

**COURT OF APPEAL MALAYSIA
(APPELLATE JURISDICTION)
CIVIL APPEAL NO. Q-02-455-07**

BETWEEN

5 **ZEMINE DEVELOPMENT SDN BHD ... APPELLANT**

AND

HONG KONG REALTY SDN BHD ... RESPONDENT

CORAM: DATO' JAMES FOONG, J.C.A.

DATO' WAN ADNAN BIN MUHAMMAD, J.C.A.

10 **DATUK SULONG MATJERAIE, J.C.A.**

GROUND OF JUDGMENT

[1] This is the judgment of the Court.

15 **[2]** This is an appeal against the decision of the learned High Court Judge at Sibuan, Sarawak who had dismissed, with costs, the Originating Summons of the appellant/plaintiff (Appellant) for an Order for the removal of caveat under Section 177 of the Sarawak Land Code (Cap.81). We agreed with and affirmed the decision of the learned High Court Judge and
20 have accordingly dismissed the appeal. Our reasons are as follows.

BRIEF FACTS:

25 **[3]** The Appellant, being the registered proprietor of all that parcel of land situate at Sungai Seduan Sibuan, containing an area of 22.983 hectares, more or less and described as Lot 1382 Block 11, Seduan Land District ('the said land'), entered into a development agreement ('development

agreement') with the respondent/defendant ('Respondent') on 9th May, 1998 for the development of the said land. The Respondent was formerly known as Vicspeed Sdn Bhd.

5 **[4]** It was envisaged under the development agreement that residential and commercial buildings will be constructed on various subdivided sublots thereon.

10 **[5]** The development agreement confers, on a sharing basis, the Appellant with 20% of the residential and commercial buildings approved by the authorities while the Respondent shall retain the remaining 80% of the said buildings.

15 **[6]** Clause 17(1) of the development agreement confers the right of the Respondent to lodge a caveat against the said land. Accordingly, the Respondent lodged a caveat at the Sibuland Registry Office on 23rd day of June 1998 vide Instrument No. L6318/1998 ('the caveat').

20 **[7]** Disputes arose between the parties hereto culminating in the termination of the development agreement and resulting in the Respondent taking Writ Action ('Writ Action') for Specific Performance against the Appellant. The said Writ Action is still pending before the High Court in Sibuland, Sarawak.

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ISSUE BEFORE THIS COURT

[8] Whether the development agreement confers onto the Respondent beneficial interest in the said land to sustain the caveat?

5 **DECISION OF LEARNED HIGH COURT JUDGE.**

[9] The learned High Court Judge was satisfied that the Respondent had successfully established a serious question to be tried and concluded that the balance of convenience laid in maintaining status quo to prevent, inter-
10 alia, scuttling the prospect of the Respondent's pending Writ Action for specific performance.

APPELLANT'S CONTENTION

15 [10] Learned counsel for the appellant argued that since the development agreement has been terminated the Respondent ceased to have any more beneficial interest over the land to sustain the caveat.

[11] He argued that the development agreement stipulates that the
20 Respondent shall apply for and obtain approval in principle in writing for the subdivision of the said land within a period of twenty-four (24) months from the date of the Agreement which was 9th May, 1998. Therefore such approval in principle should have been obtained by 9th May, 2000.

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[12] It was further argued that in the event that approval cannot be obtained within the stipulated 24 months period, then the development agreement, the Power of Attorney shall *ipso facto* lapse and be determined. The caveat shall also be withdrawn by the Respondent at its own costs.

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[13] Learned counsel for the Appellant alleged that no such approval was forthcoming within the 24 months period. He conceded however that there was a letter dated 5th May, 2000 from Jabatan Tanah dan Survei, Bahagian Sibuan, Sarawak (Lands & Surveys Department, Sibuan, Sarawak) at page 178 of the Record of Appeal but contended that approval was never obtained. It was a mere invitation to treat.

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[14] This Court notes however that the said letter seems to offer provisional approval for a period of three (3) months subject to payment of specified fees.

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[15] It was also the contention of learned counsel for the Appellant that this was a contractual interest provided for under the development agreement. He argued that once the Respondent cannot perform and comply with paragraphs 3(1) and 3(2) of the development agreement, paragraph 3(3) shall apply.

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[16] For easy reference paragraph 3(1) of the development agreement provides as follows:-

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“The Developer shall apply for and obtain the approval in principle in writing for the subdivision of the said land within a

period of twenty-four (24) months from the date of this Agreement.”

[17] Paragraph 3(2) of the same provides:-

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“This Agreement and the Power of Attorney shall ipso facto lapse and be determined in the event that the Developer shall fail to obtain the approval in principle in writing for the subdivision of the said land within the said 24 months.”

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[18] Paragraph 3(3) provides:-

“In the event the Agreement and the Power of Attorney are determined as provided in clause 3(1) and (2) hereof, the Developer shall at its own costs and expenses forthwith revoke the Power of Attorney and withdraw any caveat in respect of the said land...”

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[19] Based on the above, it was therefore the contention of the learned
20 counsel for the appellant that applying paragraph 3(3) of the Development Agreement the Respondent should have withdrawn the caveat and revoked the Power of Attorney when it failed to comply with paragraph 3(1) of the Development Agreement.

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RESPONDENT'S CONTENTION

[20] Learned counsel for the Respondent on the other hand argued that the Development Agreement conferred beneficial interest in the said land on the Respondent because of the "sharing basis" arising from the allocation of 20% of the sublots approved for the appellant and the remaining 80% to the Respondent.

[21] As a result of the termination of the Development Agreement, it was argued that there was a genuine dispute culminating in the Respondent taking a Writ action for specific performance. This action is still pending before the High Court and as such it was argued that this Court need only be satisfied, at this stage of the proceeding, that the Respondent had shown that it had an interest in the said land to preserve the caveat and on a balance of convenience status quo be maintained until the trial of the Writ Action.

DECISION OF THE COURT:

[22] In MOHAMED BIN OKI & ANOR v LAU HIENG MING & ORS [1981] 2MLJ 88 H/C, learned Tan Chiaw Thong J was of the view that the decisions in NANYANG DEVELOPMENT (1966) SDN BHD V HOW SWEE POH [1970] 1 MLJ 145 and ENG MEE YONG & ORS v LETCHUMANAN [1979] 2 MLJ 212 involving applications made under section 327 of the National Land Code are applicable to applications made under section 177 of the Sarawak Land Code (Cap 81). This is because it was his view that the provisions of section 327 of the National Land Code are substantially

similar to those in section 177 of the Sarawak Land Code (Cap.81). With respect we share his learned view. Indeed this instant application is made under section 177 of the Sarawak Land Code (Cap.81).

5 **[23]** Applying the test in ENG MEE YONG'S case, the onus is upon the Respondent, as caveator, to satisfy the court that on the evidence presented to it his claim to an interest in the property placed under caveat does raise a serious question to be tried; and having done so, he must go on to show that on the balance of convenience it would be better to
10 maintain the status quo until the trial of the action by preventing the caveatee from disposing of his land to some third party.

[24] Additionally it is pertinent at this stage to consider the provisions of section 173 of the Sarawak Land Code (Cap. 81) which deals with "Caveat
15 against dealing". Section 173 stipulates:-

173. *Any person -*

(a) claiming to be entitled to or to be beneficially interested in
20 any land, estate or interest under this Code by virtue of any unregistered agreement or other instrument or any transmission , or of any trust express or implied or otherwise howsoever, ...

25 (b) ...

(c) ...

may at any time lodge with the Registrar a caveat in Form O in the First Schedule.

5 **[25]** Therefore it is the considered view of this Court that there is merit in the finding of the learned High Court Judge that the entitlement of 80% of the subdivided lots of the said land constitutes the Respondent beneficial interest in the said land because of the words “by virtue of any unregistered agreement of other instrument” appearing in section 173 thereof are wide enough to encompass the Development Agreement.

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[26] We are equally satisfied that the Respondent had successfully established a serious question to be tried. Further we are also of the considered view that the conflicting affidavits relating to the various issues raised by the Appellant pertaining to time frames and proposition based on lapse and effluxion of time to sustain their assertion that the Development Agreement had lapsed and was no longer subsisting ought to be tried and should not be disposed of simply by way of affidavit evidence.

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[27] For the reasons stated, we hold that the Respondent has succeeded in discharging the onus placed in satisfying this court of its claim to a caveatable interest in the said land and consequently raised a serious question to be tried. We have read and re-read the grounds of decision of the learned High Court Judge and there is nothing to show that there was any error in law and does not therefore warrant interference.

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[28] We find that there is a serious question to be tried and on the balance of convenience we are of the opinion that the caveat should remain intact

to maintain a status quo pending the outcome of the hearing under appeal No.22-05-01 at the High Court in Sibul, Sarawak which will be heard very soon. This appeal is dismissed with costs. Deposit to the Respondent towards account of taxed costs.

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Original signed by:

DATUK SULONG MATJERAIE
Judge of Court of Appeal, Malaysia
10 **13th April 2009**

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