Salbiah Bte Adnan *v* Micro Credit Pte Ltd
[2014] SGHC 249

Case Number : Originating Summons No 238 of 2014

Decision Date : 26 November 2014

Tribunal/Court : High Court

Coram : Edmund Leow JC

Counsel Name(s) : Mohamed Hashim bin Abdul Rasheed (A Mohamed Hashim) for the plaintiff; SR Shanmugam (Shan & Co) for the defendant.

Parties : Salbiah Bte Adnan — Micro Credit Pte Ltd

Land – Caveats

26 November 2014 Judgment reserved.

Edmund Leow JC:

Introduction

1 This case concerns a caveat ("the Caveat") lodged by the Defendant moneylender on a property ("the Property") held by the Plaintiff and her ex-husband ("Zam") as joint tenants. The Caveat was lodged to secure the Defendant's interest in the sale proceeds of the Property to repay a loan that Zam obtained from the Defendant. The Plaintiff claims that she did not consent to the lodgement of the Caveat on the Property and is applying for it to be removed. As will be seen, this case raises some interesting and difficult issues of land law, in particular, the law in relation to caveats.

Facts

2 The Plaintiff and Zam were married on 24 November 1995 and divorced on 6 December 2012.

3 The Defendant is a licensed moneylender under the Moneylenders Act (Cap 188, 2010 Rev Ed) ("the MLA").

4 The rest of the facts are disputed. I will therefore present both the Plaintiff's and the Defendant's accounts separately.

The Defendant's account

5 On 24 September 2009, Zam approached the Defendant to borrow $2,000 for the Hari Raya festive season. He filled up the loan application form and submitted copies of the supporting documents required, such as his identification card and recent payslips. The Defendant then informed Zam that his loan application was approved for the sum of $1,000 and asked him return with the Plaintiff to sign the loan documents.

6 Zam then returned with the Plaintiff to the Defendant's premises on 26 September 2009. There, Zam signed various documents including a contract stating that he was borrowing $1,000 at an interest rate of 297% per annum. Paragraph 6 of the notes to the contract ("the Notes to the

Contract") provided as follows:

> 6) A caveat will be lodged under the borrower's property if the payment is not prompt and at anytime at the sole discretion of [the Defendant]. And will be removed upon completion of Loan payment.

7 Further, both Zam and the Plaintiff signed a document authorising and consenting to the lodgement of a caveat by the Defendant on the Property ("the 1st ACLC"). The Defendant tendered a copy of the 1st ACLC bearing what purports to be Zam's and the Plaintiff's signatures. The pertinent part of the 1st ACLC states as follows:

> Dear Sirs
>
> **AUTHORISATION AND CONSENT TO LODGEMENT OF CAVEAT BY THE CAVEATOR ON [THE PROPERTY]**
>
> …
>
> I/We, the undersigned, as the Registered Proprietor of the above property:-
>
> 1. hereby wholly, unconditionally and irrevocably direct, authorize and consent to the Caveator lodging a Caveat on/against the Property to secure the Caveator's interest in the sale proceeds of the Property to fully repay all loans granted or to be granted by the Caveator to me from time to time;
>
> 2. Hereby wholly, unconditionally and irrevocably direct, authorize and consent to the Registrar to allow the lodgement of a Caveat by the Caveator on/against the Property;
>
> 3. Hereby agree to indemnify you and your successors and assigns and hold you and/or your successors and assigns harmless against all actions, claims demands [*sic*], costs and expenses which may be brought against or suffered by you and/or your successors and assigns as a result of my said authorization, direction and consent.
>
> …

8 On 21 October 2009, Zam approached the Defendant again to borrow another $1,000. As Zam had been making prompt repayments of the 26 September 2009 loan ("the 1st Loan"), the Defendant agreed to grant Zam a further loan of $1,000 ("the 2nd Loan"). The 2nd Loan was advanced on the same terms as the 1st Loan (apart from the schedule for repayment) save that this time, by the Defendant's own admission, it did not ask for or obtain the Plaintiff's authorisation and consent to the lodgement of a caveat on the Property. The caveat authorisation document for the 2nd Loan ("the 2nd ACLC") only bears Zam's signature.

9 Zam fully repaid the 1st Loan promptly. However, he was imprisoned for drug offences shortly after he obtained the 2nd Loan and failed to repay any part thereof despite repeated reminders (as of 23 January 2014, the outstanding sum he owed to the Defendant, including principal, interest and late fees, was $28,334.19). On 19 November 2009, the Defendant took out the Caveat on the Property stating the following ground of claim:

> Persuant [*sic*] to a Loan Application (The Moneylenders Act 2009, Cap 188) dated 21 October 2009 made between the Registered Proprietor and the Caveator and the Registered Proprietor

agreed to pay and settle all debts owing to the Caveator from the proceeds of sale of the land above described. Pending the sale of the land above described, the Registered Proprietor have agreed and consented to the lodgement of this Caveat to secure the Caveator's interest in the proceeds of the sale of the land above described, thereby creating an equitable interest.

The Plaintiff's account

10 On 6 December 2012, the Plaintiff obtained a divorce from the Syariah Court. The Syariah Court ordered, *inter alia*, that the Property be transferred to the Plaintiff, with no refunds to be made to the Defendant's Central Provident Fund account ("the Syariah Court Order"). The Plaintiff then filed a transfer application with the Housing Development Board ("HDB"), whereupon she was informed by the HDB that the Property could not be transferred until the Caveat was removed. According to the Plaintiff, this was the first time she discovered the existence of the Caveat. She denies ever accompanying Zam to the Defendant's premises to apply for a loan, and says that the signature on the 1st ACLC is not hers.

11 In addition, Zam affirmed a statutory declaration on 27 November 2013 (which the Plaintiff exhibited to her affidavit) stating that he approached the Defendant for a loan of $1,000 "[s]ometime in 2009". He was handed a one-page loan document which referred only to the fact of the loan and the terms of repayment; there was no mention at all that the loan would be paid from the sale proceeds from the Property or that a caveat would be lodged against the Property. Zam duly paid three instalments of the loan and defaulted on the balance payment.

The parties' arguments

12 The Plaintiff submits that the Caveat should be removed on the following grounds:

(a) the Caveat is defective because it failed to identify the particulars of the estate or interest claimed by the Defendant, as required by s 115(1)(c) of the Land Titles Act (Cap 157, 2004 Rev Ed) ("the LTA");

(b) there was no consent from both the Plaintiff and Zam to the lodgement of the Caveat by the Defendant;

(c) even if there was such consent, it did not create an "interest in land" within the meaning of s 115(1) of the LTA entitling the Defendant to lodge the Caveat; and

(d) in any event, any agreement to use the Property or its sale proceeds as security or collateral for Zam's debt is void pursuant to s 51(1) of the Housing and Development Act (Cap 129, 2004 Rev Ed) ("the HDA").

I should note that the Plaintiff is *not* arguing that the interest rate charged by the Defendant is excessive under s 23 of the MLA.

13 For its part, the Defendant contends that by signing the 1st ACLC on 26 September 2009, Zam and the Plaintiff had given it an interest in the proceeds of the sale of the Property, which constitutes an "interest in land" entitling the Defendant to lodge the Caveat. Although the Plaintiff did not sign the 2nd ACLC, the two loans should be seen as one transaction. In the alternative, Zam's consent alone was sufficient to confer on the Defendant an interest in the sale proceeds of the Property under the concept of joint tenancy.

My decision

The factual issues and their significance

14 There is a factual dispute between the parties on whether Zam and the Plaintiff had agreed to the Caveat being lodged on the Property in the event of Zam's default. On the evidence before me, I consider the Defendant's account to be far more credible. The Defendant has tendered a copy of the 1st ACLC bearing what appears to be Zam's and the Plaintiff's signature, as well as a copy of the 2nd ACLC bearing Zam's signature. On the other hand, the Plaintiff has simply issued a bare denial that she signed the 1st ACLC and has failed to prove that the signature purporting to be hers on the 1st ACLC is a forgery, which she could easily have done by tendering copies of other official documents bearing her actual signature.

15 I also disbelieve the Plaintiff's claim that she only became aware of the Caveat when she attempted to effect the transfer of the Property. Under s 117 of the LTA, the Registrar of Titles ("the Registrar") is required to notify the caveatee whenever a caveat has been lodged and accepted by the Registrar. The Defendant has tendered evidence of a letter from the Registrar stating that notice of the Caveat was sent by post to the address of the Property on 3 December 2009. In response, the Plaintiff could only say that she did not receive the said letter.

16 As for the account of facts contained in Zam's statutory declaration, I find it to be inconsistent with the documentary evidence and place no weight on it. Zam makes no mention of the fact that he took out two loans, and claims that he was only given a one-page loan document to sign. However, the Defendant has tendered copies of the loan documents evidencing both the 1st Loan and the 2nd Loan. The documents for each loan numbered about 8–10 pages, and each page bore Zam's signature and thumbprint (with the exception of the ACLCs, which bore his signature but not his thumbprint). There is no indication that these documents are anything but genuine, and it would indeed be quite preposterous for the Defendant to resort to falsifying them and forging Zam's signature for the purpose of recovering a relatively miniscule debt.

17 That said, the above factual findings are ultimately immaterial because, in my view, this case turns on the following issues:

(a) Do the 2nd ACLC and the other loan documents (collectively, the "Loan Documents") confer on the Defendant an interest in the Property that is capable of supporting the Caveat?

(b) Assuming that the Defendant has an interest in the Property, should the Caveat nonetheless be removed for failure to comply with the formal requirements of s 115 of the LTA?

Do the Loan Documents confer on the Defendant an interest in the Property?

Whether the Plaintiff's consent to the 2nd ACLC was required

18 It is common ground that the Caveat was lodged in respect of the 2nd Loan and not the 1st Loan (which the Defendant says was repaid promptly). Consequently, does it matter that the Plaintiff did not sign the 2nd ACLC?

19 As a preliminary point, I have no hesitation in rejecting the Defendant's submission that the two loans should be considered as part of the same transaction. The two loans were obtained on separate occasions and a separate set of documentation was prepared for each. Furthermore, the claim in the Caveat (reproduced at [9] above) distinguishes between the two loans by referring to a loan application dated 21 October 2009 (*ie*, the 2nd Loan). Therefore, the two loans did not form part of

the same transaction, and the Plaintiff's consent to the 1st ACLC in respect of the 1st Loan could not bind her in respect of the 2nd Loan.

20 I turn then to the legal issue of whether the Plaintiff's consent was required for the 2nd ACLC. The Defendant says that Zam's consent alone was sufficient to bind the Property under the concept of joint tenancy. The sole authority provided by the Defendant for this proposition is *Kua Hui Li v Prosper Credit Pte Ltd* [2014] 3 SLR 1007 ("*Kua Hui Li*"). That case also involved an application by a plaintiff to remove a caveat lodged on her property by a moneylender. The caveat was lodged pursuant to a loan agreement between the plaintiff's former husband and the moneylender under which the husband agreed to repay the loan from the sale proceeds of the property and consented to the lodgement of a caveat by the moneylender against the property. The plaintiff did not consent to this arrangement. Choo J noted that the following questions arose (at [8]):

(a) First, was the contract signed between OBL and the defendant valid?

(b) Second, had OBL and the defendant entered into any further contract (presumably pursuant to the $3,000 loan)? And if so, were those further contracts valid?

(c) Third, if there were any valid contracts, did any of those contracts serve to create an interest in the Property in favour of the defendant, notwithstanding that the plaintiff, as a co-owner, was not informed, and neither was her consent procured?

(d) Fourth, if the defendant did indeed have an interest in the Property when it lodged the caveat, are there any reasons that justify the removal of the caveat?

21 However, Choo J ultimately did not answer the third and fourth questions because he found that the interest rate charged by the moneylender in that case (namely, 791.61% per annum) was excessive and set aside the loan agreement under s 23(3)(*b*) of the MLA (at [14]). I therefore fail to see how *Kua Hui Li* assists the Defendant in any way. In fact, it is trite that joint tenants have to act jointly to effectively bind the estate which they hold jointly: Tan Sook Yee, Tang Hang Wu and Kelvin F K Low, *Tan Sook Yee's Principles of Singapore Land Law* (LexisNexis, 3rd Ed, 2009) ("*Tan Sook Yee*") at para 9.9.

22 But that is not the end of the issue. Might it be argued that a joint tenant's assignment of his legal or equitable interest in the *sale proceeds* of a property is an act operating upon his own share that severs the joint tenancy and converts it into a tenancy in common? In the leading case of *Williams v Hensman* (1861) 1 John & H 546 at 557, Page Wood VC set out the following three methods of severance:

> A joint tenancy may be severed in three ways: in the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share ... Secondly, a joint-tenancy may be severed by mutual agreement. And, in the third place, there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common.

23 This is a vexed area of law. For example, the English and Australian authorities appear to be divided over whether a charge granted by one joint tenant to a third party is an alienation that effectively severs a joint tenancy: *Tan Sook Yee* at para 9.40. In his article "Partial Alienation by One Co-Owner of Land" [2000] SJLS 92, Professor Barry Crown surveyed the difficulties in this area and concluded as follows (at 108–109):

> The difficulties that have occurred in working out the effects of a partial alienation have their root in the doctrine that each joint tenant owns the whole of the estate and not merely a proportionate share. The problem is compounded when this is coupled with the idea that it is possible for one joint tenant to alienate an interest that he does not actually have and that he thereby creates the very interest which was supposedly the subject matter of the transfer in the first place. These notions are too firmly rooted in English law to be set aside now. However, as Lord Nicholls stated in the recent House of Lords case of *Burton v London Borough of Camden* [[2000] 2 AC 399 at 404–405],
>
> > The legal concept relied upon ... is that a joint tenant, as distinct from a tenant in common, has nothing to transfer to the other tenant, because each already owns the whole. I have to say that this esoteric concept is remote from the realities of life. It should be handled with care, and applied with caution.
>
> An attempt has been made in this article to follow this guidance and to look at the law of severance in the light of the realities of life. The most important factor is the existence in Singapore of a simple and effective method of severance by statute. This, coupled with the need to ensure that parties are fully aware of their rights and that no one party should be able to sever behind the back of his fellow co-owners, means that the courts should not be astute to discover new methods of severance and, in particular, should avoid legitimising any form of severance which can be effected by one party without the knowledge of the other joint tenants.

24 However, I need not decide this issue because I find that, *as a matter of interpretation*, the Loan Documents did not confer on the Defendant any legal or equitable interest in the sale proceeds of the Property. I will elaborate on this later in the next section.

Whether the Defendant has an interest in the proceeds of sale of land

(1) The meaning of "interest in the proceeds of sale of land"

25 Section 115 of the LTA allows any person "claiming an interest in land" to lodge with the Registrar a caveat prohibiting the registration of any dealing affecting the land. Two other sections in the LTA are pertinent for the purposes of construing the phrase "claiming an interest in land". The first is s 4, which defines "interest" as follows:

> …
>
> "interest", in relation to land, means any interest in land recognised as such by law, and includes an estate in land;
>
> …

The second is s 115(3), which provides as follows:

> (3) For the purposes of this Part, and without limiting its generality, a reference to a person claiming an interest in land shall include a reference to any of the following persons:
>
> > (*a*) *any person who has an interest in the proceeds of sale of land*, not being an interest arising from a judgment or order for the payment of money; and
> >
> > (*b*) a person who has obtained an injunction in respect of an estate or interest in land.

[emphasis added]

26 The Defendant contends that the effect of the Loan Documents was that they granted it an interest in the sale proceeds of the Property. Pursuant to s 115(3)(*a*), this counts as an "interest in land" for the purpose of lodging a caveat. In reply, the Plaintiff submits that the Loan Documents merely granted Zam's authorisation and consent for the Defendant to lodge a caveat, which is insufficient to create an interest in land.

27 There are thus two issues that I have to decide:

(a) What does "interest in the proceeds of the sale of land" in s 115(3)(*a*) mean?

(b) Do the Loan Documents create such an interest?

28 The progenitor of s 115(3)(*a*) of the LTA is s 93(1)(3) of the Land Titles Ordinance 1956 ("the LTO"). That sub-section stated:

93.—

…

(3) For the Purposes of this Part, and without limiting its generality, an interest in the proceeds of sale of land shall be deemed an interest in land.

29 Significantly, no such provision can be found in the Real Property Act 1900 (NSW) ("the NSW RPA"), on which the LTO was modelled (the drafter of the LTO, John Baalman ("Baalman"), was an expert in the Torrens system of land titles registration in New South Wales: *ACS Computer Pte Ltd v Rubina Watch Co (Pte) Ltd and another* [1997] 1 SLR(R) 1006 at [18]). Section 74B(1) of the NSW RPA simply states: "A person who claims a legal or equitable estate or interest in land that is the subject of a primary application, or in any part of any such land, may … lodge with the Registrar-General a caveat prohibiting the bringing of that land or part under the provisions of this Act". The same can be said of similar provisions in other Australian jurisdictions, such as s 89(1) of the Transfer of Land Act 1958 (Vic). Consequently, the Australian courts have held that an interest in the sale proceeds of land is insufficient to found a caveat. In *Dykstra and another v Dysktra* (1991) 22 NSWLR 556, the Supreme Court of New South Wales noted that a contractual right to payment of a sum of money out of the proceeds of sale of a particular property does not give rise to a caveatable interest (at 559). In *Epple v Wilson* [1972] VR 440, the Supreme Court of Victoria held that an *equitable* right to the sale proceeds does not do so either (at 444).

30 It is therefore necessary to consider why Baalman included s 93(3) in the LTO. Some light is shed by his authoritative commentary on the LTO. He wrote in *The Singapore Torrens System* (The Government of the State of Singapore, 1961) at pp 195–196:

The number of interests which will justify the lodging of a caveat is limited by the number of permissible "interests in land". In *Keppel* v. *Bailey* (1834) 2 My. & K. 517, 535; 39 E.R. 1042, *Lord Brougham*, L.C. said,—

> "It must not be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner. It is clearly inconvenient both to the science of the law and the public weal that such latitude should be given. There can be no harm in allowing the fullest latitude to men in binding themselves … to answer in damages for breach

> of their obligations … But great detriment would arise and much confusion of rights if parties were allowed to invent new modes of holding and enjoying real property."
>
> A new interest in land can be created only by legislation – either parliamentary, as in the case of perpetual leases, or judicial, as in the case of restrictive covenants … There is nothing in the [LTO] to suggest that this is one of the occasions on which the Legislature intended to create a new interest in land to be known as a caveatable interest.
>
> …
>
> *A person entitled to land which has undergone the transformation effected by the equitable doctrine of conversion, would prima facie cease to have a caveatable interest. Section 93 (3) operates to reconvert an interest in the proceeds of sale of land (e.g. under a trust for sale) into an interest in land.*
>
> [emphasis added in italics]

31 The equitable doctrine of conversion that Baalman referred to requires some elaboration. One of the common law methods for settling land was the device of a trust for sale. This arose where land was transferred by deed or will to trustees with an imperative direction that they were to effect a sale and to hold the proceeds of sale upon certain specified trusts. The equitable doctrine of conversion states that in such cases, the interests of the beneficiaries were in the proceeds of sale and not in the land, because equity looks on that as done which ought to be done – the imperative direction to turn land into money impresses the land with the quality of money no matter how long the sale may be postponed. The effect of this doctrine was that when the trustees sold the land in performance of their duty to sell, the purchaser took the land free of any trusts, since the beneficial interests were imposed upon the sale proceeds and not the land itself: see Edward H Burn and John Cartwright, *Cheshire and Burn's Modern Law of Real Property* (Oxford University Press, 18th Ed, 2011) at pp 104–105.

32 The equitable doctrine of conversion gives rise to problems in cases where the operation of another legal mechanism is contingent on the beneficiary of a trust for sale having an interest in land. One example can be found in the case of *Irani Finance Ltd v Singh and others* [1971] 1 Ch 59. Under s 35 of the Administration of Justice Act 1956 (c 46) (UK), a judgment creditor could obtain a court order imposing a charge on "any such land or interest in land of the debtor" to secure the payment of the judgment debt. The issue was whether the first and second defendants, who were legal and equitable tenants of land conveyed to them under a trust for sale, had "land or interest in land" capable of being charged under s 35. The Court of Appeal held that they did not, reasoning as follows (at 79–80):

> … The words "interest in land" are no doubt capable in an appropriate context of including interests under trusts for sale of land, and though there is no need for us to express a concluded opinion on the point we certainly do not wish to be taken to be casting any doubt on the correctness of the dicta in *Cooper* v. *Critchley* [1955] Ch. 431, but for 100 years before 1956 the words, or equivalent words, have been held in this field not to include interests arising under trusts for sale. If it had been the intention of Parliament in 1956 to subject interests or some interests arising under trusts for sale of land to charges for judgment debts, it would surely have done so in clear terms.
>
> …

> … The whole purpose of the trust for sale is to make sure, by shifting the equitable interests away from the land and into the proceeds of sale, that a purchaser of the land takes free from the equitable interests. To hold these to be equitable interests in the land itself would be to frustrate this purpose. Even to hold that they have equitable interests in the land for a limited period, namely, until the land is sold, would, we think, be inconsistent with the trust for sale being an "immediate" trust for sale working an immediate conversion, which is what the Law of Property Act, 1925, envisages (see section 205 (1) (xxix)), though, of course, it is not in fact only such a limited interest that the plaintiffs are seeking to charge.

33 It therefore appears that the purpose of s 115(3)(*a*) of the LTA is to avoid difficulties like these and allow a beneficiary of a trust for sale to protect his or her interest by means of a caveat. This is not to say, however, that s 115(3)(*a*) is restricted only to individuals whose interests arise under a trust for sale. The provision is phrased in general terms, and Baalman himself made it clear that the trust for sale is just one example under which a person might acquire an interest in the sale proceeds of land. Another example might be the interest of a foreign person who inherits a property under the will of the deceased owner or through the law on intestate succession: *Tan Sook Yee* at para 15.11. Under s 3(3) of the Residential Property Act (Cap 274, 2009 Rev Ed), no estate or interest in the property would pass to the foreign person; however, s 3(4) imposes a duty on the personal representatives of the deceased to sell the property within five years and pay the net sale proceeds to the foreign person. A foreign person in such a situation might therefore be said to have an interest in the proceeds of sale of land.

34 In both of the above cases, the caveator has a definite entitlement to the proceeds of sale because the trustee or the personal representative is charged with a *duty* of sale. There is no doubt that the property has to be sold, and the only issue to be decided is that of timing. It therefore makes sense to allow such persons to lodge caveats to protect their interest in the sale proceeds. But where there is *no* duty of sale and the caveator's interest in the sale proceeds is wholly contingent on the owner of the property deciding to sell, would that suffice as a caveatable interest?

35 If the matter were free of authority, I would have thought that such an interest would be insufficient to support a caveat. Such a nebulous interest appears too far removed from the type of the interest that s 115(3)(*a*) of the LTA was originally meant to protect. But at least two cases have held that a right to be paid out of the sale proceeds of land is a caveatable interest, even where there is no duty of sale. First, in *Abdul Hamid Bin Mohamed Ismail and Others v Shaik Raheem s/o Abdul Shaik Shaik Dawood and Another Action* [2005] SGDC 28 ("*Abdul Hamid*"), the plaintiffs obtained a $20,000 loan from a licensed moneylender. The relevant terms of the loan agreement were as follows (at [7]):

> Covenant to give notice
>
> 3. The Borrowers covenant with the Company that at all times before full payment of the loan and interest not to sell or transfer or otherwise dispose of their interest in the flat at Block 138 Bukit Batok West Avenue 6 #02-389 Singapore 650138 (hereinafter referred to as "the Flat") without giving prior notice of at least seven (7) days of the date of such sale transfer or otherwise to the Company.
>
> Assignment of sale proceeds
>
> 4. The Borrowers agree that the sale proceeds of the sale of the Flat that the Borrowers may become entitled or receive from the purchaser of the Flat have been assigned to the Company for the repayment of all monies due to the Company under the Terms and conditions of this

Agreement.

Consent to Caveat

5. The Borrowers hereby consent to the Company lodging a Caveat with the Singapore Land Registry against the title of the Flat and confirm that the Company has an interest in the sale proceeds of the sale of the Flat PROVIDED THAT the Company shall on receipt of all monies due and owing to the Company by the Borrowers withdraw the Caveat.

Further Assurance

6. The Borrowers shall at all times if and required by the Company execute such further charges or assignments or other documents as may be necessary to effect the assignment of the sale proceeds of the Flat to the Company or the due payment of the Loan to the Company.

36 The district judge held that the moneylender was entitled to lodge a caveat on the plaintiffs' property. Her reasoning merits setting out in full (at [19]–[21]):

19 On principles of statutory interpretation, I could not agree with the plaintiffs' submissions. The wording of section 115(3)(a) read in their plain and literal sense clearly intended to widen the scope of "interest in land" for purposes of caveats to include a person who has an interest in the proceeds of sale of the land which may not necessarily arise from recognized categories of interests in land. It should be noted that the interpretations in section 4 are prefaced with the words "*unless the context otherwise requires*". The opening words of section 115(3)(a) – "*For the purposes of this Part*"- in themselves already set a different context altogether to require a different meaning to be accorded to the word "interest". This preamble to section 115(3)(a) must surely signify a legislative intent to import a wider interpretation to the definition of "interest in land" in the part of the Act dealing with caveats than those appearing in the other parts of the Act. If the plaintiffs' contentions *viz* that these words should be restricted to the definition of "interest" as in section 4, reflect the true intent of Parliament, section 115(3)(a) would, in my view, be rendered otiose.

20 If the interpretation of section 115(3)(a) has to be circumscribed in the manner advocated by the plaintiffs, it would not have been necessary for Parliament to introduce the amendment in 2001 to delimit the categories of interests to those "*not being an interest arising from a judgment or order for the payment of money*". It must have been contemplated that the category of caveatable interests in section 115(3)(a) would include interests other than proprietary interests or what we traditionally understand as interests in land. If a caveator's interest in the sale proceeds of land came about only by way of an attempt to enforce a monetary judgment with no other connection whatsoever to the property, such an interest would be outlawed by the delimiting words in section 115(3)(a). It would appear from these words that you cannot seek to encumber the titles of registered land by lodging caveats when all that you have against the registered proprietor is a judgment or order for payment of money. The judgment creditor can however seek enforcement of his judgment against the property of the judgment debtor by applying for a writ of seizure and sale pursuant to Order 47 Rule 4 of the Rules of Court and the order made thereon would then be registered with the Land Titles Registry. A judgment creditor would therefore have no necessity to lodge a caveat as he already has the means to attach the property of the debtor and to have his interest to the property notified on the register.

21 Considering the way section 115(3)(a) has been drafted, it leads to the irresistible

conclusion that there would be categories of interests in proceeds of sale of land which would not come within the general understanding of an interest in land. It has been recognized by textbook writers that the rights covered by section 115(3)(a) are not really interests in land.

37 Second, in *Ho Seek Yueng Novel and another v J & V Development Pte Ltd* [2006] 2 SLR(R) 742 ("*Novel Ho*"), the owner of the defendant company ("Mr Tan") had caused caveats to be lodged against 12 properties. He offered two bases to support the caveats. First, by way of an oral agreement, he had granted the plaintiffs a loan in respect of the sale and purchase of the properties. Second, under the same oral agreement, the plaintiffs had granted him a right of first refusal in respect of the sale and purchase of the properties. In the event that he agreed to purchase the property concerned, the loan granted to the plaintiffs in respect of the said property would be set off against the sale price; if he did not wish to purchase the property and it was sold to a third party, the loan concerned would then be repaid by the plaintiffs from the sale proceeds.

38 The High Court accepted Mr Tan's version of events and held that both the loan agreement and the right of first refusal independently conferred on Mr Tan a caveatable interest in the properties. Unfortunately, although the court devoted a large amount of space to explaining why the right of first refusal gave rise to a caveatable interest, there was relatively little analysis of why the *loan* created such an interest as well. The court simply stated as follows (at [38]–[39]):

> 38 As already alluded to above, the first legal issue is whether or not the loan extended by the defendant to the plaintiffs gave rise to an interest in land that was caveatable under the LTA.
>
> 39 The defendant's interest in this regard would be in the sale proceeds and this is clearly an interest in land that is caveatable under the LTA. This is in fact *expressly provided for* under s 115(3)(*a*) of the LTA, which was also referred to by counsel for the defendant in his closing submissions. …
>
> [emphasis in original]

39 In *Abdul Hamid*, there was an express assignment of the future sale proceeds to the caveator. In *Novel Ho*, however, there was no mention of any assignment and Mr Tan's right to the sale proceeds appears to be purely contractual in nature. The proposition that a *personal* right to the repayment of a debt can create a caveatable interest within the meaning of s 115(3)(*a*) sits uneasily with the original object and purpose of that section (which I have set out earlier). This was pointed out in William J M Ricquier, *Land Law* (LexisNexis, 3rd Ed, 2007) at p 127, where the learned author made the following observation on the decision in *Novel Ho*:

> It is the first holding, regarding the loan, that perhaps raises more questions. Much depends on what is mean[t] by 'an interest in the proceeds of sale' in s 115(3)(a). On the face of it, it means a proprietary interest. A beneficiary under a trust for sale has an interest in the proceeds of sale because of the equitable doctrine of conversion. A foreign person who inherits residential property – which has to be sold pursuant to the provisions of the Residential Property Act – has an interest in the proceeds of sale thereof. Mr Tan's 'interest' in the proceeds of sale of the Geylang properties looks more like a personal, contractual claim.

40 Admittedly, there is a trend in our courts towards allowing non-proprietary interests to be caveated. One example is a right of first refusal (also known as a right of pre-emption). The prevailing judicial opinion is that such a right is purely contractual in nature at the time of its grant: see the survey of this area of law in *Novel Ho* at [51]–[56]; see also *Ong Chay Tong & Sons (Pte) Ltd v Ong Hoo Eng* [2009] 1 SLR(R) 305 ("*Ong Chay Tong*") at [79] and [83]. However, the High Court in *Novel*

Ho and the Court of Appeal in *Ong Chay Tong* have held that a right of first refusal is an interest in land that can sustain a caveat. A key rationale for this holding is that land is unique, so that certain interests in land, although not proprietary in nature, are also deserving of protection by the caveat machinery. As pointed out in *Novel Ho* (at [62]):

> … It must also be emphasised at this juncture that the subject matter involved is *land or real property* and, given the uniqueness of land, the holder of a right of first refusal might well consider a contractual remedy in damages to be inadequate – hence, the possible remedy of an injunction or even specific performance … [emphasis in original]

The reasoning was approved by the court in *Ong Chay Tong* (at [79]):

> … In particular, we agree with Phang J that such an approach would be consistent with the purpose and function of a caveat, and that *it would be fair, logical and commonsensical to allow a person with a pre-emption right over* ***a defined piece of unique property*** *to lodge a caveat over that property*. This would avoid a situation where a pre-emption right is defeated by the stealth assignment of the legal interest or by way of s 49 of the LTA without the holder of the right having first the opportunity to invoke the court process to give effect to his right. While such a conclusion might at first blush be interpreted by some as giving undue "proprietary" reach to a "personal" right, we should nevertheless be mindful of the fact that a contractual restraint on land has long been recognised as one that is susceptible to injunctive relief ... [emphasis added in italics and bold italics]

41 But where a person is claiming an interest in the *sale proceeds* of land, his interest is purely monetary in nature and I can see no reason why, bearing in mind the original object and purpose of s 115(3)(a), the requirement of a proprietary interest should not apply strictly in such a case. To hold that a person with a mere contractual right to be paid from the sale proceeds of a property can lodge a caveat on that property would effectively allow such agreements to function as a form of quasi-security, since the caveatee would be unable to register dealings in respect of the property until he pays up. This is not a purpose of the caveat mechanism; a caveat is meant to protect pre-existing interests in land, not operate in and of itself as a form of quasi-security for otherwise unsecured debts. If a moneylender wishes to take security over a borrower's property, he should take a mortgage or a charge. Moreover, it would create an anomaly whereby a creditor who has a contractual right to have a loan repaid out of the sale proceeds of property may lodge a caveat on the basis of his contractual claim, but a creditor who successfully sues the debtor on the same contract (so that his claim is extinguished by the judgment and merged into the latter) may not.

42 This is another area of law raising difficult issues that might merit re-examination in the future. Once again, however, I need not decide them definitively because I find that the Loan Documents did not confer any legal, equitable or even contractual interest in the sale proceeds. Even if they did, any interest acquired by the Defendant has already been extinguished by the Syariah Court Order.

(2) The effect of the Loan Documents

43 I turn now to the issue of how the Loan Documents should be interpreted. I have already set out all the relevant terms at [6]–[7] above; there are no other terms or notes in the loan documents which say anything about a caveat or the sale proceeds of the Property. I should also mention that in the note of contract for the 2nd Loan, section I(g) titled "Details of security (if any)" was left blank.

44 Before I go on to examine the relevant terms, it is necessary to consider several instructive cases. First, in *Troncone and others v Aliperti and others* (1994) 6 BPR 13,291 ("*Troncone*"), the

Court of Appeal of New South Wales had to consider the effect of a clause ("CL5") in a loan agreement stating: "The Debtor authorises the Creditors to lodge a Caveat on any property owned by the Debtors (sic) to protect his interest." There was no other clause in the agreement providing for any security for the repayment of the loan. Nonetheless, the court held that CL5 was effective in creating a caveatable interest. Mahoney JA reasoned as follows (at 13,292):

> It was, in my opinion, the clear intention of the parties that the creditors should have from Mr Aliperti the authority "to lodge a caveat on any property owned by" him. In my opinion, CL5, on its proper construction authorised the person or persons described in the relevant agreement as "the Creditors" to lodge a caveat to protect the interest of that creditor or creditors. …
>
> *It is a fundamental principle of construction that "Whoever grants a thing is deemed also to grant that without which the grant itself would be of no effect"* ("Cuicunque aliquis quid concedit concedere videtur et id sine quo res ipsa esse non potuit"): Broome's Legal Maxims (9th ed) at 307. The principle is said to go back at least to Shepherds Touchstone 89.
>
> A caveat cannot be entered against land unless the caveator has the relevant proprietary interest in the land: see Real Property Act 1900, s74F(1) ("a legal or equitable estate or interest in land"). *Therefore, unless there be evident an intention to the contrary, the grant to the creditors of an authority to lodge a caveat on the relevant property carried with it by implication such an estate or interest in land as was necessary to enable that authority to be exercised.* There was, in the present case, no intention to the contrary. Indeed, it might be thought to involve deception or worse if Mr Aliperti had intended to authorise the lodgment of a caveat but to withhold the creation of the interest in the land necessary for that to be done.
>
> [emphasis added]

45 However, in *The Asiatic Enterprises (Pte) Ltd v United Overseas Bank Ltd* [1999] 3 SLR(R) 976 ("*Asiatic*"), the Court of Appeal held that Singapore's LTA was different and declined to follow *Troncone* and other Australian authorities in the same vein. In *Asiatic*, the Court of Appeal had to consider the effect of the following clause (at [3]):

> On the occurrence of any of the following events of default (i) the Bank [the respondent] shall cease to be under any further commitment to you [the appellant] and all outstandings under the entire credit line ('the Outstandings') shall become due and payable immediately; (ii) the Bank shall, in addition to the rights set out herein, be entitled (as equitable chargee) to attach the Outstandings to any property of yours (whether real or personal) and to lodge a caveat against any real property that may now or hereafter be registered in your name whether singly or jointly ...

The court held that this clause did not create a charge or any interest in land that was capable of supporting a caveat, for the following reasons (at [28]–[29]):

> 28 In our opinion, a caveat is premised on a certain estate or interest in land which the caveator claims. The respondent could not claim an interest in the appellant's registered land as an equitable chargee, if at all, until the occurrence of an event of default, and in that event it exercised its right under cl 10 of the Standard Terms to take a charge over such property. On the approach contended by counsel, such an interest would arise at the point in time when the respondent lodged the caveats against the properties on 9 July 1998, as that act constituted the exercise of its option. However, the statutory framework relating to the lodgement of caveats presupposes that the respondent already had a pre-existing claim to an equitable charge over the

properties which supported the caveats it lodged on that day. This "paradox" was demonstrated clearly by Ashley J in *Chiodo* at 11 as follows:

> The conclusion reached by Handley JA that 'the action of the lender in lodging the caveat operated as an exercise of its option to attach its debt to the subject property, and create an equitable charge over that property', has been described (see 68 ALJ at 752) as involving a paradox. It is this: *assuming that an equitable charge over land, without more, is a sufficient estate or interest in land to sustain a caveat lodged under s 89(1) of the [Transfer of Land Act 1958], the language of the subsection assumes the existence of the interest antecedent to lodgment*. But here, according to the reasoning of Handley JA, the lodging of the caveat was a necessary step in the creation of the equitable interest that the lodgment in turn was intended to protect. There was not, antecedent to lodgment, an estate or interest in land capable of attracting the operation of s 89(1). Such an estate or interest ... arose contemporaneously with lodgment.
>
> 29 *On the basis of the statutory framework, it is impossible, in terms of chronology, for the lodgement of a caveat to be the act which also gives rise to the claim to an interest in land needed to support the same caveat.* In our judgment, the act of lodging a caveat by a caveator does not have the effect of creating that interest in land for which the caveat was lodged. The Act does not contemplate such an act as creating an interest in land.
>
> [emphasis added]

Although the decision in *Asiatic* has been the subject of some academic criticism (see, *eg*, Barry Crown, "Requirement of a Pre-Existing Interest to Support a Caveat under the Land Titles Act" [2000] SJLS 341; Lee Eng Beng, "Invisible and Springing Security Interests in Corporate Insolvency Law" (2000) 12 SAcLJ 210; Victor C S Yeo, "No Security for the Unsecured Creditor" (2000) 12 SAcLJ 218), it remains the law in Singapore and I am bound by it.

46 I should add that the force of *Troncone* appears to have been attenuated even in Australia. In *Bellissimo v JCL Investments Pty Ltd* [2009] NSWSC 1260, the Supreme Court of New South Wales had to consider the effect of the following clause (at [11]):

> That the company J C L INVESTMENTS PTY LTD hereby consents to Francesco Bellissimo t/as Bellissimo & Associates Solicitors to lodge a caveat at the Property Information Service division of the Department of Lands, over the property known as folio identifier lot X section Y in deposited plan Z situated at AA Ellis Street Condell Park 2200 in the State of New South Wales whereby it is hereby agreed that Frank Bellissimo has a caveatable interest in the property and that Francesco Bellissimo will withdraw the caveat only upon payment of costs and disbursements referred to in (i) and (ii) immediately above and any interest payable in accordance with the fees agreements annexed to this Deed.

Despite citing *Troncone* and acknowledging the principle that "whoever grants a thing is deemed to grant that without which the grant itself would be of no effect" (at [12]), White J held that the clause did *not* give rise to a caveatable interest. He reasoned as follows (at [17], [18] and [21]):

> 17 Had it been intended to create a charge, whereby the plaintiff could apply to the court for an order for sale of the property or for the appointment of a receiver, one would expect the nature of that arrangement to be spelled out clearly in an agreement between a solicitor and his client, or between a solicitor and a company associated with the client, and not be left to implication.

18 It is more likely that the parties intended by clause 2(iii), that by the plaintiff's being authorised to lodge a caveat, and by its being agreed that he had a caveatable interest in the property, that the parties intended, and intended only, that the company would not be permitted to deal with the land without the plaintiff's consent. Such a negative covenant does not create an interest in land (*Redglove Projects Pty Ltd v Ngunnawal Local Aboriginal Land Council*).

…

22 I should add that there is a public policy interest in persons taking instruments which are intended to create a mortgage or charge in drawing to the attention of the mortgagor or chargor, being the party primarily liable for the duty, that, such a liability exists. At the very least that would draw to the attention of those signing such instruments that an agreement, which in terms is expressed to be an agreement to the lodgment of a caveat, will be contended by the other party to amount to a charge over the first person's land.

47 Applying the above principles, I find that neither para 6 of the Notes to the Contract nor the 2nd ACLC granted the Defendant any legal or equitable interest in the Property or in the sale proceeds thereof. In fact, the Defendant did not even acquire a *contractual* right to have the 2nd Loan repaid from the sale proceeds of the Property. This is because:

(a) Paragraph 6 simply states that a caveat will be lodged on the Property if payment is not prompt and removed upon completion of the loan payment. It does not say that the interest in the sale proceeds of the Property are assigned to the Defendant or to be held on trust for it. Nor is there mention of any agreement to repay the 2nd Loan out of the sale proceeds.

(b) The 2nd ACLC states that Zam authorises and consents to the lodgement of a caveat by the Defendant to secure its interest in the sale proceeds of the Property. But this presupposes that the Defendant has an interest in the sale proceeds in the first place. Since there is nothing else in the loan documents which confers on the Defendant such an interest, there is nothing for a caveat to secure. As held in *Asiatic* at [29], the act of lodging a caveat cannot in itself create the interest that is supposed to support the caveat.

48 Therefore, the Defendant does not have a caveatable interest in the Property, and the Caveat ought to be removed.

(3) The Defendant’s interest in the sale proceeds has been extinguished

49 Even if my analysis above is incorrect and the Loan Documents were effective in conferring on the Defendant a caveatable interest in the Property, there is, in my judgment, another reason why the Caveat ought to be removed: the Defendant’s interest in the sale proceeds have been extinguished by the Syariah Court Order.

50 Assuming that the Loan Documents granted the Defendant an interest in the sale proceeds of the Property, they could only have given the Defendant an interest in *Zam’s* share of the sale proceeds, since the Plaintiff did not sign the Loan Documents. The Defendant’s interest in the sale proceeds was therefore contingent on Zam being entitled to sell the Property and receive proceeds therefrom. But under the Syariah Court Order, Zam was ordered to transfer his interest in the Property to the Plaintiff for no consideration (see [10] above). Thus, a sale of the Property by Zam is no longer possible, and even if the Plaintiff decides to sell it, Zam would have no entitlement to the sale proceeds. The Defendant’s interest in the sale proceeds is correspondingly extinguished and there is no basis for allowing the Caveat to remain.

51 In this regard, one must keep in mind that a caveat is "nothing more than [a] statutory injunction to keep the property in status quo until the court has had an opportunity of discovering what are the rights of the parties": *Alrich Development Pte Ltd v Rafiq Jumabhoy* [1993] 1 SLR(R) 598 at [37]. In the present case, the Caveat has served its purpose. The Property has been kept in status quo while I considered what the rights of the parties were. As a result of this process I have found that the Defendant never had any caveatable interest in the Property or its sale proceeds, and that even if it did, this interest has since been extinguished by the Syariah Court Order. Consequently, the Caveat should be removed.

Should the Caveat be removed for failure to comply with the formal requirements of s 115(1) of the LTA?

52 Given my findings at [47] above, it follows that the Caveat also does not satisfy the formal requirements of s 115(1) of the LTA because its description (see [9] above) is erroneous. There was no agreement between the Defendant and the registered proprietors of the Property that Zam's debt would be paid from the sale proceeds of the Property, nor does the Defendant have any equitable interest in the sale proceeds.

Section 51 of the HDA

53 The final issue relates to s 51 of the HDA, which provides as follows:

> **Property not to be used as security or attached, etc., and no trust in respect thereof to be created without approval of Board**
>
> 51.—(1) Subject to subsection (4), any contract or agreement to directly or indirectly use protected property (or the proceeds of sale of protected property) as security or collateral for any debt, obligation or claim shall be null and void.
>
> (2) Any act (including the deposit of title deeds), deed, instrument or document that purports to protect rights under or give effect to any contract or agreement that is null and void under subsection (1) shall be of no effect and shall not result in or create any interest in land or be capable of being registered under the provisions of the Registration of Deeds Act (Cap. 269) or the Land Titles Act (Cap. 157).
>
> …
>
> (11) In this section —
>
> …
>
> "proceeds of sale", in relation to any property, means the proceeds from any transaction involving the sale, transfer, conveyance, assignment, mortgage, charge or the disposal in any manner of the property or an estate or interest in the property;
>
> "protected property" means any flat, house or other building that has been sold by the Board under the provisions of this Part;
>
> …

54 This provision was enacted precisely to address cases like the present where a homeowner

uses the sale proceeds of his HDB flat as security or collateral for a loan. As the Minister for National Development stated in Parliament (*Singapore Parliamentary Debates, Official Report* (19 July 2010) vol 87 at cols 723, 725–726, (Mah Bow Tan, Minister for National Development)):

> Members may recall that in 2008, Parliament approved the Moneylenders Bill to revamp the regulatory regime for moneylenders. The purpose was to introduce a more flexible and progressive approach to the regulation of moneylending to keep pace with the modern credit economy. Following this, the number of moneylenders licences has increased significantly.
>
> At the same time, there has been an increasing number of HDB flat owners borrowing from moneylenders and agreeing to assign the sales proceeds from their flats as repayment. These moneylenders then lodge caveats against the flats to claim an interest in the sales proceeds. In 2008, there were 12 registered resale applications with caveats lodged by moneylenders. In 2009, the figure increased to 546. In the six months of this year alone, there were 556 such cases.
>
> While this is permitted under the current legislative framework, the Government is concerned about this trend as it undermines the intention of the home ownership policy which seeks to provide a home for our people for long-term stay.
>
> …
>
> Sir, under the current rules, moneylenders can enter into an agreement with the HDB flat owners for the sales proceeds to be assigned to them as repayment of debt, upon which the moneylenders then lodge caveats against the flats. Such caveats enable the moneylender to determine repayment owed before he agrees to withdraw the caveat to allow the sale transaction of the flat to go through.
>
> The problem is that once the flat seller has sold off his flat and repaid the moneylender, he cannot afford to purchase his next flat. The flat seller and the other flat occupiers become homeless and pose a burden to their family and friends for their housing needs and some join HDB's queue for rental flats, when they in fact do not qualify for rental housing.
>
> Against this context, we have decided to go one step further now and disallow the lodging of caveats to claim an interest in the sales proceeds of the flat. And this is the focus of the Housing and Development (Amendment) Bill 2010 that is before this House now.
>
> Currently, section 51 of the Housing and Development Act only provides that the title deeds of HDB flats cannot be used to create a security for debt. Section 51 does not prevent moneylenders from lodging caveats to claim an interest in the sales proceeds, after providing a loan.
>
> Clause 5 of the Bill repeals the existing section 51 and re-enacts the section. It continues to disallow HDB flat owners from using their HDB flat as security or collateral for any debt, or obligation, or claim. One key difference with this new clause is that this prohibition now includes the sales proceeds from the HDB flat. The re-enacted section 51 also implements a new rule that voids any contract or agreement to use HDB flats, including the sales proceeds, as security or collateral. The changes do not affect banks and financial institutions, who can continue to grant loans on the security of the flat for the purpose of financing its purchase.
>
> Besides providing that any contract using the HDB flat as security for debt is null and void, the

Bill also provides that any Act, deed, instrument or document which protects rights under such a contract has no effect. This means that caveats against HDB flats for the payment of debt can no longer be lodged after the Bill is enacted. *Existing contracts with valid caveats lodged would not be affected. This is in recognition of the sanctity of contracts that are already legally entered into.*

[emphasis added]

55 Section 51 of the HDA thus appears to supply a complete answer to the present case, and the Plaintiff did indeed attempt to rely on it. The spanner in the works is that it only came into force on 11 August 2010. It therefore does not affect the agreement for the 2nd Loan which was concluded on 21 October 2009. Nevertheless, as explained earlier, I have held that the Caveat should be removed for other reasons.

Conclusion

56 For the foregoing reasons, I allow the Plaintiff's application and order that:

(a) the Caveat lodged by the Defendant against the Property be removed;

(b) the Registrar of the Supreme Court be empowered to execute any and all documents on the Defendant's behalf to enable the Caveat to be removed; and

(c) the Defendant to be restrained from lodging further caveats against the Property in respect of the 2nd Loan.

57 The Plaintiff is entitled to the costs of these proceedings to be taxed if not agreed.

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