



## **RESTRAINTS ON DEALING UNDER THE NATIONAL LAND CODE 1965: PRIVATE CAVEATS**

*by*

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### **Introduction**

The Malaysian National Land Code 1965 (“NLC”) is a codified set of laws, rules, regulations and procedures that govern land transactions in West Malaysia. Sabah and Sarawak have their own set of laws and rules under the Sabah Land Ordinance and the Sarawak Land Code. The NLC is divided into thirty five Parts and is, at first glance, an intimidating piece of legislation. Nevertheless, it is essential for every conveyancer to understand the fundamentals of each part and how each chapter therein applies to individual circumstances.

One such part under Part Nineteen is entitled Restraints on Dealing and covers two important sections; caveats and prohibitory orders. There are four types of caveats registrable under Part Nineteen namely Registrar’s Caveats, Private Caveats, Lien-Holders’ Caveats and Trust Caveats. This article will focus on the law surrounding Private Caveats.

### **Private Caveats**

Consider this scenario.



You, as the registered proprietor of a piece of land sign an offer letter with a willing buyer for the purchase of the said land. A few days after signing the Sale and Purchase agreement, the buyer's solicitor informs your solicitor that upon conducting a land search on the said land, it was discovered that a private caveat had been entered on the land by a private individual one year prior. You had no knowledge of the private caveat entered on your land although you recognise the name of the caveator to be a previous potential buyer of the land. You now face the risk of the current intended buyer terminating the agreement unless the private caveat is successfully removed as you agreed to sell the land "free from all encumbrances".<sup>[1]</sup>

If you are a seasoned property manager or if you have had prior experience in such dealings, it is likely that you would know and understand the consequences of a private caveat binding your land. However, it is often the case that land owners are left feeling angered and cheated at the thought of another party entering a caveat on their land, more so without their consent. What then are the remedies or options available in such circumstances?

In order to fully appreciate the remedies and options available, we shall first examine the nature and effect of private caveats as well as the instances in which an application may be made to enter a private caveat on a title to land.

#### **I) Nature and effect of private caveats<sup>[2]</sup>**



A private caveat entered by the Registrar on the document of title to land may bind the entire land, an undivided share in the land or a specific interest in the land.<sup>[3]</sup> The effect of a caveat is to prohibit the registration, endorsement or entry of any dealings on the register document of title and to also preserve the status quo of the land pending resolution of a dispute by the Court.<sup>[4]</sup> Dealings include transfers pursuant to sale agreements and trust deeds. The registration of an instrument of dealing or endorsement may still be made however if the consent of the caveator is obtained or if the entry is made by the caveator himself.<sup>[5]</sup> For the sake of clarity, the term “caveator” is used for the person who entered the caveat and “caveatee” for the person whose land or interest is bound by the caveat.

## **II) Application for entry of private caveats<sup>[6]</sup>**

Revisiting the scenario posed earlier, land owners often ask the question of how one party is able to caveat land belonging to another without the express consent of the land owner. In addressing this point, the NLC states that a private caveat may be entered by:-

- a) Any person or body claiming title to, or any registrable interest in, any alienated land or undivided share in any alienated land or any right to such title or interest;
- b) Any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and
- c) The guardian or next friend of any minor claiming to be entitled as mentioned in paragraph (b).

An application for the entry of a private caveat is made by filling up Form 19B, stating the nature of the claim and submitting it together with the prescribed fee and a statutory declaration verifying the grounds to the claim. The caveator must also state expressly whether the caveat is to bind the land or a particular interest only. Whilst the application procedure may appear straightforward, care must be taken when preparing and formulating the application as non-compliance with the requirements may be fatal and be valid grounds for removal.<sup>[7]</sup>

Once the application has been prepared and submitted at the relevant land office, the Registrar has an administrative duty to enter the caveat and so long as the application satisfies the provisions of the NLC, is in statutory form and duly attested with the supporting documents and prescribed fees, the Registrar must enter it.<sup>[8]</sup>

From the above categories of persons allowed to enter private caveats on any land, item (c) is self-explanatory. In all cases whether under items (a), (b) or (c), the Courts have held that the caveator must possess and disclose a “caveatable interest” on the land. In the Federal Court case of *Score Options Sdn. Bhd. v. Mexaland Development Sdn. Bhd.*,<sup>[9]</sup> Arifin Zakaria CJ in delivering the judgement of the court stated that “...*the only parties authorised to lodge a private caveat are those who may effect dealings in the particular interests in the land. Those parties may either have a claim to the title to the land or a claim to a registrable interest in the land or a claim to any right to such title or registrable interest*”.



Situations which have given rise to a caveatable interest include purchasers under a sale and purchase agreement where the earnest deposit has been paid.<sup>[10]</sup> However an option to purchase which creates future interest does not give rise to a caveatable interest as the interest must be an existing one.<sup>[11]</sup> It has been further established by the Courts that joint venture agreements for sharing of profits do not create caveatable interests.<sup>[12]</sup>

It is to be noted that the Courts have repeatedly held that a caveat is purely a creature of statute and can only be lodged and maintained according to the statute. Parties cannot by agreement between themselves create a caveatable interest.<sup>[13]</sup>

At this juncture, we consider a common complication that arises where there is one title for a large piece of land belonging to numerous land owners and a caveat or several caveats have been entered on the land. Although caveats are available for particular interests in land or an undivided share, a caveator may wrongfully enter a caveat on the entire land which binds the whole land itself. In such situations, none of the land owners would be able to register any dealings on their portion of the land due to the entry of the caveat. One option available would be to firstly, conduct a search at the relevant land office to determine the details of the caveator and the reasons for entering the caveat. If there is urgency in registering a dealing on the said land or if time is limited, it would be advisable to try to obtain the written consent of the caveator to the registration of the dealing in particular and submit the consent together with the instrument of dealing. Nevertheless, this option is rarely exercised as effort will be needed to locate and contact the caveator and in some



cases, the details of the caveator on the land register may be inaccurate or not updated.

### **III) Removal of Private Caveats**

#### **a) Section 325 NLC- Withdrawal by caveator**

Section 325 provides the caveator with the option to withdraw his caveat at any time by filling a notice in Form 19G together with the prescribed fee. Upon receiving the notice, the Registrar will then cancel the caveat and notify the respective party whose land or interests were previously bound. This option is commonly exercised by buyers who had initially entered a caveat to protect their interests upon paying the deposit under a Sale and Purchase agreement. Subsequently, at the point of presentation of the transfer documents, the buyer will withdraw the caveat in order to register the dealing.

#### **b) Section 326 NLC- Removal by Registrar**

Section 326 states that any person or body whose land or interest is bound by a private caveat (caveatee) may at any time apply for the removal of the caveat. The category of persons or bodies that may apply for removal under this section are the registered proprietors, registered chargees, registered lessees and sub-lessees.<sup>[14]</sup> Upon receiving the application from the caveatee, the Registrar will notify the caveator and if the caveator wishes to object to the removal, he would have to obtain a court order for the extension of the caveat. If the court order is not obtained and served upon the Registrar within two months from receipt of the notification, the caveat

will be cancelled. Once a caveat is cancelled, it cannot be extended.<sup>[15]</sup> Section 326 would therefore be the remedy available to land owners, as in the scenario posed above, who have discovered that a caveat has been wrongfully entered on their land.

In *Eng Mee Yong & Ors v. Letchumanan*,<sup>[16]</sup> the Privy Council held that under section 326, a caveatee can rely on his registered title as *prima facie* evidence of his unfettered right to deal with the land as he pleases and it is for the caveator to prove in law and fact that there are sufficient grounds for continuing the caveat which prevents the caveatee from dealing with the land. In deciding whether to grant an extension of caveat, the guiding principles can be found in the case of *Luggage Distributors (M) Sdn. Bhd. v. Tan Hor Teng & Anor*<sup>[17]</sup> where Gopal Sri Ram JCA (as he was then) stated at p. 535 that “*The first stage is the examination of the grounds expressed in the application for the caveat. If the grounds stated therein are insufficient in law to support a caveat then cadit quaestio the caveat must be removed without the necessity of going any further*”. The second stage involves the caveator showing that his claim discloses a serious question meriting a trial and the third stage is to determine “*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*”.<sup>[18]</sup>

The Courts have taken the position that the above considerations should be confined to the claims and facts set out in the application by the caveator under section 323(1) of the NLC and other grounds not stated in the application should not be considered.<sup>[19]</sup> The second stage of the test

referred to in *Luggage Distributors (M) Sdn. Bhd.*<sup>[20]</sup> speaks about a claim meriting a trial and therefore the caveator should also satisfy the Court that legal proceedings have been initiated. As aptly stated by Lord Diplock in *Eng Mee Yong & Ors v. Letchumanan*,<sup>[21]</sup> “*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, in an ordinary action brought by the caveator against the caveatee for that purpose...caveats are available, in appropriate cases, for the interim protection of rights to title to land or registrable interests in land that are alleged by the caveator but not yet proved*”. Therefore, if there has been inaction on the caveator’s part to initiate legal proceedings, it would appear that the application to extend the caveat should fail. It is only upon the satisfaction of these three stages that the caveat should be extended.

c) Section 327 NLC- Removal by Court

Section 327 on the other hand, provides that any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal. Upon receiving the order, the Registrar shall cancel the caveat, noting the reason and date.<sup>[22]</sup> Unlike section 326, the category of applicants under this section covers any person whose land or interest is adversely affected by the entry of the caveat and includes those persons under section 326.

There are two issues to be considered under section 327 (1) NLC; firstly whether the Plaintiff is an aggrieved person and secondly, whether the

defendant has shown a caveatable interest in the property.<sup>[23]</sup> The burden on the Plaintiff under section 327 is heavier than under section 326 as it is for the Plaintiff to first prove that he is entitled to apply to remove the caveat by establishing that he is aggrieved by the existence of the caveat.<sup>[24]</sup> Once this has been established, the three stage test established in *Luggage Distributors (M) Sdn. Bhd.*<sup>[25]</sup> will apply.

A private caveat, in any event, lapses at the expiry of six years from the time it took effect and will either be cancelled automatically by the Registrar on his own motion or on an application by any interested person or body.<sup>[26]</sup> In some cases, the land owner or aggrieved party as it may be, only discovers the caveat entry many years after its entry when there's a new dealing on the land. In such instances, a direct application can be made to the Registrar for its removal without having to go to Court or involving the caveator.

The land owner also has the option of claiming compensation from the caveator for wrongfully entering the caveat and causing losses.<sup>[27]</sup> Such a situation could arise where a buyer, as indicated in the scenario above, has terminated a Sale and Purchase agreement on grounds that, contrary to the terms of the agreement, the land is not free from all encumbrances. The aggrieved party will however be required to prove losses or damages resulting from the wrongful entry.<sup>[28]</sup>

## **Conclusion**

Private caveats, whilst there to protect the legitimate interests of third parties, have been abused by non-interested parties to prevent dealings by

land owners. The claims behind these entries are sometimes malicious and unwarranted and the ease at which such entries are made can be attributed to the rather administrative process of entering the caveat whereby the merits of the application are not considered by the Registrar. Consequently, the burden and cost is then on the land owner or other aggrieved party to take onerous steps for its removal. Nevertheless, knowing that there are options and remedies available to release the land, whether through the Court system or by the Registrar, is to some degree a consolation for land owners and other aggrieved parties.

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**Endnotes:**

[<sup>1</sup>] *Lee Chin Cheng Dengkil Oil Palm v. Kaplands Sdn. Bhd.* [2002] 4 CLJ 753.

[<sup>2</sup>] s. 322 NLC.

[<sup>3</sup>] s. 322(1) NLC.

[<sup>4</sup>] *Kho Ah Soon v. Duniaga Sdn. Bhd* [1996] 2 MLJ 181.

[<sup>5</sup>] s. 322(5) NLC.

[<sup>6</sup>] s. 323 NLC.

[<sup>7</sup>] *Tan Heng Poh v. Tan Boon Thong & Ors* [1992] 2 MLJ 1.

[<sup>8</sup>] “*Principles of Malaysian Land Law*” by Ainul Jaria Maidin, Sharifah Zubaidah Syed Abd. Kader, Bashiram Begum, Fauziah Md Noor, Nor Asiah Mohamed, Azlinor Suffian and Ratna Aziz Bt Rosli, LexisNexis 2008.



[9] [2012] 7 CLJ 802.

[10] *Macon Engineering Sdn. Bhd. v. Goh Hooi Yin* [1976] 1 LNS 67.

[11] *Goo Hee Sing v. Will Raja Perumal & Anor* [1994] 1 CLJ 255.

[12] *Tan Geok Teck & Yang Lain lwn. Upaya Kelana (M) Sdn Bhd* [2007] 3 CLJ 312.

[13] *Wong Kuan Tan v. Gambut Development Sdn Bhd* [1984] 1 CLJ Rep 441; [1984] 2 CLJ 26.

[14] *Eng Mee Yong v. Letchumanan* [1979] 2 MLJ 212.

[15] *Maniam Kandasamy v. Pentadbir Tanah Daerah Raub & Anor* [2011] 7 CLJ 583.

[16] [1979] 2 MLJ 212.

[17] [1995] 3 CLJ 520.

[18] *Murugappa Chettiar Lakshamanan v. Lee Teck Mook* [1995] 1 MLJ 782.

[19] *Chen Sook Peng v. Wee Phean Yung* [2004] 5 MLJ 116.

[20] [1995] 3 CLJ 520.

[21] [1979] 2 MLJ 212.

[22] s. 327(2) NLC.

[23] *Soon Seng Co Sdn. Bhd. v. Toko Palayakat Jamal (M) Sdn. Bhd.* [1999] 5 MLJ 75.

[24] See *Wu Sun Chen v. Raja Zainal Abidin b Raja Hussin* [1977] 2 MLJ 487 for definition of “aggrieved person”.

[25] [1995] 3 CLJ 520.

[26] s. 328 NLC.



[27] s. 329 NLC.

[28] *Mawar Biru Sdn. Bhd. v. Lim Kai Chew* [1992] 1 LNS 22.