

CAVEATS

There are four (4) types of Caveats under the National Land Code, namely –

Registrar's Caveats (Sections 319 to 321)

Private Caveats (Sections 322 to 329)

Lien-holder's Caveats (Sections 330 to 331)

Trust Caveats (Sections 332 to 333)

1. Registrar's Caveats

A Registrar's Caveat (also known as a Land Administrator's Caveat where it affects alienated land under Land Office title) may be entered by the Registrar (or Land Administrator) in any of the circumstances specified in Section 320, one of which is for securing the payment of debt due and owing to the government e.g. income tax liabilities under Section 320(1)(ba).

This sub-section was enacted after the Government suffered a defeat in the Federal Court in *Temenggong Securities Ltd. & Anor v. Registrar of Titles Johor & Ors* (1974)2 MLJ 45 where the Registrar's Caveat to secure income tax liabilities was removed as the proprietor no longer has any beneficial interest in the land.

The effect of a Registrar's Caveat under Section 319(1)(b) is substantially similar to that of a private caveat under Section 322(2) subject to this important distinction i.e. the Registrar's Caveat will prevent the registration of any instrument of dealing presented prior to the entry thereof so long as the registration of the instrument has not been completed by the Registrar in accordance with Section 304 (see Section 319(2) and Section 322(4) of the Code).

The Registrar is also empowered to waive (under Section 319(3)) the prohibition under the Registrar's caveat where he is satisfied that to do so would not be inconsistent with the purpose for which the caveat was entered e.g. in respect of a transfer from a trustee to a beneficiary whose interest was protected under the Registrar's Caveat.

Unlike a private caveat under Section 328 a Registrar's Caveat does not lapse at the expiry of six (6) years and shall continue in force until it is cancelled by the Registrar in the circumstances set out in Section 321(3) i.e. on his own motion, on application by the proprietor or pursuant to order of court.

2. Private Caveats

An application for entry of private caveat shall be made in the prescribed form vide Form 19B in accordance with Section 323 by any person or body claiming an interest in the alienated land.

Initially, the proviso to Section 322(1) that “such a caveat shall not be capable of being entered in respect of a part of the land” introduced on 25.3.85 vide Act 587/1984 give rise to some difficulties as it was contended that a person claiming an interest in a portion is not entitled to caveat the whole land.

This contention has been rejected by the Federal Court in *Chor Phaik Har v. Farlim Properties Sdn. Bhd.* (1994) 3 MLJ 345.

Consequently, a purchaser of a housing accommodation without individual or strata title is entitled to lodge a caveat against the “master” title though in practice many developers would give their consent to any assignment by the Purchaser to his financial institution only on condition no private caveat be lodged.

This “no caveat” condition may be prejudicial to the interest of the purchaser and/or his financiers in the following events e.g.

- (a) the Developer creates additional charges;
- (b) the Developer transfers the land to a third party;
- (c) forfeiture action for non-payment of quit rent has been taken by the State Authority which is required to serve notice only on any person or body having a claim protected by a caveat (Section 98(1) and Section 129(2) of the Code).

Another problem that may be encountered at some land registries concerns the attestation of the application for private caveat over land under Malay Reservation.

Acting on the directions contained in KPTG Circular 2/92, the Registrar may reject the Form 19B on the ground it was attested by an advocate and solicitor and not by the Land Administrator.

With respect the KPTG Circular may have been issued in error without taking into account the meaning of “dealing” as defined in Section 5 of the Code.

It is clear the requirement that applications for caveat over Malay Reservation lands must be attested by a Land Administrator is contrary to the Code as it is applicable only to dealings e.g. transfer, charge or lease.

A caveat is expressly excluded from the definition of "dealing" in Section 5 of the Code.

Another hassle that may arise at certain land registries is the refusal of the Registrar to appreciate that a caveat is not a dealing within the meaning of Section 5 of the Code and consequently, the provisions of paragraph 6 of the Tenth Schedule specifying the correct dimensions of a form relating to a dealing are not applicable to an application for entry of caveat but only to an instrument of dealing.

It is also noted with regret the failure of many Registrars to recognise that in dealing with an application for entry of private caveat they are under no duty to enquire into the validity of the caveator's claim as mentioned in Section 324.

It has been ruled by the Federal Court that in the performance of his duty in entering a private caveat, the Registrar exercises a purely administrative function (*Nanyang Development (1966) Sdn. Bhd. v. How Swee Poh* (1970) 1 MLJ 46.)

It is therefore in excess of the Registrar's powers to require the applicant to substantiate his claim by e.g. production of the sale purchase agreement or other documents.

It should be noted that a private caveat cannot prevent the registration of a memorandum of discharge as the discharge is not an "instrument of dealing executed by or on behalf of the proprietor" within the purview of Section 322 (2)(a).

This view is confirmed by the learned author S.K. Das in "The Torrens System in Malaya" at page 328.

If a caveat is not withdrawn by the caveator in accordance with Section 325 the proprietor or chargee may apply to the Registrar for its removal pursuant to Section 326 and unless it has been extended by an order of court the caveat will lapse at the expiry of two (2) months from the date of service of the Form 19C (Notice of Intended Removal).

It should be noted that the extension order would be ineffective to prevent the lapse of the caveat under Section 326 (1B) unless it is served on the Registrar prior to the expiry of the said period.

A proprietor, chargor or any person aggrieved by the existence of the caveat e.g. a purchaser or intended chargee may also apply under Section 327 to the Court for its removal.

The normal life span of a private caveat is six (6) years as provided under Section 328 unless withdrawn under Section 325 or extended under Section 326 (2) or cancelled by the Court under Section 327.

3. Lien-holder's Caveats

A Lender (e.g. a financial institution) with whom the issue document of title to any land has been deposited as security for a loan may instead of accepting a charge apply vide Form 19D to the Registrar pursuant to Section 330 for the entry of a lien-holder's caveat.

Such application is required to be supported by the production of the issue document of title.

However, the endorsement of the lien-holder's caveat will only appear on the register document of title as provided under Section 330(3)(a) but not on the issue document of title.

A lien-holder's caveat have the like effect as that specified in Section 322 in relation to a private caveat but a lien-holder's caveat does not lapse at the expiry of six (6) years (though it may be withdrawn by notice in accordance with Section 331).

To be effective as a lien-holder's caveat, the issue document of title must be deposited with the lender by or with the consent of all the proprietors and not merely by a borrower who is not the sole proprietor.

4. Trust Caveats

An application for entry of a trust caveat may be made in accordance with Section 333 vide Form 19E by –

- (a) the trustees for the time being of the land or interest;
- (b) the transferor of the land or interest; or
- (c) the beneficiaries of the land or interest.

A trust caveat shall continue in force until cancelled by the Registrar on joint application by the trustees and the beneficiaries in accordance with Section 333(5).

In practice, a beneficiary would normally protect his interest by applying for entry of a private caveat pursuant to Section 323 which may be easily withdrawn in accordance with Section 325 without the concurrence of the trustees as in the case of a trust caveat.

5. Other Restraints on Dealings

A judgment creditor may attach any land registered in the name of a judgment debtor by obtaining a prohibitory order from a court of competent jurisdiction.

The prohibitory order shall take effect upon endorsement on the register document of title in accordance with Section 335.

The prohibitory order has the same effect as a private caveat save and except that it cannot prohibit the registration of a certificate of sale as provided in Section 336(2)(a).

A prohibitory order will lapse at the expiry of six (6) months from the date of the order – not from the date it was endorsed on register document of title – Section 338(1).

Though it may be extended by order of court it would have no effect unless a copy of the extension order is presented for registration at the land registry prior to its expiry date – Section 338(2).

A prohibitory order may be withdrawn by order of court and shall cease to be effective on registration of the transfer executed by an officer of the Court under Section 337 or registration of certificate of sale – Section 339.

6. Lis Pendens

It has been decided by the Privy Council in *Damodaran v. Choe Kuan Him* (1979) 2 MLJ 267 that where by reason of a pending action in which the title is in dispute, the proper and effective way of suspending the registered proprietor's right to transfer the land pending the determination of the action is by entry of a private caveat and not by the registration of a lis pendens which was developed as part of the English land law and inconsistent with the Torrens System of registration of title to land.

The whole purpose of the Torrens System under the Code is to get away from the complicated system of rules regulating land dealings in England (see Section 6 Civil Law Act 1956).