STRETCHING THE BOUNDARIES OF EQUITY

MAHADEVAN & ANOR V MANILAL & SONS (M) SDN BHD[1]

The result of the application of the Torrens System to the land law of Malaysia is most elusive, at least in one area in particular, viz, the application of equitable principles. For Malaysia at least, the Torrens System of registration of titles to land is supposed to introduce a system which will be far removed from the complexity and tediousity surrounding the English deed system. A system based on title obtained only upon registration was thought to be more suited to the populace, the majority of whom reside in villages and have little or no education and therefore require something easily comprehendable with a minimum degree of administrative complexity.[2] The Torrens System, with registration as the principal source from which all rights and titles to land spring, formed the pillar of Malaysian land law, but the National Land Code, 1965 which represents the codification of the Torrens concept became instead the primary source of doubt and dispute.

Over the years, commentators, authors, academicians and members of the Bar and Bench have come to question the very basis of the Torrens concept itself, especially the concept as codified in the National Land Code (hereinafter referred to as "the Code"). Is the Code conclusive? Is there any place in the system for an unregistered dealing? What is the position of a party holding an unregistered instrument? If one goes on the basis that the core of the Torrens System is registration and registration alone, one can easily dismiss the above questions.

[1] [1984] 1 MLJ 266.

[2] See, generally, Das, SK, *The Torrens System in Malaya*, 1963 MLJ (Ltd.) (S'pore).

However, cases and opinions on this issue differ so greatly that the state of the law at present is quite confusing.[3]

The question hinges on one central issue: whether equitable principles can be applied in the light of the Torrens System and its codification thereof in the Code. This article will not add to the already existing store of doubt and confusion which exists at the moment on this issue, but, by examining just one case it is hoped that it will bring to light how important it is that this issue be settled. Otherwise, due to an overzealous effort on the part of some to "do equity" the Malaysian legal system will develop the habit of accumulating absurdities.

In *Mahadevan & Anor* v *Manilal & Sons (M) Sdn Bhd*,[4] the respondents alleged that they had advanced to one R (since deceased) the sums of $29,500 on December 20, 1966 and $250,000 on March 21, 1967. The deceased repaid $50,000 leaving a balance of $229,500. The deceased died on April 19, 1973 and the appellants were the administrators of his estate. The respondents brought an action to recover the sum owing and the learned Judicial Commissioner found in favour of the respondents. The respondents had established that the sums were paid to R on the security of a lien and equitable charge being based on the common intention of the respondents and R to have the said lands charged to the respondents as temporary security pending the sale of certain property.

On appeal from the decision of the Judicial Commissioner, the Federal Court held in favour of the respondents. One of the points raised at this appeal was whether the respondents' suit was statute-barred, as the suit was commenced on July 30, 1974, which is more than seven years *after the money was received.*

[3] See, among others, Jackson, D., "Equity and the Torrens System Statutory and Other Interests" [1964] 6 Mal. LR 146; Wong, David SY, "Equitable Interests and the Malaysian Torrens System" [1967] 9 Mal. LR 20; Kok, SY, "The Nature of Right, Title and Interest under the Malaysian Torrens System: The non-application of English equities and equitable interests to Malaysian Land Law" [1983] 1 MLJ cxlix; Haji Salleh Buang, "Equity and the National Land Code - Penetrating the Dark Clouds" [1986] 1 MLJ cxxxv; Teo Keang Sood, "The Scope and Application of section 6 of The Civil Law Act, 1956" [1987] 1 MLJ lxix.
See also, *Wilkins & Ors* v *Kannamal & Anor* [1951] MLJ 99; *Chin Cheng Hong* v *Hameed & Ors* [1954] MLJ 169; *Pemungut Hasil Tanah Kota Tinggi* v *UMBC* [1981] 2 MLJ 264; *Chin Chor & Ors* v *Collector of Stamp Duties* [1981] 2 MLJ 47.

[4] [1984] 1 MLJ 266.

In deciding this question regarding limitation his Lordship Salleh Abas CJ (as he then was) stated that it depended upon the purpose for which these sums were paid and upon the nature of rights acquired by the respondent regarding the payments. If it was a debt pure and simple, section 6(1) of the Limitation Act 1953 provides that actions founded on a contract cannot be brought after the expiration of six years from *the date on which the cause of action accrued.* However, under section 21(1) of the same Act, an action to recover a principal sum of money secured by a mortgage or other charge on land cannot be brought after the expiration of twelve years from the *date when the right to receive the money accrued.*

His Lordship Salleh Abas reasoned that this was not a straight case of recovering a debt, which is an action based solely on contract; it was an action to recover a sum of money secured by a mortgage or other charge on land. The peculiarity of this reasoning is that there were no charges or liens created over the land in the manner that would be commonly understood, i.e., a statutory charge or lien. Neither was there evidence of any written agreement to create such a charge or lien. The only evidence led of the security was the fact that the respondent and the deceased had a joint venture business of buying and selling lands, by which the respondent would supply part of the capital and before the land was sold, it would be charged to them or at least its title deed would be deposited with the parties' common solicitors in order to secure the part capital which they had advanced. In short, there existed a common intention to create a security in consideration for the advances made by the respondents to R.

His Lordship Salleh Abas decided that this common intention to create a security by way of a charge or lien amounted to an equitable charge or lien being created, with the result that the action was not statute-barred as it could now be covered by section 21(1) of the Limitation Act, where such actions "to recover any principal sum of money secured by a mortgage or other charge on land" could be brought within twelve years from the date when the right to receive the money accrued.

With respect, it is submitted that there are several flaws in his Lordship's decision in this case. His Lordship actually gave recognition to a security having been created over land from

evidence of a common intention to so create a security. It is submitted that this decision is without any parallel in the history of decisions regarding the application of equitable principles under the Code. His Lordship cited cases such as *Vallipuram Sivaguru*[5] v *Palaniappa Chetty*, *Mercantile Bank*[6] v *Official Assignee*[7] and *Arunasalam Chetty* v *Teah Ah Poh*[8] as giving him the mandate to make the decision which he did. However, it is submitted that neither of those cases cited by His Lordship went so far as to state that a security coult exist in equity if it is not in conformity with the Code. At best, there existed an equitable interest in the land which would enable the holder thereof to enter a caveat. In fact, in *Mercantile Bank* v *Official Assignee*, Raja Azlan Shah J (as he then was) did not state that a depositee of title deeds possessed an equitable lien; he stated that such a depositee possessed a *right to a lien* in equity.[9] *Teah Ah Poh's case* cannot be used as authority to say that an equitable lien can now be created by a deposit of title deeds; in that case, the then existing Kedah Land Enactment of 1932 contained no provision for the creation of a statutory lien. Therefore, equitable principles were applied to supply the omission. It is submitted therefore, that the earlier cases which his Lordship Salleh Abas sought to rely on can, and should have been distinguished.

Further, his Lordship made no reference to statutory provisions, in particular section 6 of the Civil Law Act, 1956, and the cases wherein the effect of section 6 have been discussed.[10] Further, his Lordship stated:

[5] [1937] MLJ 55.

[6] [1969] 2 MLJ 196.

[7] (1936) FMSLR 175.

[8] [1969] 2 MLJ 196, 197.

[9] See *Pemungut Hasil Tanah Kota Tinggi* v *UMBC* [1981] 2 MLJ 264; *Chin Choy & Ors* v *Collector of Stamp Duties* [1981] 2 MLJ 47.

[10] Section 6 states: "Nothing in this Part shall be taken to introduce into Malaysia or any of the States comprised therein any part of the law of England relating to the tenure or conveyance or assurance of or succession to any immovable property or any estate, right or interest therein." See also, Teo Keang Sood, note 3, wherein it was argued that the Civil Law Act, 1956 does not *totally prohibit* the importation of English equitable principles.

> There is, ... no provision in the National Land Code prohibiting the creation of equitable charges and liens. The Code is silent as to the effect of securities which do not conform to the Code's charge or lien. Therefore equitable charge and liens are permissible under our land law.[10]

The Code contains laborious provisions regarding the necessity for instruments of dealing to be "in one of the forms" and the necessity for such instruments to be registered, upon which the dealing would then take effect.[11] One of the main reasons why courts have refused to take cognisance of the fact that a *jual-janji* is a form of security over land is the fact that a *jual-janji* agreement does not constitute an instrument of dealing which is in conformity with "one of the forms" and therefore, it is not registrable and consequently, it merely forms a contract between the parties and is not a security. The inference which can be drawn from all this is that the Code does not recognise as security, "securities" which do not conform. Therefore, it is not true to say that the Code "is silent" as to the effect of securities which do not conform to the Code's charge or lien. His Lordship did not discuss the effect of the various provisions of the Code itself on this point, in particular sections 205, 206, 207, 281, 242 and 243.

The idea of law is not just to maintain an orderly society by "curbing the evil passions of man" but also to provide an avenue of justice to society.[12] As the law which is normally applied in the state is man-made law, it is to be expected that such laws may not be complete; it would have shortcomings and as society progresses and changes, it may become obsolete in parts and would necessitate change. The duty of the judge is to interpret and apply the law and when the law itself is incomplete and has shortcomings, the duty of the judge is an awesome one. How does one dispense justice in the face of a law which is incomplete and defective in parts? One way out

[10] At p 271.

[11] National Land Code, 1965, section 206(1)(b).

[12] See generally, Lloyd, Dennis, *The Idea of Law*, Penguin, 1964.

is to look to other sources of law which may be able to supply the omission. For example, if the Code does not provide for the status of a person holding an unregistered document of charge, one may perhaps refer to principles of equity wherein it has been decided that such a person would have an equitable interest in the land cncerned. However, in the struggle to do justice between the parties who may not be holders of registered documents of dealing, one must not forget the equities of other members of society. In this case, by holding that an equitable charge has been created although nothing has appeared on the register, his Lordship may have satisfied the equities of the parties to the dispute. However, his Lordship's judgment on this point may have far-reaching effect in later cases, and there may be a case where a dealing may be effected with a party who has no knowledge that an earlier equitable charge had been created over the land concerned. If his Lordship's reasoning holds true, such a party's interest would be defeated by the interest of the earlier claimant through no fault of his, for even if he were to check the register, he would have found nothing. Recognition of equitable principles here would result in the register being inconclusive and a party may not be able to rely on it as evidencing the history of the land concerned. However, the main objective of the Torrens System is to provide simplicity and certainty with respect to dealings in land, and in this regard, registration is the fountain from which all interests in land spring.[13] Should he be made to pay for this difference between the system in theory and the system in fact?

Further, if there is a case worthy of equitable intervention, it is the case of the *jual-janji* transaction. The security element as evidenced from the agreement to transfer with the option or right to have the land redeemed is clearly present and there is also the recognition in England as well as Australia for this form of security over land.[14] However, the courts have shied away from a positive assertion of the rightful status of the *jual-*

[13]See, for example *Oh Hiam & Ors* v *Tham Kong* [1980] 2 MLJ 159; *Macon Engineers Sdn Bhd* v *Goh Hooi Yin* [1976] 2 MLJ 53.

[14]See *Sander* v *Twigg* (1887) 13 VLR 765; *Currey* v *Federal Building Soc.* (1929) 42 CLR 421; *Watson* v *Royal Permanent Building Soc.* (1888) 14 VLR 283; *Wright* v *Register of Titles* [1979] Qd. R. 523.

janji as a specie of security interest over land. They have not said that it is a form of "equitable charge" which can exist "outside" the Code. In fact, in *Kanapathi Pillay* v *Joseph Chong*,[15] his Lordship Salleh Abas FJ (as he then was) had the golden opportunity to so apply equity and uphold the *jual-janji* transaction as an equitable charge. However, his Lordship refused to do so and categorically stated that "It is certainly not a charge as it is not in accordance with statutory requirements."[16] In the present case, with only the intention to create a charge or lien by deposit of title to go by, his Lordship has affirmed that that is sufficient to constitute an equitable charge. His Lordship mentioned the Privy Council decision in *Haji Abdul Rahman* v *Mohamed Hassan*[17] and stated that the decision in that case, which prevents the creation of an equitable charge, cannot be extended to other cases due to the presence of section 4 of the (Selangor) Registration of Title Regulation 1891 which happened to be in force at that time. This is correct as far as that case is concerned. However, there are other Malaysian cases which were decided under provisions similar to the Code or even under the Code itself which states that an equitable charge cannot be created, including his Lordship's own judgment in *Kanapathi Pillay*.[18] His Lordship did not explain or distinguish his Lordship's own decision in that case. Are we to take it that this decision has overruled his Lordship's own decision in *Kanapathi Pillay* and all the other cases of a similar vein? Does it mean that the *jual-janji* is now an equitable charge?

With respect, it is submitted that the inconsistency in the application of equity may be more destructive than supportive of the common good.

On appeal to the Privy Council,[19] their Lordships of the Privy Council upheld the decision of the Judicial Commissioner,

[15] [1981] 2 MLJ 117.

[16] *Ibid.*, at p 120.

[17] [1917] AC 209.

[18] See *Yaacob bin Lebai Jusoh* v *Hamisah binti Saad* [1950] MLJ 255; *Wong See Leng* v *Saraswathy Ammal* [1954] MLJ 141.

[19] [1986] 1 MLJ 357.

who had decided that since there was an extension of time for payment up to December 20, 1968, the right to sue for the balance of $229,500 arose on December 20, 1968, and since the writ was issued on June 30, 1974, the statutory limitation of six years had not expired by the time the action was brought. Their Lordships offered no opinion on the status of an "equitable charge" under the Malaysian Torrens System, as they felt that it was not necessary, in view of their finding on the issue of limitation.

It is hereby submitted that a similar finding as the Privy Council's could have been made by the Federal Court which would not have necessitated the court to investigate further whether the sum claimed was secured by a charge or not. However, his Lordship Salleh Abas proceeded to examine the issue of limitation by asking the question whether the suit was commenced more than six years "after the money was received". The Limitation Act talks of at least six years "from the date on which the cause of action accrued", and the cause of action can only accrue on the date upon which the agreement has been breached.[20] In this case, it would be the date upon which payment of the sums were due to be paid but had not been paid, and, as noted by the Privy Council, there was an extension of time for the repayment. If his Lordship had considered the limitation period from the date on which the cause of action accrued and not from the date on which the money was received, there would be no need for his Lordship to consider the issue of security here. If the action has been brought within the six year limitation period, what is the point of considering whether it would be within the 12 year limitation period? It is submitted that his Lordship considered the 12 year limitation period because his Lordship was of the mistaken impression that the transaction was more than just a mere debt and therefore time ran from the date the money was received. This is clearly incorrect. Assuming that there could be security elements involved in the transaction, it would still be incorrect to say that time ran from "the date the money was received." Section 21(1) of

[20] *Bolo* v *Koklan* (1930) LR 57 IA 325 (PC).

the Limitation Act, 1953 talks of "the date when *the right to receive the money* accrued."[21]

It ought to be clear by now that there is sound basis for the saying "equity is an unruly horse." If not reined in and properly controlled, it is bound to go clop-clopping into fields it has no business to go into, overturning long-existing flower beds and causing mischief. In the field of the application of equitable principles in Malaysian land law, it is time to pull the reins and maintain a controlled and orderly trot.

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[21] Emphasis is author's own.