National Land Code unless the way in which he exercised it is shown to have been manifestly wrong. In the instant case their Lordships see no reason for differing from the opinion of Ajaib Singh J. that the various references

in the Caveator's affidavit to there having been an agreement for a two months' extension of time were too implausible to throw any doubt upon the Caveatees' express denial upon oath that there ever had been one.

Apart altogether from implausibility as to questions of fact their Lordships are not persuaded that an agreement of the kind alleged (so far as this can be ascertained from the references to it in the affidavit) would be capable in law of conferring upon the Caveator any continuing interest in the land or estopping the Caveatees from denying his interest after he had himself failed to perform it or take advantage of it by tendering the balance of the purchase price on or before 28 November 1974.

Finally it was contended on behalf of the Caveator that in so far as the two sums forfeited exceeded ten per cent of the purchase price under the former agreement, viz. $77,765, they amounted to a penalty against which the court would grant relief and that the Caveator was entitled to an equitable charge upon the land for the amount of the excess, viz. $50,000.

This contention was rejected by the learned judge; and although it was raised in the Memorandum of Appeal to the Federal Court it was abandoned by Counsel for the Caveator at the hearing of the appeal. So their Lordships need say no more about it, except that the removal of the caveat will not prevent the Caveator, if he is so advised, from pursuing his claim that monies that the Caveatees have forfeited amounted to a penalty and are recoverable.

Their Lordships therefore see no ground upon which an appellate court would be justified in interfering with the way in which Ajaib Singh J. exercised his discretion to order the removal of the caveat.

In the Federal Court the argument appears to have turned upon the circumstances in which the Sale Agreement was terminated. Time being of the essence of the provisions in the Sale Agreement for payment of the purchase price, the failure of the Caveator to pay on the due date was a breach of condition which the Caveatees were entitled to elect to treat as bringing the contract to an end. This they did by their letters of 30 September 1974. It would appear that the Federal Court took the view, which their Lordships have already held to be erroneous, that once the Caveator had asserted in his affidavit that the Sale Agreement had not been lawfully terminated and had commenced an action for specific performance of it, the court had no option but to leave the caveat in existence until the action was tried. The Federal Court accordingly did not consider whether the learned judge's evaluation of the affidavit evidence on which he based the exercise of his discretion was manifestly wrong.

For the reasons given earlier in this opinion their Lordships consider that Ajaib Singh J.'s evaluation of the affidavit evidence was justified and that there is no ground for an appellate court to interfere with the way in which his discretion was exercised.

Their Lordships will accordingly advise His Majesty the Yang di-Pertuan Agong that this appeal should be allowed with costs here and in the Federal Court and that the order of the High Court of 10 November 1975 should be restored.

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