

**Thevathason v Kwong Joon**

HIGH COURT (JOHORE BAHRU) — ORIGINATING  
MOTION NO 25-37 OF 1989  
LC VOHRAH J  
7 APRIL 1990

*Land Law — Registration of titles — Caveat — Removal of — Right of caveatee to lodge fresh caveat after lapsing of original caveat — Whether extinguished — National Land Code 1965, ss 326 & 328(1)*

This was an application on the part of the plaintiff to remove a caveat filed by the defendant in respect of a piece of land known as HS (D) 19335 TLO 10489 Township of Johore Bahru ('the said piece of land').

By a sale and purchase agreement executed on 6 May 1980 between Jet Age Construction Sdn Bhd ('the developer') and the defendant, it was agreed that the developer would sell the said piece of land together with a dwelling house to be built thereon for a total purchase price of \$65,010. The defendant paid the sum of \$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 by 6 November 1981. The house was never built. On 4 December 1982, the developer charged the said piece of land together with 26 other pieces of land in respect of other purchasers to the plaintiff. On 3 January 1983, the defendant caused a private caveat to be lodged on the said piece of land ('the first caveat') to protect his interest 'as a bona fide purchaser with valuable consideration'. On 16 February 1989, after the expiry of the first caveat the defendant lodged another caveat which he withdrew on 26 April 1989 ('the second caveat'). On the very same day the defendant lodged yet another caveat ('the third caveat').

**Held**, dismissing the plaintiff's application:

(1) The National Land Code 1965 contains no express provisions prohibiting the entry of a fresh caveat after the lapse of the first caveat at the end of six years.

(2) There is no prohibition in law against 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.

[*Editorial Note*: The plaintiff has appealed to the Supreme Court vide Civil Appeal No 02-516 of 1990.]

**Cases referred to**

- 1 *Damodaran v Vasudeva* [1974] 1 MLJ 128 (distd)
- 2 *KIMuhiudeen Rawther v KEP Abdul Kassim & Ors* [1959] MLJ 257 (not folld)
- 3 *Lim Kiat Moy v Hamzah* [1966] 2 MLJ 175 (not folld)

**Legislation referred to**

National Land Code 1965 ss 326, 328(1)

*P Suppiah* for the plaintiff.

*Lj Lau (Miss)* for the defendant.

*Cur Adv Vult*

**LC Vohrah J:** This was an application on the part of the plaintiff (chargee) to remove a caveat filed by the defen-

**A** dant in respect of a piece of land known as HD(D) 19335 TLO 10489 Township of Johore Bahru ('the said piece of land').

**B** The facts as discerned from the affidavits filed are as follows. By a sale and purchase agreement executed on 6 May 1980 between Jet Age Construction Sdn Bhd ('the developer') and the defendant, it was agreed that the developer would sell the said piece of land together with a dwelling house to be built thereon for a total purchase price of \$65,010. The defendant paid the sum of \$6,501 to the developer as deposit and a further sum of \$350 as additional payment for improvement on the house lot.

**C** The developer contracted to build the dwelling house and hand over vacant possession by 6 November 1981. The house was never built. On 4 December 1982, the developer charged the said piece of land together with 26 other pieces of land in respect of other purchasers to the plaintiff. On 3 January 1983, the defendant caused a private caveat to be lodged on the said piece of land ('the first caveat') to protect his interest 'as a bona fide purchaser with valuable consideration'. On 17 October 1985, the defendant filed Suit No 999/85 against the developer for, inter alia, specific performance of the sale and purchase agreement or for damages in lieu. This suit is still pending.

**D** On 16 February 1989 after the expiry of the first caveat, the defendant lodged another caveat which he withdrew on 26 April 1989 ('the second caveat'). On the very same day, the defendant lodged yet another caveat ('the third caveat') on the ground that he had filed the civil suit against the developer. No less than 13 civil suits have been

**E** filed by various purchasers (apart from the defendant) against the developer in respect of its housing project.

**F**

**G** The defendant in his affidavit-in-reply alleged, inter alia, that the charge created in respect of the said piece of land was a 'sham transaction without consideration' and that the charge transaction was void because the plaintiff was not a licensed moneylender and opposed the application in order to protect his interest until the disposal of his suit.

**H** It would be convenient at this point to reproduce the relevant provisions of the National Land Code 1965 which were referred to by counsel. Section 326 relating to the removal of private caveats by the registrar reads:

(1) Any person or body whose land or interest is bound by a private caveat may at any time apply in Form 9 to the Registrar for its removal, and such application shall be accompanied by the prescribed fee.

**I** (1A) On receiving any application for removal under this section, the Registrar shall —

(a) serve upon the person or body at whose instance the caveat was entered a notice of intended removal in Form 19C; and

(b) subject to sub-section (2), remove the caveat at the expiry of the period of one month specified in that notice.

(2) The Court may, on the application of any person or body on whom such a notice has been served (and acting, if the circumstances so require, *ex parte*), from time to time extend the said period of one month; and the Registrar, on being duly served with any order of the Court under this subsection, shall not remove the caveat until the expiry of the said period as thereby extended.

(3) The Registrar shall remove any caveat pursuant to this section by cancelling the entry thereof on the register document of title, and noting thereon the reason for the cancellation and the date thereof.

(4) Every cancellation under sub-section (3) shall be signed and sealed.

Section 328 relating to lapse of private caveats reads:

(1) A private caveat shall, if not sooner withdrawn under section 325 or removed by the Registrar pursuant to section 326 or an order of the Court under section 327, lapse at the expiry of six years from the time from which it took effect, and the entry thereof may be cancelled accordingly by the Registrar, either of his own motion or on an application in that behalf by any interested person or body.

(2) Every cancellation under sub-section (1) shall be signed and sealed.

At the hearing of this application, counsel for the plaintiff submitted that there was only one issue for determination and that it was a purely legal issue as to whether 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 under the provisions of s 328(1). The only authority he cited for the determination of this issue (which was also the sole authority relied upon by counsel for the defendant) was the case of *Damodaran v Vasudeva*.<sup>1</sup> This authority dealt with the question as to whether it was proper for two private caveats to be issued at the instance of the same applicant in respect of the same land and on precisely the same grounds. Counsel for the plaintiff contended that once a caveat had lapsed no further caveats could be filed in respect of the same subject matter and referred to what Syed Agil Barakbah J (as he then was), when addressing his mind specifically to the provisions of s 326(2) of the Code relating to the removal of private caveats by the Registrar of Titles, had to say at p 129:

The object of the subsection is dealt with in precise detail by Raja Azlan Shah J (as he then was) in *Lim Kiat Moy v Hamzah* ([1966] 2 MLJ 175) which I accept with respect. It is clear that the word 'extend' appearing in the subsection has to be construed according to 'its use in the common intercourse of mankind and the popular meaning attributed to it is that it enlarges or gives further duration to any existing right rather than revert an expired right'. In other words, it 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 re-creation as to allow the issue of another caveat on or before the expiry of the existing one. This is because once a caveat has lapsed and a memorial thereof is made by the registering authority, it is extinguished forever and the court has no power to revive, renew or continue a caveat after its lapse. The extinc-

tion is final and irrevocable. (Per Ong J (as he then was) in *KI Muhiudeen Rawther v KEP Abdul Kassim & Ors* ([1959] 25 MLJ 257).) If the subsection were to be construed otherwise a great public injury would be effected by calling back a right that by lapse of time has become extinct. (Per Raja Azlan Shah J (as he then was) in *Lim Kiat Moy's case, supra*). Further, s 328(1) provides for a caveat to lapse at the expiry of six years from the time from which it took effect unless earlier withdrawn or removed. Considering its object and function the period is long enough for one caveat to be in existence at any one time without there being entered another caveat.

and at p 130:

If the law is allowed to be circumvented by recognizing 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, counsel for the defendant argued that the same authority allowed the third caveat to be lodged on a new ground, namely, the institution of the civil suit for specific performance of the sale and purchase agreement in 1985, a ground which did not exist in 1982 when the first caveat was lodged. She relied on an earlier statement of the learned judge in the same penultimate paragraph also at p 130 as follows:

... The subsection may be construed as to enable another caveat to be entered provided it is based on different grounds from the former and after the former caveat has ceased to exist. In other words it is not a renewal, revival or continuance of the former; it speaks of an entirely separate caveat distinct from the other.

It was not in dispute that the ground on which the third caveat was lodged was a new and fresh ground and my function was to determine whether there was anything in law which prevented a further caveat from being lodged upon the lapse of the first caveat at the expiry of six years from the time from which the first caveat took effect. In other words, did the automatic lapsing of the first caveat on the expiry of six years extinguish finally and irrevocably the caveatee's right to lodge another caveat?

An examination of the National Land Code 1965 did not reveal any express provisions prohibiting the entry of a fresh caveat after the lapse of the first caveat at the end of six years. The only judgment that was cited by both counsel for consideration of this question, as I mentioned, was *Damodaran v Vasudeva*<sup>1</sup> but that case only lays down the proposition that the court has no power to renew or extend a caveat on the same ground and clearly does not forbid or disallow a fresh or further caveat 'to be entered provided it is based on different grounds from the former and after the former caveat has ceased to exist'.

It was only in *Muhiudeen Rawther's case*<sup>2</sup> that it was stated that once a caveat had lapsed and a memorial made by the registering authority it was extinguished forever. That case however dealt with the powers expressly given to the court by the former Land Code (Cap 138) and

related to specific provisions which were not identical or comparable to provisions of the National Land Code 1965 or to s 328 thereof relating to the lapse of private caveats. *Lim Kiat Moy's* case<sup>3</sup> turned on the interpretation of the specific provisions of s 326 of the National Land Code 1965 and was concerned with the meaning of the word 'extend' in that section. I did not think that both these authorities which were cited in *Damodaran v Vasudeva*<sup>1</sup> 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 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.

I accordingly dismissed the application with costs.

*Application dismissed.*

Solicitors: *J Singh & Co; Foo & Woon.*

Reported by *Kevin Mathews*

## Public Prosecutor v Tiong Ching Heng

HIGH COURT (MUAR) — CRIMINAL APPEAL NO 52-5 OF  
1987  
RICHARD TALALLA JC  
1 APRIL 1990

*Criminal Procedure — Institution of proceedings — Consent of deputy public prosecutor — Whether vitiated by conduct — Prevention of Corruption Act 1961, s 26(1)*

The respondent was charged before the learned sessions court judge under s 3(a)(ii) of the Prevention of Corruption Act 1961 ('the Act'). The respondent claimed trial and at the end of the case for the prosecution, the learned judge acquitted the respondent without calling for his defence. Section 26(1) of the Act provides that a prosecution under the Act shall not be instituted except by or with the consent of the prosecutor. In this case there was such a consent. There was nothing wrong with it except for a misspelt name. The deputy public prosecutor under whose hand the consent was given was called as a witness. He testified that the mistake was a typographical error. The respondent attacked the validity of this consent. He submitted that it was insufficient for the deputy public prosecutor merely to rely

A on the brief facts or any information given by the investigating officer. The learned judge accepted this submission and acquitted and discharged the respondent without calling for his defence. The learned judge said that the trial was a nullity because the learned deputy public prosecutor did not study the investigation papers but instead issued his consent based on information given to him by the investigating officer.

B **Held**, allowing the public prosecutor's appeal:

(1) Where the prosecutor himself testifies in the trial expressly to correct a mistake in spelling, his consent is implied in his action.

(2) All that was required was the consent of the prosecutor. The prosecutor was not required in law to come forward and explain how he came to give such consent.

C (3) The consent was valid and the trial should proceed.

### Cases referred to

- 1 *Abdul Hamid v PP* [1956] MLJ 231 (refd)
- 2 *PP v Mohamed Halipah* [1982] 1 MLJ 155 (refd)
- 3 *PP v Oie Hee Koi* [1968] 1 MLJ 148 (refd)

D

### Legislation referred to

Evidence Act 1950 s 114(e)  
Prevention of Corruption Act 1961 s 26(1)

*Tan Poh Lai (Cik)* (Deputy Public Prosecutor) for the appellant.

E Respondent in person.

*Cur Adv Vult*

**Richard Talalla JC:** The respondent was charged before the learned sessions court judge as follows:

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That you on 7 July 1983 between 3pm to 4pm at a shop namely Tong Huat Motor Co, No 69, Jalan Besar, Parit Sulong, in the District of Batu Pahat, in the State of Johor, did corruptly receive for yourself a gratification, to wit, \$70 cash, from one Sumadi bin Hj Ahmad, as an inducement to a member of a public body, to wit, Constable 97713 Zainuddin bin Hashim, Balai Polis Parit Sulong for forbearing to a thing in respect of a matter in which the public body is concerned, to wit, not taking legal action against one Mohd Rahman Bin Sumadi, who had allegedly committed traffic offences for riding an unregistered motor cycle without a driving licence on 6 July 1983 at about 4.30pm at the Main Road, Parit Sulong and that you thereby committed an offence under section 3(a) (ii) and punishable under section 3 of the Prevention of Corruption Act 1961 (Laws of Malaysia Act 57).

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H

The respondent claimed trial to the charge. A trial followed. At the end of the case for the prosecution, the learned judge acquitted the respondent without calling on him for his defence.

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Section 26(1) of the Prevention of Corruption Act 1961 provides that a prosecution under that Act shall not be instituted except by or with the consent of the prosecutor. In this case there was such a consent. There was nothing wrong with it except for a misspelt name. As stated in the charge the shop at which the offence is alleged to have taken place was named Tong Huat Motor Co. In the consent the name 'Tong' was misspelt 'Tiong'.