

**DALAM MAHKAMAH TINGGI MALAYA DI SHAH ALAM
DALAM NEGERI SELANGOR DARUL EHSAN
(SAMAN PEMULA NO: BA-24NCVC-1094-09/2018)**

**Dalam Perkara Mengenai Borang
19C - Notis Berkenaan Dengan
Cadangan Untuk Memotong Kaveat
oleh Kesavan A/L Muniandy dan
Parameswari A/P Ramasamy di
bawah Seksyen 326 Kanun Tanah
Negara 1965**

Dan

**Dalam Perkara Mengenai Kaveat
Persendirian No. Perserahan
28468/2018 bertarikh 13.6.2018
terhadap hartanah yang dipegang di
bawah Hakmilik Geran 333897, No.
Lot 10034 (dahulu dikenali sebagai
Geran 132573, No. Lot 10034),
Bandar Kundang, Daerah Gombak,
Negeri Selangor**

Dan

**Dalam Perkara Seksyen 326(2) dan
Seksyen 417 Kanun Tanah Negara
1965**

Dan

**Dalam Perkara Seksyen 25 Akta
Mahkamah Kehakiman 1964 dan
Perkara 6 dalam Jadual Akta
Mahkamah Kehakiman 1964**

Dan

**Dalam Perkara Mengenai Aturan 92
Kaedah 4 Kaedah-Kaedah
Mahkamah 2012**

ANTARA

**DAYOU TEXTILES CORP. SDN BHD
(NO. SYARIKAT: 608279-X)**

...PLAINTIF

DAN

- 1. KESAVAN A/L MUNIANDY
(NO. K/P: 570602-08-5449)**
- 2. PARAMESWARI A/P RAMASAMY
(NO. K/P: 610513-07-5410)**

... DEFENDAN-DEFENDAN

JUDGMENT

INTRODUCTION

- 1. This is the Defendants' application (Enclosure 15) to strike out the Originating Summons dated 7 September 2018 and the Ex-Parte Order dated 20 September 2018.**

- 2. The cause papers for this application are as follows:**
 - (a) Notis Permohonan (Membatalkan Saman Pemula dan Perintah Ex-Parte) dated 15 November 2018;**
 - (b) Affidavit Sokongan duly affirmed by Kesavan a/l Muniandy on 15 November 2018;**
 - (c) Affidavit Jawaban Plaintiff duly affirmed by Tan Kuan Wee on 13 December 2018;**
 - (d) Affidavit Balasan Defendan-defendan duly affirmed by Kesavan a/l Muniandy on 9 January 2019;**

The Plaintiff has also filed a "Notis Niat untuk Menggunakan Affidavit" namely :

- (e) Affidavit Sokongan Paintiff duly affirmed by Tan Kuan Wee on 7 September 2018;**

- (f) Affidavit Balasan Plaintiff duly affirmed by Tan Kuan Wee on 28 November 2018; and
- (g) Affidavit Jawaban duly affirmed by Yap Ching Fa on 28 November 2018.

FACT OF CASE

3. Based on the Affidavits filed by parties, I would conclude the fact of case as follows :

- (a) The Plaintiff is a private limited company incorporated under the Companies Act 1965 and is in the business of trading in textile products;
- (b) The Defendants are Directors and the Second Defendant is the shareholder of a private limited company known as PK Garments Manufacturer (M) Sdn. Bhd. PK Garments is in the business of trading and marketing of textiles, fabric, clothe and other related products;
- (c) The Defendants are also the owners of the Individual Title Held Under Geran 333897, Lot no. 10034 (previously known as Geran 132573, Lot No. 10034), Bandar Kundang, Daerah Gombak, Negeri Selangor;
- (d) The Plaintiff and PK Garments have been doing business since 2013 – 2015, whereby the Plaintiff will supply textiles to PK Garments;

- (e) Form 28 June 2013 till 16 January 2014, PK Garments have an outstanding debt which is due and owing to the Plaintiff in the sum of RM330,006-50;
- (f) At that point in time, the Defendants, in their capacity as Directors of PK Garments have informed the Plaintiff that PK Garments is unable to pay the amount due and owing as they are experiencing financial difficulties;
- (g) Despite owing the Plaintiff RM330,006-05, the Plaintiff agrees to assist PK Garments and has accordingly provided PK Garments with an additional loan RM100,000-00 on the representations by the Defendant that they will pledge the property as collateral to the Plaintiff;
- (h) To show their sincerity in the above transactions, the Defendants have given the original Geran of the said property to the Plaintiff, for safekeeping;
- (i) At the same time, the Defendants and the Plaintiff have signed the Sale and Purchase Agreement, Power of Attorney as well as the Memorandum of Transfer for the said property;
- (j) Despite signing the above, the Plaintiff did not perfect the transfer of the property as the Defendants have promised to settle the debts as soon as possible;

- (k) After signing the Sale and Purchase Agreement, Power of Attorney as well as the Memorandum of Transfer for the said property, to safeguard the Plaintiff's interest, the Plaintiff instruct his solicitors (Messrs. Norhafiza Yap & Neo) to enter a private caveat on the property;
- (l) The Plaintiff continues to supply textiles to PK Garments and PK Garments have made occasional part payments. As at 20 June 2016, the total debt that is due and owing by PK Garments to the Plaintiff is in the sum of RM492,207-02;
- (m) Despite multiple demands from the Plaintiff, PK Garments failed, refused and/or neglected to settle the amount due and owing. They also did not contact the Plaintiff not order any more textiles from the Plaintiff;
- (n) Given their refusal, on or around June 2018, the Plaintiff visited the Selangor Land Office in an attempt to perfect the transfer of the property to the Plaintiff. The Plaintiff's discovery at the Selangor Land Office shocks the Plaintiff;
- (o) The Plaintiff was informed by the Officer at the Selangor Land Office that the First Private Caveat was not entered. The Plaintiff was further informed that the transfer of the Property could not be perfected as the Defendants had already applied and gotten a new Geran for the said Property. The Defendants have

obtained a new Geran on the grounds that the old Geran was lost when in actual fact the old original Geran was in the Plaintiff's possession and safe keeping all along;

- (p) Upon the discovery, the Plaintiff contends that the Defendants' act are tainted with bad faith because till todate they, in their capacity as directors of PK Garments have failed, refused and/or neglected to settle the amount due and owing to the Plaintiff;
- (q) Premised on the above and since the First Private Caveat was not entered, the Plaintiff proceeded to enter Second Private Caveat. Thereafter, the Plaintiff proceeded to forward a statement of account to PK Garments to demand for the amount due and owing;
- (r) Not only did the PK Garments failed to pay the Plaintiff, the Defendants have gone to the Selangor Land Office to remove the Second Private Caveat;
- (s) On this note, the Plaintiff contends that the Defendant's act at all material times are tainted with bad faith and the Defendants are committing fraud as well as misrepresentations against the Plaintiff.

DEFENDANT'S COUNSEL SUBMISSION

4. The learned counsel for the Defendant in attempting to set aside and strike out the Ex-Parte Order dated 20 September 2018 based on the following grounds :

- (a) The Plaintiff has obtained the final reliefs vide the Ex-Parte Order dated 20 September 2018;
- (b) The relief prayed for and obtained vide the Ex-Parte Order dated 20 September 2018 is wrong in law; and
- (c) There is irregularity and procedural non-compliance with the Rules of Court 2012 with regards to the Ex-Parte Order dated 20 September 2018.

FINDING OF THIS COURT

Having considered the Affidavits filed by parties and the Written Submissions, I shall now consider the rival contention amongst them.

FIRST ISSUE

Ex-Parte Order dated 20 September 2018 – a final relief?

5. The Ex-Parte Oder dated 20 September 2018 was issued in pursuant to Enclosure 10 and it relates to the order prayed for by the Plaintiff in the Originating Summons (Enclosure 1). For purpose of deciding this issue, it is best to quote the Order granted by the Court and the Order prayed by the Plaintiff.

Orders prayed for in the Originating Summons [Ex Parte] (Enclosure 1).

1. *Bahawa Kaveat Persendirian No. Perserahan 28468/2018 bertarikh 13.6.2018 terhadap Hartanah yang dipegang di bawah HakmilikGeran 333897, No. Lot 10034 (dahulu dikenali sebagai Geran 132573, No. Lot 19934), Bandar Kundang, Daerah Gombak, Negeri Selangor dilanjutkan sehingga perintah selanjutnya*

- oleh Mahkamah Yang Mulia Ini dan/atau sehingga pelupusan prosiding undang-undang di antara Plaintiff dan Defendan-Defendan;
2. Bahawa Borang 19C – Notis Berkenaan Dengan Cadangan Untuk Memotong Kaveat oleh Kesavan A/L Muniandy dan Parameswari A/P Ramasamy yang dikeluarkan oleh Pendaftar/ Pentadbir Tanah Pejabat Tanah Dan Galian Selangor bertarikh 1.8.2018 di bawah Seksyen 326 Kanun Tanah Negara 1965 terhadap Plaintiff yang beralamat di No.29-2B, Jalan PJU 1/3F, Sunwaymas Commercial Centre, 47301 Selangor diketepikan;
 3. Kos tindakan ini mengikut kausa; dan
 4. Relif-relif lain dan selanjutnya yang Mahkamah Mulia Ini anggap patut dan sesuai.

Orders granted as per Ex-Parte Order dated 20.9.2018 (Enclosure 10).

1. Bahawa Kaveat Persendirian No. Perserahan 28468/2018 bertarikh 13.6.2018 terhadap Hartanah yang dipegang di bawah Hakmilik Geran 333897, No. Lot 10034 (dahulu dikenali sebagai Geran 132573, No. Lot 19934), Bandar Kundang, Daerah Gombak, Negeri Selangor **dilanjutkan sehingga perintah selanjutnya oleh Mahkamah Yang Mulia Ini;**
2. Bahawa Borang 19C – Notis Berkenaan Dengan Cadangan Untuk Memotong Kaveat oleh Kesavan A/L Muniandy dan Parameswari A/P Ramasamy yang dikeluarkan oleh Pendaftar/ Pentadbir Tanah Pejabat Tanah Dan Galian Selangor bertarikh 1.8.2018 di

bawah Seksyen 326 Kanun Tanah Negara 1965 terhadap Plaintiff yang beralamat di No.29-2B, Jalan PJU 1/3F, Sunwaymas Commercial Centre, 47301 Selangor diketepikan;

3. *Kos tindakan ini mengikut kausa; dan*
4. *Perkara ini adalah ditetapkan untuk pendengaran inter-partes pada 11.10.2018.*

Having obtained the Ex-Parte Order by the Plaintiff, the learned counsel for the Defendant submitted that Plaintiff had obtained the final relief as prayed for under Enclosure 1. Such action would be in breach of natural justice as it would deprive the Defendant of his right to be heard.

6. With respect, upon perusing the Ex-Parte Order dated 20 September 2018, the key word in the Order spelt out as below :

".....Bahawa Kaveat Persendirian No. Perserahan 28468/2018 bertarikh 13.6.2018 terhadap Hartanah yang dipegang di bawah Hakmilik Geran 333897, No. Lot 10034 (dahulu dikenali sebagai Geran 132573, No. Lot 19934), Bandar Kundang, Daerah Gombak, Negeri Selangor dilanjutkan sehingga perintah selanjutnya oleh Mahkamah Yang Mulia ini;

The above Order is subjected to further Order from the Court. In such a situation it would spelt out the date for *Inter Partes* hearing in 21 days after the date of the Ex-Parte Order. It would mean that the hearing date for *Inter Partes* was fixed on 11 October 2018. As such, the Defendant would be allowed to contest, dispute or challenge the Ex-Parte Order dated 20 September 2018.

Nevertheless, the *Inter Partes* hearing did not take place as parties obtained further directions pertaining to the filing of Affidavits. **In such a situation, it is clear to my mind that the Ex-Parte Order is not a final relief as contended by the Defendants.** Having read the Ex-Parte Oder, I am in agreement with the Plaintiff's solicitor in that the objectives of Enclosure 1 is merely to preserve the Plaintiff's right on the Property to subsequently commence legal action against PK Garments Manufacturer (M) Sdn. Bhd. and the Defendants to recover the sum of RM492,207-02.

Sub-Issue

Has the Defendant being deprived of the principles of Audi Alteram Partem?

7. The principles of "*Audi Alteram Partem*" simply talk on the Defendant's right to be heard. As the hearing date was first fixed on 11 October 2018, the Defendants have appointed their own solicitors. From the record, I noticed that parties have already exhausted the Affidavit for Enclosure 1 and hearing will be heard in due course. In such a situation, both parties especially the Defendant shall put their argument pertaining to this matter. On the day of the hearing, upon hearing the arguments by both parties, this Honourable Court would made a finding as to whether the Second Caveat would be preserved and extended or such Caveat should be lifted and set aside pending the disposal of the action made by the Plaintiff against PK Garment and the Defendant. Having perused the Affidavits, it has come to my attention that the Plaintiff had given an additional loan to the Defendant. At the same time, the Defendant's property would be given to the Plaintiff as collateral to the loan by surrendering the original title for

safekeeping. Apart from this, the Defendant had also signed the Sale and Purchase Agreement dated 10 March 2014, Power of Attorney dated 10 March 2014 and the Transfer Form (Form 14A). Although the Defendant alleged that the Plaintiff had defrauded them by giving the first and the last pages of these document for signing, nevertheless the Plaintiff in his Affidavit had exhibited "TKW-6", "TKW-15", "TKW-17", "KSVMY-OS-4" and "KSVMY-OS-5" showing that all these documents were within the full knowledge of the Defendant. Having considered this matter, to my mind the Plaintiff has valid reasons to extend the Second Caveat as they have caveatable interest over the Property which qualify them for an Ex-Parte application in Enclosure 1. In the case of : **Sing Lian Express Sdn. Bhd. v. Soh Kim Tee (1974) 2 MLJ 24**, Syed Othman J (as His Lordship then was) held that :

".....In the application for extension of the caveat it was shown that the respondent had the option, the company had refused the exercise of the option within the time specified in the option, and the respondent had filed an action in court with a view to enforcing his legal rights under the option affecting the land. Prima facie a case was made up for the extension of the period of the caveat....."

In the case of : **Devi Meyyammai M. Ramanathan & Anor. v. Hartini Mohamad & Anor (2013) 3 CLJ 31 (CA)**, Aziah Ali JCA (as Her Ladyship then was) delivering the judgment of the court :

*".....An application to lodge a private caveat must contain an assertion by the purchaser that **there is a concluded contract for the sale and purchase of the land because there can be no claim to the title to the registered land until and unless a purchaser has an enforceable contract***

for such sale. The fact that there was a concluded contract between the appellants and the first respondent was not an issue. It was also not disputed that the appellants had performed their contractual obligations by tendering monies to the bank which amounted to part performance of the SPA. (paras 13 & 14)

.....The onus is upon the caveator to satisfy the court that on the evidence presented, his claim to an interest in the property 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 maintain the status quo until the trial of the action by preventing the caveatee from disposing of his land to some third party. At this stage of the proceedings, what is required of the appellants is to show that they had a prima facie case and not that they must ultimately succeed. (para 19)....."

8. Based on the above cases, in my view that the Plaintiff has merit and justification in preserving and preventing the Property from being disposed of to the third party. It would also assist the Plaintiff to commence legal action against PK Garments Manufacturer (M) Sdn. Bhd. and the Defendants to recover the sum of RM492,207.02. To this effect, **it is my considered view that the Ex-Parte Order was not a final relief as the Defendant had ever opportunity of being heard and were never prejudiced by the Plaintiff's action.**

SECOND ISSUE***The relief prayed for and obtained vide the Ex-Parte Order - wrong in law ??***

9. The learned counsel for the Defendant had alleged that the Prayer 2 of the Order dated 20 September 2018 is wrong in law. As it is wrong in law, Defendant submitted that such Order need to be strike out or set aside. Prayer 2 reads as follows :

".....Bahawa Borang 19C – Notis Berkenaan Dengan Cadangan Untuk Memotong Kaveat oleh Kesavan A/L Muniandy dan Parameswari A/P Ramasamy yang dikeluarkan oleh Pendaftar/ Pentadbir Tanah Pejabat Tanah Dan Galian Selangor bertarikh 1.8.2018 di bawah Seksyen 326 Kanun Tanah Negara 1965 terhadap Plaintiff yang beralamat di No.29-2B, Jalan PJU 1/3F, Sunwaymas Commercial Centre, 47301 Selangor diketepikan....."

In concluding this issue, I am guided by Section 417(1) of the National Land Code 1965 which provides as follow :

417 General authority of the Court

- (1) *The Court or a Judge may by order direct the Registrar or any Land Administrator to do all such things as may be necessary to give effect to any judgment or order given or made in any proceedings relating to land, and it shall be the duty of the Registrar or Land Administrator to comply with the order forthwith."*

In the case of : **Malaysia Building Society Bhd. v. KCSB Konsortium Sdn. Bhd. (2017) 4 CLJ 24 (FC)**, Ariffin Zakaria CJ delivering the judgment of the court :

".....Any court making an order on any matter which relates to land may, consequent upon the order, give such direction to the Registrar as may be necessary to give effect to such order. There was nothing to say that a party has to firstly obtain the order of the court in one proceeding and subsequently apply in another proceeding for a direction under s. 417 of the NLC. Therefore, there was nothing to support the two stage approach/process. Under s. 417 of the NLC, the court is vested with the power to direct the Registrar to do anything it deems necessary to give effect to its judgment or order. This power was conferred by the NLC on the court to ensure that judgment or order of the court was duly carried out by the Registrar....."

Based on the above, to my mind, Prayer 2 of the Order would form as a consequential order after the Second Caveat had been extended. To this effect, there is nothing wrong for this Court to set aside Borang C and to direct the Registrar to give effect to the Ex-Parte Order. As such the relief prayed for vide the Ex-Parte Order dated 20 September 2018 is not wrong in law and validly obtained.

THIRD ISSUE

Ex-Parte Order dated 20 September 2018 – any irregularity and non compliance in procedure??

10. The learned counsel for the Defendant submitted that the Plaintiff obtained one Ex-Parte Order on 20 September 2018. Nevertheless, there were instead two separate sealed Ex-Parte Orders. These were prepared and caused by the Plaintiff namely :

- (a) The sealed Ex-Parte Order dated 20 September 2018 (Enclosure 8) which contained the word "DERAF" on the title of the Order; and
- (b) The re-sealed Ex-Parte Order dated 20 September 2018 which the word "DERAF" has been removed.

From the record, the re-sealed Order as (b) above was served to the Defendant and the Registrar Land Office. The learned counsel for the Defendant submitted that there is an irregularity and procedural non-compliance with the Order rendering it a nullity. According to the learned counsel, the Plaintiff did not comply with Order 20 Rule 11 Rules of Court 2012 in that the Plaintiff did not make an application to remove the word "DERAF". Having failed to do so, it would caused the Ex-Parte Order be irregular and hence there is no requirement of having Inter-Partes hearing. In such a situation, the Ex-Parte Order would be set aside. In coming to the conclusion of this issue, I have rechecked on the previous scenario that had occurred until the sealing of the Order. On 7 September 2018, the Originating Summons (Ex-Parte) was filed and heard before this court on 20 September 2018 in which reliefs as stated in Enclosure 10 was granted. Subsequently, the Plaintiff filed the Draft Order. On the same date ie. 20 September 2018, the learned Senior Assistant Registrar had approved the Draft Order with minor amendments with the word "DERAF" still exists. As such, the Plaintiff filed a Fair Order and accordingly sealed (Enclosure 8). Having filed a Fair Order, the Plaintiff had informed the learned Senior Assistant Registrar that such Order contain the word

"DERAF" on the title and subsequently were directed to refile a new Fair Order without the word "DERAF" on the title. On such instruction, the Plaintiff had filed a new Fair Order and was sealed and extracted. The same was duly served on the Defendant and the Registrar Land Office. Nevertheless, the Plaintiff did not file an application to remove the word "DERAF".

11. The question that come to my mind is whether the Plaintiff's failure to apply under Order 20 Rule 11 Rules of Court 2012 to remove the word "DERAF" from the Ex-Parte Order dated 20 September 2019 (Enclosure) render it a nullity??

Amendment of judgement and orders

(Order 20 Rule 11 ROC 2012)

11. *Clerical mistakes in judgment or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court by notice of application without an appeal*

Having observed the Order in Enclosure 8 and Enclosure 10, I noticed that the contents of both Order remain the same except the word "DERAF" appears on the title. Furthermore, with the word "may" in Order 20 Rule 11 reflects to me that the provision is not mandatory but merely directory. **To my mind, non-compliance of this provision does not invalidate and nullify the Order dated 20 September 2018 (Enclosure 10) as it would not cause any miscarriage of justice. The removal of the word "DERAF" in Enclosure is a mere misnomer which can be corrected by this Honourable Court. The resealing of Enclosure 10 would not in any way prejudiced to the Defendant and the Registrar Land**

Office. As such, the irregularity is curable under Order 1A and Order 2 Rules of Court 2012 and does not nullify the Ex-Parte dated 20 September 2018 (Enclosure 10). The Court has inherent authority to amend and correct the minor irregularity. In the case of : **Sabri Ahmad Tah & Satu Lagi v. Dato' Muhammad Muhiyuddin Hati Abdullah & Yang Lain (2017) 1 LNS 605**, Che Mohd Ruzima J held as follows :-

".....[24] Setelah diteliti persoalan yang dibangkitkan, adalah didapati bahawa kesilapan menyebut nama plaintiff-plaintif di dalam pliding hanyalah satu salah nama (misnomer) sahaja, suatu kesilapan yang tidak memudaratkan dan boleh dipulihkan. Mohamed Azmi HMA di dalam kes Ng Siew Wah & Ors v. Maa Holdings Sdn Bhd & Anor [1985] 1 LNS 37; [1985] 2 MLJ 332 telah memutuskan :-

.....Be that as it may, it is an established principle that rectification is not necessary if there is obvious mistake or misnomer in a document. No court will allow people to take advantage of a misnomer or a typing error when everyone knows what was intended. Thus, in Nittan v. Solent Steel [1981] 1 Lloyd's Rep, Lord Brightman, L.J. said at page 639:-

"In my opinion, in construing a document, the court is at liberty, as a matter of construction, to correct a misnomer..."

[25] Selain itu, defendan-defendan tidak diprejudis dengan salah nama tersebut..... Tidak ada sebarang keterangan yang dikemukakan bagi membuktikan bahawa salah nama tersebut telah menjejaskan hak pihak defendan di dalam mengemukakan pembelaan....."

In the case of : **Mokhtar Amin v. Mohamed Mokhtar Omar (2001) 4 CLJ 489 (CA)**, Gopal Sri Ram FCJ (as His Lordship then was) delivering the judgment of the court :

".....Similarly, mandatory and directory provisions whether in the rules of court or other procedural legislation were interpreted in a straightjacket fashion. So, as a general rule, when a provision said "shall", it was regarded as being mandatory In effect, whereas if it said, "may", then it was treated as being merely directory. Non-compliance of the former rendered invalidated proceedings, but non-compliance of the latter did not. No attention whatsoever was paid to the consequences of noncompliance of such provisions. It did not matter, for instance, whether anybody was prejudiced by, or whether any Injustice resulted from, the non-compliance in question...

.....This, I think, is the approach that should be adopted by our courts. In my judgment, the non-compliance of procedural requirements should not be treated as invalidating any action or other proceeding or step taken therein unless it occasions a substantial miscarriage of justice....."

In the case of : **Dull Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v. Datuk Captain Hamzah Mohd Noor & Anot (2009) 4 CLJ 329 (FC)**, Zaki Tun Azmi CJ (as His Lordship then was) delivering the judgment of the court :

".....[46] The technical non-compliance of any rule may be remedied where there is an accidental omission or oversight by a party. A general provision such as O. 1A RHC is for the court or judge to give heed to justice over technical non-compliance...

[47] It is now necessary to determine the meaning of the phrase "... technical non-compliance..." in O. 1A RHC as it will assist in identifying the breaches contemplated by the rule. Useful guidance is provided by the meaning of the phrase "technical defect" considered in *Gangadhar Dandawate v. Premechand Kashyap* AIR [1958] MP 182 where AH Khan J said at p. 184 :

It is not always easy to define what the expression 'technical defect' means. A technical defect in law is one which may come within the four corners of it, but it does not affect the merits of the case. It is a mistake which does not go to the core of the matter...

[48] *In the context of the Rules of the High Court 1980 the phrase "... technical non-compliance..." is thus a reference to non-compliance with a rule which is not fundamental or mandatory in nature....."*

Similarly, in the case of: **Malayan Banking Bhd. v. Koay Kang Chuwan & Anor (2010) 6 CLJ 172 (CA)**, Abdul Malik Ishak JCA (as His Lordship then was) delivering the judgment of the court :

".....No irregularity or defect would render the proceeding a nullity. Order 2 r. 1(1) of the RHC gives the court the widest possible power to cure an irregularity in order to do justice. Here, the failure to serve the affidavit of Chew Hai Chee on the first respondent was an irregularity and not a nullity and was certainly curable. (paras 19, 20, 21, 22 & 36)....."

FOURTH ISSUE

Is the Ex-Parte Order – Injunctive in Nature??

12. The learned counsel for the Defendant had also contended that the Ex-Parte Order dated 20 September 2018 was also Injunctive in nature and has not comply the requirement to obtain the Injunction. Having perused Enclosure 1 of the application, it merely relate to an extension of Private Caveat under the National Land Code and not an Interlocutory Injunction. The argument put forward by the learned counsel for the Plaintiff showing that the Plaintiff has caveatable interest, serious question that need to be tried and the balance of convenience would always lies with the Plaintiff during the Ex-Parte hearing of Enclosure 1. This in in line with the principles enunciated in the case of : **Luggage Distributors (M) Sdn. Bhd. v. Tan Hor Teng @ Tan Tien Chi & Anot (1995) 3 CLJ 520 (CA)**, Gopal Sri Ram FCJ (as His Lordship then was) delivering the judgment of the court :

*".....In my judgment, there are three stages through which an inquiry of this nature must go. **The first stage is the examination of the grounds expressed in the application for the caveat. If it appears that the grounds stated therein are insufficient in law to support a caveat, then caditquaestio, and the caveat must be removed without the necessity of going any further...***

*The matter does not come to an end once the caveator satisfies the Court that his claim as expressed in the application in Form 19B amounts in law to a caveatable interest. **He must go on to show, in appropriate cases, that, based on the affidavits filed, his claim discloses a serious question meriting a trial. This then is the second***

stage. The degree of proof that has to be offered will, of course, vary from case to case...

The third stage is arrived at only after the first two hurdles have been crossed by the caveator. Here the question to be asked relates to the balance of justice, or what Lord Diplock termed in Eng Mee Yong (supra) as 'the balance of convenience'.

It is only upon satisfying these three stages of curial scrutiny that a caveat may be permitted to remain. That this should be so is only logical; for it is a serious matter to caveat a person's property, and unless a case is properly made out, a caveat ought not be permitted to remain on the register a moment longer than is absolutely necessary....."

13. Having considered the above, based on the submission by the learned counsel, it is my conclusion that :
- (i) The Ex-Parte Order dated 20 September 2018 was not a final relief and the Defendants were never deprived of the opportunity from being heard;
 - (ii) The Order was legally obtained and not wrong in law. It was granted as a form of consequential order after the Second Caveat had been extended;
 - (iii) The removal of the word "DERAF" IN Enclosure 10 is a mere misnomer which can be corrected by this Honourable Court. The resealing of Enclosure 10 did not in any way prejudice the Defendant and the Registrar Land Office; and

(iv) The Ex-Parte Order for Enclosure 1 ie. the Plaintiff's application to extend Private Caveat relied on the statutory relief provided under Section 326 National Land Code 1965 and not equitable relief ie. an Interlocutory Injunction.

14. After hearing the submission by both the learned counsel, in the premise, I hold that the Defendant's application (Enclosure 15) be dismissed with cost of RM3,000-00. Parties are to proceed with the Inter Partes hearing of Enclosure 1.

Dated 19 February 2019


(DATO' HJ. MOHAMAD SHARIFF BIN HJ. ABU SAMAH)
Judicial Commissioner (NCVC 6)
High Court of Malaya
Shah Alam, Selangor Darul Ehsan

Counsel

For the Plaintiff: Lim Eu Jin and Ong Hui Yi
(Messrs Josephine, L K Chow & Co.)

For the Defendant: Brian Sim
(Messrs. Azmi Fadzly Maha & Sim)