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***Challenges of the Malaysian Torrens System  
in the 21st Century***

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# Prospect and Challenges of Land Development: Challenges of the Malaysian Torrens System in the 21<sup>st</sup> Century

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*Whenever, we turn we find an overwhelming confusion of grants and titles of every class...*

Lord Torrington<sup>1</sup>

## Abstract

Torrens system was introduced to provide certainty and accuracy of title and to avoid any legal problems of dual dealings. One of the earliest land registration codes was the Selangor Registration of Titles 1891. Section 4 of the Code, had applied a strict rule of registration or rigid application of registration whereby any land transactions that had to be registered shall be declared null and void. The provision had been repealed.

Even though the courts have exerted themselves to closely interpret the law according to the intention of the legislature but differences of opinion still occur and in many instances the law has been constructively interpreted by the court. This is due to the vast land development and the frequent changes in the land policy.

The objective of this paper is to analyse certain areas in land law that poses challenges to a healthy development of the dynamic Malaysian land system. The latest judgement, for example, on the effect of registration of title which gave rise to the immediate indefeasibility of title in *Adorna Properties v Boonsom Boonyanit*<sup>2</sup> has been received with mixed views and unwelcome comments. By virtue of that, other issues have appeared and needs serious attention; such as security of land title, the insurance policy for land, the right of the bona fide purchaser, the position of notice of any earlier interest and also the encroachment of equitable rights and interest under the Malaysian land tenure.

Moreover, in the era of globalization and computerization, there is always a question for all the land owners as to what extent the government is seriously looking into these problems. How prepared is the government in facing all these future challenges strategically, physically, and financially.

### Key words

Torrens system, indefeasibility of title, registration, title insurance

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<sup>1</sup> Extracts from a dispatch from Lord Torrington, dated May 11<sup>th</sup> 1849, 10<sup>th</sup> General Report of the Colonial, p. 111. (Arkib Malaysia)

<sup>2</sup> [2001] MLJ

## Introduction

When Sir Robert Richard Torrens introduced a revolutionary land system in 1857 in South Australia, his aims were to achieve five qualities of land system i.e. reliability, simplicity, cheap, fast and suitability.<sup>3</sup> The system was designed to obviate the need for a chain of title and the necessity of tracing vendor's title through a series of documents.<sup>4</sup> Its birth was a result of a revolt against a deed based system of registration that was cumbersome and expensive. Thus this paper seeks to find some answers pertaining to the above aims. How reliable the land title is as produced by Torrens system? How simple is the process? Is it really cheap? How long can you get your transaction executed and registered? And last but not least, how relevant is the concept, process and the outcome of the system in complementing the needs and demands of the people nowadays? And based on this background, Maxwell brought back the system to Malaysia to be introduced together with the existing legal system which finds its root in custom, Islamic law, common law and equity. It is important to acknowledge the fact that Torrens system is not an exclusive system but the Malaysian land system does recognise the place of other sources of laws as mentioned above. Section 4(2) of the National Land Code, section 3, 5 and 6 of the Civil Law Act 1956 explain further the position of the above sources of law to the Malaysian land development. Likewise, Article 3 of the Federal Constitution 1957 provides for the place of Islamic law in the Malaysian legal system and as far as the definition of law is concerned, Islamic law is part of the 'law' defined by the constitution. This background is important in order to properly align the position of the Malaysian Torrens system in this country.

Torrens system was introduced into the Federated Malay States via the Selangor Regulation of Registration of Titles 1891.<sup>5</sup> The system introduces that good titles can only be issued by registration. Alienation of any piece of State land by the State Authority will not be complete and bind the world at large unless a *register* document of title (RDT) in respect thereof has been duly registered. Without such registration, the land will remain State land notwithstanding that the application for alienation of State land has already been approved by the State Authority. Registration, therefore, forms the principal factor in all Torrens statutes and the National Land Code 1965<sup>6</sup> (herein after shall be referred as the NLC), being a Torrens statute, is of no exception.

The land title is an evidence of ownership. It reflects all the relevant information about the registered owner, whose name appears on the RDT. He is having an indefeasible of title to the land. It means that his title cannot be denied or impeached unless it falls under on of the exceptions in section 340(2) of the NLC.

The main features of the Torrens system can be summarized as follows:

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<sup>3</sup> Ruoff, T.B.F., 1957. *An Englishman Looks at the Torrens System*, The Law Book Co. of Australasia Pty. Ltd.

<sup>4</sup> Torrens Title, [http://en.wikipedia.org/wiki/Torrens\\_title](http://en.wikipedia.org/wiki/Torrens_title)

<sup>5</sup> It was under the regulation, the registered title was declared as having the effect of indefeasible title.

<sup>6</sup> Act 56

**a. Registration of all land dealings using the prescribed form in the Land Office**

The NLC which is applicable in Peninsula Malaysia is a product of Torrens system.<sup>7</sup> One of the cardinal features of the system is the registration of all dealings pertaining to land in the land office. Once registered, a title will be issued as a conclusive evidence of ownership. This title is indefeasible; it is free from any attack, challenging the validity of the title, except as provided under the NLC.<sup>8</sup> The registration and the conclusiveness of the title have helped in providing a cohesive certainty to the Malaysian land law. As a result, land dealings become reliable, simpler, faster, cheaper and safe. In *Gibbs v Messer*,<sup>9</sup> the court, in illustrating the objective of the Torrens system, had this to say; “to save dealing with the registered proprietors from the trouble and expense of going behind the register in order to investigate the history of the author’s title to satisfy them of its validity.” Lord Wilberforce in *Frazer v. Walker*<sup>10</sup> warned that “any departure from the Torrens principle would be destructive of the whole system of registration.” Although these two cases did not represent the Malaysian decision, yet the principle was approved and recognized by Malaysian courts.

The law and procedures pertaining to land need to be simple and transparent. This is to ensure that the public has confidence in land conveyance and in the land office. The Land Office should provide people’s friendly approach; ‘service with a smile’ yet providing certainty and accuracy in the title.

With full assurance, any conflicts and confusions shall be referred to the provisions of the NLC. The court in *UMBC v. PHT, Kota Tinggi*<sup>11</sup> was firm by saying that the NLC provides “a complete and comprehensive code of law governing the tenure of land in Malaysia.” It is indeed important for any party dealing with the land tenure in Malaysia to have full confidence in the system by rendering full support and priority to any provisions of the NLC.

The provisions of the NLC have been attacked in several instances and to a certain extent, upset the guarantee provided by the State Authority. There are several people who are always searching for the loophole or lacuna in the law and choose to enter into evil land dealings, taking full advantage of the ambiguous provisions.

**b. Indefeasibility of Title**

Section 340 of the NLC confers indefeasibility of title upon registration. According to Judith Sihombing<sup>12</sup>, indefeasibility is a measure of conclusiveness granted to an estate or interest in an alienated land on registration upon an appropriate dealing in a statutory

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<sup>7</sup> The land system was introduced in Australia by Sir Richard Torrens in 1858 by virtue of the introduction of the Real Property Act 1858 introduced in December 1857.

<sup>8</sup> Section 340 (2) of the Code

<sup>9</sup> [1891] A.C. 248

<sup>10</sup> [1967] A.C. 569

<sup>11</sup> [1984] 2 MLJ 87, at p. 91.

<sup>12</sup> *The National Land Code A Commentary* 2, MLJ, 1997, Third Edition, p XXVI 10-60

form. It is achieved by a registration of an instrument of dealings in a statutory form which has been executed and attested in accordance with the requirements of the NLC and then determined by the Registrar to be fit for registration.<sup>13</sup> It is important to understand that the title is only obtained through a registration and not from the execution of the instrument.<sup>14</sup>

Another important characteristic that is missing from section 340 of the NLC but has been entrenched in the earlier concept of the Torrens system is the requirement for the newly registered owner to have dealt personally with the prior registered proprietor in order to obtain an indefeasible title.<sup>15</sup>

#### c. No Adverse Possession against the State<sup>16</sup>

The NLC has prescribed that all land other than alienated land belongs to the state<sup>17</sup> and the only way to get land is through the state. The State Authority has all the rights to determine the rightful owner of any land to be alienated and the NLC has never provided that priority to be given to the holder of temporary occupation license or any other persons occupying any state land based on permit. Moreover, acquisition of state land by adverse possession has been statutorily precluded by the NLC.<sup>18</sup>

Any person found illegally occupying state land can be charged under section 425 of the NLC and can be fined not exceeding RM10, 000.00 or imprisonment up to a year.

#### d. Equity and equitable principles has a place under the Malaysian land system

The debate about the place of equity under the Malaysian land law seems to reach no end. The court in many occasions preferred the view that the equitable principles need upholding for the sake of justice. As a result, in the area of land the courts have accepted equitable charge<sup>19</sup>, equitable leases, equitable lien as well as recognizing the concept of bare trustee and also the equitable ownership.

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<sup>13</sup> Section 297.

<sup>14</sup> *Buxton & Anor v Supreme Finance (M) Sdn Berhad* [1992] 2 MLJ 481

<sup>15</sup> *Gibbs v Messer* [1891] AC 248

<sup>16</sup> Section 48 of the NLC; see the decision of *G Rethinasamy v Majlis Ugama Islam, Pulau Pinang & Ors.* [1993] 2 MLJ 166. In this case, the court rejected the argument of the defendant that they had been occupying the land registered under the name of the Plaintiff since before the enforcement of the NLC 1965 thus entitled to deny the plaintiff's right to the land by virtue of the principle of adverse possession for the reason that they had not done anything or take any action to determine their rights. However, in this case also, the court decided the case for the defendant by virtue of section 4(2) of the NLC which is the saving clause that protect any interest concerning *wakaf*.

<sup>17</sup> Section 40 of the NLC

<sup>18</sup> Section 341

<sup>19</sup> See, the judgement of Salleh Abas in *Mahadevan & Anor v Manilal & Sons & Anor* [1984] 1 MLJ 266;

#### e. Assurance Fund

In the event land owners suffer losses through the fault of the land system, they may seek for compensation from the Assurance Fund. As mentioned earlier, the main feature of the Torrens system is indefeasibility of title. Under this principle, the person whose name is recorded in the Register as a proprietor is assured a good title free from unregistered encumbrances. In the remote event, that loss is suffered through reliance on the integrity of the Register, the registered proprietor who becomes the victim of the registration system, can look to the assurance fund for compensation.<sup>20</sup>

Although assurance fund may not represent the basic feature of Torrens system in all Torrens jurisdictions, nevertheless, it is an important characteristic of Torrens system in Australia, the origin state of the system. Malaysia together with Sudan, Fiji, West Germany and also Austria do not offer assurance fund or title insurance to any unfortunate land owners.

#### f. Need for a State Guarantee of registered title

Registration is a State guarantee and an integral part of a Torrens system. Sackville and Neave<sup>21</sup> are of the view that the State guarantee of the registered proprietor's title is the basis of the Torrens system:

[i]f the goals of the system are to be attained, the State should compensate all person[s] who sustain loss by reliance on the register where it proves to be inaccurate, and should also compensate those who find themselves wrongfully deprived of a registered interest.

There is neither Assurance Fund nor any private title insurance offered to the land owners who have become victims of the land registration system.

Looking at the above features, it is observed that the Malaysian Torrens system has not received any major change in its feature since its introduction. The features remain despite substantial changes in society. Perhaps this is evidence that Torrens system works well in this country or in other Torrens jurisdiction thus strong and flexible enough to face challenges in the 21<sup>st</sup> century. Is the Torrens system still achieving its objectives? Does the system need refurbishment? The following discussion looks at some of the challenges and issues that demand for policy and legal guideline for better prospect of developing the Malaysian land system.

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<sup>20</sup> Baalman *Report on Conversion of Land to the Torrens System* (Unpublished report, Property Law Revision Committee, Sydney, 1957) 156.

<sup>21</sup> M A Neave, C J Rossiter and M A Stone *Sackville & Neave, Property Law: Cases and Materials* (4th ed, Butterworths, Sydney, 1988) 398.

The relevant circumstances in which the characteristics of the NLC have been challenged and an outlook of the Malaysian Torrens system prospect for development in the 21<sup>st</sup> Century

Although the NLC contains provisions<sup>22</sup> declaring the exclusiveness of the register to ensure the certainty and security of title obtained by an innocent purchaser, yet some judges have adopted different attitudes in interpreting the provisions.<sup>23</sup> As a result, there are many conflicting judicial decisions; a situation that have created doubts and uncertainties revolving around the position of the NLC as a conclusive land Code.

a. The issue pertaining to bona fide purchaser under section 340(3) of the NLC

Both the High Court and the Federal Court judgements in *Adorna Properties Sdn Bhd v Boonsom Boonyanit*<sup>24</sup> (hereinafter shall be referred as *Boonsom's* case) have tested the reliability and integrity of the registration system. Many have voiced out their worries about the impact of the said decision to the land ownership. When the courts have officially recognized the rights of the existing land owner in replaced to the rights of the earlier land owner i.e. Madam Boonsom, it is reasonably suggested that every existing land owner would be exposed to the same situation and shall be put in the same position as Madam Boonsom. It seems to suggest that there is an imposition for an extra duty on the part of an existing land owner to ascertain the status of his land that has been registered in the land office. In a simple language, it would mean that registration per se is not sufficient to provide a security to the land owners.

In *Boonsom's* case, an old woman, Madam Boonsom, a Thai citizen owned a piece of land in Penang. One day, after Madam Boonsom returned from a long holiday in Bangkok, she discovered that her land has been sold and transferred to Adorna, a developer who claimed to be a bona fide purchaser and has bought the land at a market value.

Later, it was found that the land was bought by Adorna Properties from a lady who impersonating herself as Madam Boonsom. She claimed that she has lost her land title and applied for a replacement using a fake passport. In this case, the Federal Court held that immediate indefeasibility has applied in Malaysia. The court was in the opinion that the moment the property was registered into Adorna's name and by virtue him being a bona fide purchaser, therefore, the title cannot be challenged and thus, become an indefeasible title, even though, initially the title was obtained through fraud and/or forgery. In this case, Adorna's right was protected by virtue of s 340(3) of the NLC. The rule pertaining to immediate indefeasibility as held by the High Court and confirmed by

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<sup>22</sup> Section 340

<sup>23</sup> Recent decisions in *Adorna Properties Sdn Bhd v Boonsoom Boonyanit* [2001] 2 CLJ 133

<sup>24</sup> *Adorna Properties Sdn Bhd v Boonsoom Boonyanit* [2001] 2 CLJ 133

the Federal Court has marked a new development of the law to replaced the old belief that the Malaysian Torrens system applies deferred indefeasibility.

The Federal Court has also emphasized on the immunity of the bona fide purchasers for valuable consideration from any claim under section 340(2) NLC. It is pertinent to note that, there are certain guidelines to be adhered before a court can satisfy on the status of a bona fide purchaser. In *Liew Yok Yin v AGS Harta Sdn Bhd*<sup>25</sup> YA Syed Ahmad Helmy pointed out that in order to qualify as a bona fide purchaser of value, aside from valuable consideration there must be an absence of fraud, deceit or dishonesty and the knowledge or means of knowledge of such by the defendant at the time of entry into transaction. The evidential burden is on the purchaser to show that he is not only a purchaser for valuable consideration but also a purchaser in good faith. And the Court in this case has also taken into consideration the common reasonable action that should be taken by any solicitor in ensuring that his client is getting a good and clean title.

Another important principle arising from Boonsom's case is on the burden of proof in proving fraud and forgery. The High Court held that forgery must be proved beyond reasonable doubt, while the Court of Appeal held that it should be on a balance of probabilities.<sup>26</sup> Finally, the Federal Court concurred with the decision of the Court of Appeal that the burden of proof for forgery is on the balance of probabilities and not on beyond reasonable doubt.

What is the right of Madam Boonsom? She is also a registered owner. She has also relied on s 340(1) of the NLC. Therefore, what solutions can the Malaysian Torrens system offer to her being a land owner, who has full confidence in the land registration system and the assurance given to her by the State Authority?

This is the law at present as claimed by the Federal Court. Unknowingly, the Federal Court's decision has created the feeling of uncertainty in the minds of all the registered proprietors. Now, none of the registered proprietors can be confident that the land would be theirs forever because of the assurance that once the land is registered, it provides security and nobody can take away the land unless through the process of law have been challenged and ruined. One might now have a valid ground to apply for Registrar's caveat or Private caveat from the Land Office to caveat his own land – to provide further protection or security to his land.

The Federal Court decision in Boonsom has received criticisms from all levels but due to the rule of precedent, the High Court in *Ismail Mohamad & Anor v Husin & Ors*<sup>27</sup> as well as one of the judges at the Court of Appeal in *Abu Bakar Ismail & Anor v Ismail Husin & Ors & Other Appeals*<sup>28</sup> felt that they are bound by the decision of the Federal Court in Boonsom's case.

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<sup>25</sup> [2006] 3 CLJ 787

<sup>26</sup> [1997] 2 AMR 1813 at 1833-1838

<sup>27</sup> [2005] 4 CLJ 328

<sup>28</sup> [2007] 3 CLJ 97



The attempt to differ with the above judgement appeared in the judgement of *Subramaniam a/l NS Dhurai v Sandrakasan a/l Retnasamy & Ors*<sup>29</sup> though merely a passing judgement from the Court of Appeal but the decision of Gopal Sri Ram is worth noting. In this case, the judge highlighted that in *Boonsom's* case, the Federal Court has failed to differentiate between a purchaser and a proprietor as explained in section 5 of the NLC. Thus, in *Boonsom's* case, at the time of the suit, Adorna's is the registered proprietor and not the purchaser therefore s 340(1) and section 340(2) are applicable. Only a party who can show to the court that he is a bona fide purchaser for value without notice can fall under the exception of s 340(3) of the NLC.

In *Abu Bakar Ismail & Anor v Ismail Husin & Ors & Other Appeals*,<sup>30</sup> the Court of Appeal has offered several line of arguments that made the court differ from the decision in *Boonsom's* case. The plaintiffs in this case submitted that the interest registered by way of charge in favour of the 4<sup>th</sup> defendant i.e. Bank Rakyat was defeasible under one or more of the grounds set out in s 340(2) of the NLC. The reason given is that the second defendant being the solicitor preparing document to fourth Defendant i.e. Bank Rakyat thus acted as an agent to Bank Rakyat. Thus, the principal is responsible for any act done by his agent. Therefore, in this case, the second defendant i.e. the solicitor for Bank Rakyat was charged for committing fraud and misrepresentation in securing a bank loan from Bank Rakyat on behalf of the fifth defendant, and the fourth defendant being the principal for the agent thus the charge document registered under the name of the fourth defendant should become defeasible.

In no event the issue whether the fourth defendant at the Federal Court i.e. Bank Rakyat was a bona fide purchaser was raised. Even if it was, the court was in the view that Bank Rakyat is not as it was bound by the act of its agent.

Earlier, Justice Ariffin Jaka at the High Court ruled that the court was bound by the decision of the Federal Court in *Boonsom's* case and was in the opinion that Bank Rakyat was the bona fide purchaser in good faith for valuable consideration thus acquired an indefeasible interests in the said lands by virtue of section 340(3) of the NLC notwithstanding that the signatures on the charge document and the annexure were forged. And based on the evidence, the High Court based on the evidence also ruled out that the solicitors i.e. the second and third defendant were not the agent for Bank Rakyat thus the interest pertaining to the registered charge was not defeasible under section 340(2)(a) of the NLC.

The line of argument as forwarded by the lawyers and judges in those cases pose a question of the certainty of the provisions of the NLC. For example, the uncertainty as to the position of whether the effect of registration is immediate and deferred seems to expose the landowner to more loopholes in the law. Certainly, the main cause of the problems lies in human conduct. Past experience has shown that law is never sufficient to deter human misconduct. Nevertheless, it is always the duty of the court and legislators to minimize any discrepancies or ambiguity in law. Perhaps, it is high time for those in legal fraternity to consider for a solid assurance of rights of registered owner in the statute in

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<sup>29</sup> [2005] 6 MLJ 120-131

<sup>30</sup> [2007] 3 CLJ 97

the event a similar tragedy such as *Boonsom's* case occurs. Though discussions and critics on this issue never point any finger to those in the Land Office as regards to their duty and credibility in assuring the best security ever applied for any case of issuance of land title especially when it involves the replacement for lost and damaged land title, it is timely also for them to adopt double security. As suggested by many and applied in other government departments such as the Immigration Department, the use of thumb print is viable and practical as providing double security for any land transaction

Next is the issue whether the Court of Appeal in *Abu Bakar Ismail & Anor*] is bound by the decision of the Federal Court in *Adorna Properties v Boonsom Boonyanit's* case. His Lordship Gopal Sri Ram has a long explanation to justify his opinion. The Lordship was of the opinion that *Boonsom's* case did not declare a principle of the common law based on policy consideration as in *Donoghue v Stevenson*<sup>31</sup> Instead; it is a case involving the interpretation of a provision in a statute, namely, s 340 NLC. A precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of statute. Quoting John Salmond in his book *Treatise in Jurisprudence*, His Lordship further said that even a lower court can impugn the decision of the higher court on such ground.

Indeed, arguments and cases as above are worrisome to any land owner especially in Malaysia where there is nothing known as title insurance or assurance fund as practiced by some Torrens jurisdictions. All this, while people put their trust in the system though the system now seems to be so vulnerable to any human misconduct. The main culprit is always the human being. The problem in *Boonsom's* case requires *amanah*, willingness, readiness and expertise on the part of the Land Office as well as a strong commitment of the court to give justice to the parties. It shall not be influenced by any party under what reasons so ever. At the same time, the government should be fully responsible and resort should only be made to the court.

What kind of guarantee has the government fulfilled? What remedy has the registered land owner received? Certainly, a land owner who has paid all the taxes without fail would expect for a better, reliable, secured and clean land system. And the expectation is more nowadays when land transaction is just at one press button. Would the land office ready to have an expert or to call for experts to act in certain cases including application for replacement of title and supported with a fake identity cards or passport? Perhaps, we should consider reverting to taking thumb print for any transaction for a better security land system. Alternatively, as suggested by Salleh Buang, it is high time for us to consider for having insurance for land title<sup>32</sup> and certainly, the need is more for strata titles.

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<sup>31</sup> [1932] AC 562

<sup>32</sup> Salleh Buang, "Security of Tenure Under the Malaysian Torrens System: What Next After Boonsom Boonyanit?", *International Real Estate Research Symposium (IRERS)* 11-13 April, 2006, PWTC, Kuala Lumpur, Malaysia.

## b. The wide application of equitable principles

Equity promotes justice, fairness and good conscience. The application applies across the field of law including the Malaysian land law which is said to be free from any rules and concept originated from any English land tenure system.<sup>33</sup> However, agreeing with the view that equity is a universal application and is not confined only to English land tenure, equitable principles, rights and interests have been widely upheld by the Malaysian courts simply for the reason of giving justice to parties in dispute.<sup>34</sup>

The first circumstance where the provision of the NLC was attacked is by virtue of s 206(3) of the NLC. It is suggested that s 206(3) provides a protection for any transaction done outside the ambit of its provision, provided always that the transaction must fulfil the basic requirements to form a valid agreement under the law of contract.<sup>35</sup> Although the provision might be engineered as a means of protecting the right of vendor and purchaser in sale and purchase of land, yet, in certain cases, it was applied as a mean to refer to English principles of 'equitable owner and bare trustee'. As a result, the English principle of bare trustee is widely followed in Malaysia. It is unfortunate that s 206(3) is used to justify the importation of English 'equity' into Malaysia.

The un-guided general provision of s 206(3) has created another line of argument in a case of easement. Recently, the court has invoked equity to easement<sup>36</sup> which is normally considered as truly Torrens. In *Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor*<sup>37</sup>, Edgar Joseph Jr. referring to the historical background of the application of equity in Malaysia and concluded that s 206(3) of the NLC provides for a statutory authority for a liberal application of equity by the court of law whenever there is a basis for it. As a result, an equitable easement was said to be created based on an agreement to provide a right of way though such was lack of the elements of easement as provided under s 281 of the NLC. The learned Judge had distinguished his decision with *UMBC Berhad & Anor v PHT, Kota Tinggi*<sup>38</sup> stated that the latter was decided on the basis of which there is a clear prohibitive provision in the NLC while the earlier is not. This view was later followed in *Cheng Hang Guan & Ors v Perumahan Farlim P Pinang Sdn Bhd & Ors*.<sup>39</sup> where the same judge emphasized that the validity of the contracts relating to land or any interest therein is declared in s 206(3) of the NLC 1965 and are not defeasible.

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<sup>33</sup> Section 6 of the Civil Law Act 1956.

<sup>34</sup> See, *Devi v Francis*, ....

<sup>35</sup> See, Nor Asiah Mohamad, *A study of the Application of Equitable Principles to the Malaysian Land Law*, unpublished Ph. D Thesis, International Islamic University Malaysia, 2003, p.253.

<sup>36</sup> See, *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd*. [1989] 2 MLJ 202.

<sup>37</sup> [1993] 1 MLJ 443

<sup>38</sup> [1984] 2 MLJ 87

<sup>39</sup> [1993] 3 MLJ 352.

At present, equity is widely subscribed by the Australian courts. However, Hogg, in his well-known book<sup>40</sup> criticized the English equity based on dual ownership of land as “one of the causes of evils in the [English] system of conveyancing”. Wong,<sup>41</sup> in supporting Hogg’s view, claimed that Hogg’s opinion matches neatly with the purported procedural simplicity of dealings with land under the Torrens system. It has to be noted that the absence of a clear provision which prescribes clearly the prohibitive effect of the application of equity in land matters under the NLC has contributed to the inconsistent attitudes towards equity by many quarters. However, such a shortcoming must be read together with sections 3 and 6 of the Civil Law Act, 1956.<sup>42</sup> Section 3 is actually a general provision stating that the common law of England and any rules of equity are applicable in Peninsular Malaysia. Whereas, s 6 of the same Act provides to the effect that nothing of any part of the law of England relating to tenure or succession to any immovable property or any estate or interest therein shall be introduced into the West Malaysia. The debate on equity basically revolved around the interpretation of these two provisions. More often than not, the judges have followed the practice in other Torrens jurisdictions like Australia, Canada and New Zealand where equitable principles have been applied. Therefore, irrespective of the above opinions, though controversial, equity remains a living issue in Malaysia.<sup>43</sup>

Having analyzed several cases on equity, one may always feel intrigued by the question as to what extent the courts are serious in supporting the requirement for registration of dealings in Malaysia. The cases indicate that there is still much confusion in judicial thinking. In some cases, the courts chose to apply equitable rules as a basis of giving justice to the party. On the other hand, in certain circumstances, a strict rule of interpretation of the provisions in the NLC has been adopted in order to give certainty to the provision of the NLC, being an exclusive and comprehensive code of law. On this point, Wong has suggested that, “the question is not whether to sway to English equity but one of policy for the judges to decide whether and how to extend equitable justice to meet actual requirements in various circumstances in the field of land law”.<sup>44</sup> It is unfortunate that this opinion, which was aired more than 25 years ago, and until now, we are yet to see any firm stand lay out on this point.

The second example of the uncertainty of the provision of the NLC is where the wordings of the Code were not considered mandatory. One of the examples can be seen in cases pertaining to lease. There are many instances where the courts have decided that the unregistered lease was as good as the registered lease on the basis of equity.<sup>45</sup> The courts, in their effort to promote justice for the parties, have chosen to apply English equitable principle to the cases. It is observed that the court failed or in some cases

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<sup>40</sup> *The Australian Torrens System*. [1905]. See Chapter II “On the General Nature of Estate, Interest and Rights in land under the System” quoted from Wong, *Equitable Interests and the Malaysian Torrens system* [1967] *Malayan Law Review*, Vol. 9 No. 1 p. 20.

<sup>41</sup> Wong, *ibid*.

<sup>42</sup> Act 67, Revised 1974.

<sup>43</sup> Salleh Buang, “The Eternal Enigma of the NLC” *Malaysian Law News* [1990] p. 301.

<sup>44</sup> Wong, *Tenure and Land Dealings in the Malay States*, Singapore University Press, 1975, p. 301.

<sup>45</sup> *Siew Soon Wah & Ors v Yong Tong Hong* [1973] 1 MLJ 133 ; *Margaret Chua v Ho Swee Kiew & Ors* [1961] MLJ 173

refused to make an effort to explore the rule under the comprehensive NLC. Teo<sup>46</sup> has proposed that instead of applying English equitable principle to the case, the court should have invoked s 206(3) of the Code so that any contractual obligation would still be considered good and valid and is not subjected to the registration provision.<sup>47</sup>

Another important consideration in the application of equity for justice is the sensitivity of the people as well as the principle of public policy. The recent decision of the Federal Court in

### c. Land Computerization system

Without a doubt, the introduction of land computerized system into the Malaysian land system has enlarged the prospect and future of land system in Malaysia. With this system, land transaction is made easy and land search and documentation is just at one touch button. While the government should receive big applause for having introduced the land computerization system, any worry is also valid especially with regard to the preparation of competent human resource, financial as well as the infrastructure that manage to support the system.

The National Land Code 1965 via (Amendment) Act 1992 (Act A832/92) has introduced, *inter alia*, the administration of the land registration system through the use of computers. With this amendment, a new s 5A has been added whereby the preparation and registration of titles to alienated land and the registration of permissible dealings in such immovable properties and the entries of caveats, prohibitory orders, notices of land acquisition, transmission on death and other miscellaneous entries on the *register* document of title as well as any correction or cancellation will be effected electronically through the use of computers.<sup>48</sup> To accomplish the above, there is an urgent need for experts with high integrity in the management of land title. The law has granted powers to the Registrar or Land Administrator at various states to control the computer system including its database and related terminals. The necessity of endorsing a memorial of registration and the affixing of the signature and the official seal of office by the relevant registering authority has been constantly emphasized by the registering provisions which are contained in the NLC.<sup>49</sup>

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<sup>46</sup> "Equity in Land Law", *Journal of Malaysian Comparative Law*, 1988, p. 69

<sup>47</sup> See. Section 206(1) (2); 207-212 of the National Land Code 1965.

<sup>48</sup> Section 5A states:

(1) The Minister may, with the approval of the National Land Council, by notification in the Gazette of the Federation, appoint a date for the coming into force of the Computerized Land Registration System in any land Registry. (2) For the purposes of subsection (1), the term 'land Registry' means - (a) in the case of land held or to be held under Registry title, or under the form of qualified title corresponding to Registry title, the office of the Registrar of Titles; (b) in the case of land held or to be held under Land Office title, or under the form of qualified title corresponding to Land Office title, the office of the Land Administrator.

<sup>49</sup> What amounts to an act of registration of an instrument of dealing in alienated land was reviewed by the High Court in *Mohammad bin Buyong v Pemungut Hasil Tanah Gombak & Ors*.

How instruments are to be registered is provided by Chap 4 Pt 18 of the National Land Code. Section 304(2) provides the Registrar shall register any instrument by making a memorial 'under his hand and seal'.

Although s 304(1) of the NLC is concerned with the registration of instruments of dealings in alienated land as well as strata properties and not with the registration of titles to land, its relevance extends to the statutory manner in which registration may be correctly carried out by the Registrar of Titles or the Land Administrator as well. Generally, one of the basic acts of registration, be it a land title or an instrument of dealing in land, is that the memorial of registration must be under the hand and seal of office of the registering authority. One, without the other, will not render the act of registration complete; consequently, the registration will be *void ab initio*. On the other hand, if an instrument of dealing is to be registered, an additional memorial of registration must be endorsed on the register document of title and also on the instrument itself in accordance with s 304(2)(a) and (b). The procedures underlying the execution of registration, demands both, a qualified and an honest person to carry out the task.

Rule 11 in the 14th Schedule of the NLC emphasizes the fundamental principle of every Torrens system; namely, the conclusiveness of the Torrens register. This particular rule states that for the purpose of section 89 and sub-section (3) of section 178, every folio of a computer printed *register* document of title is conclusive evidence of the particulars recorded therein. In a layman speaking, the effect of r 11 is that the accuracy of every data which has been entered in an electronically generated land title is a State guaranteed. Needless to say, the computer which is used in the preparation and printing of any computer printed document of title must be kept under the strict control and supervision of the Registrar of Titles or the Land Administrator. Its uses must always be under the direction of the aforesaid registering authorities. The public should not have access to nor can the computers be operated by any members of the public other than when conducting land title search. This rule requires all computer printed titles to be signed and sealed by the registering authorities before they are rendered valid and marketable.<sup>50</sup> The use of the computer seems not to let go the need for signed and witnessed paper instrument at least by the Registrar. Perhaps future electronic conveyancing should try to address this issue. The way forward should be to look at paperless transaction with control of Quality Assurance system.

The readiness to use electronic conveyancing must cover all aspects and it is important that all parties including the public understand the aim, the procedures as well as the effect of computerisation practically and legally. The system must be efficient enough so that it may detect any human misconduct. In order to maintain the performance, research and improvement must be done from time to time to keep abreast with the need of the development.

#### **d. The doctrine of notice or knowledge of the earlier unregistered interest**

Another challenge is from the application of the doctrine of 'notice' or 'knowledge' in resolving land disputes.<sup>51</sup> Even though the Malaysian Torrens system does not give any priority to any unregistered interest but as it is shown earlier, there are cases where the

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<sup>50</sup> Rule 11

<sup>51</sup> See for example the decisions in the cases of *Vallipuram Sivaguru v Palaniappa Chetty* [1937] MLJ Rep 59; *Haroon v Nik Mah & Anor* [1951] MLJ 209; *UMBC Bhd v Goh Tuan Laye & Ors* [1976] IMLJ 169.

court has taken into consideration the failure of the person who acquired the title to take notice or to check on the earlier unregistered interest. This has certainly put an extra duty on the prospective acquirer thus pose a query to the mirror and curtain principle of the Torrens system.

According to Yong Chiu Mei<sup>52</sup>, the Australian and New Zealand statutes contain provisions vindicating a purchaser from notice of a prior unregistered interest.<sup>53</sup> Nevertheless, the NLC does not include a corresponding provision. Unfortunately or fortunately, the Malaysian courts as shown in some of the judgements seem to be quite comfortable to uphold the rule of constructive notice or knowledge for reasons such as knowledge of the earlier transaction would be indicative of fraud.

Studies on the Malaysian cases have also revealed that there are two groups of opinion held by the Malaysian courts. The first group holds that the English doctrine of notice does not apply to the Malaysian land law.<sup>54</sup> With this, it means, a purchaser who has entered into any dealings pertaining to alienated land or any interest therein with notice of the earlier unregistered interest can still claim priority to the interest. In certain cases, the word 'notice' was interpreted as 'mere notice'. Stemming from this, the court found it to be unreasonable to simply defeat the registered interest on his 'mere notice' of the unregistered interest.<sup>55</sup>

The second group believes that 'notice' does apply in the Malaysian land system.<sup>56</sup> Their contention is moved on the basis that it is unconscionable to allow a later interest to claim ownership of the title or interest while at the same times, he has noticed or knowledge of the presence of an earlier interest. In fact, to a certain extent, a person who has knowledge of the earlier interest can be charged for fraud if 'the designed object of the transfer be to cheat a man of a known existing right.'<sup>57</sup> In other words, any person who has purchased a piece of land or has entered into a contract relating to any interest in land would be affected by notice of any instrument, fact or thing which would have come to his knowledge.

The crux of the issue lies in whether the element of notice has affected the judgement on fraud in the NLC. And as it is understood, there is no legal provision to clearly oust the equitable doctrine of notice and similarly, there is no legal provision to provide a clear definition of fraud. This dilemma seems valid when perceived from the view point of the concept of "unconscionability" and good faith where both represent equity elements. In

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<sup>52</sup>Yong Chiu Mie, "Equity and Indefeasibility of Title and Interests in Land under the Peninsular Malaysian National Land Code 1965". [2006] 2 MLJ xlix, p. xlii.

<sup>53</sup> For example, s 182 of the New Zealand Land Transfer Act 1952.

<sup>54</sup> *Macon Engineer Sdn Bhd v Goh Hooi Yin* [1976] 2 MLJ 53; *Ong Ban Chai & Ors v Seah Siang Mong* [1998] 3 MLJ 346; *Punca Klasik Sdn Bhd v Foh Chong & Sons Sdn Bhd & Ors* [1998] 1 CLJ 601

<sup>55</sup> Per Abdul Hamid FJ in *Tai Lee Finance Co Sdn Bhd* [1983] 1 MLJ 81

<sup>56</sup> *OCBC Ltd. v. Lee Tan Hwa & Anor* [1989] 1 MLJ 261; *Standard Chartered v. Yap Sing Yoke* [1989] 2 MLJ 49.

<sup>57</sup> *Waimiha Sawmilling, Co Ltd v Waione Timber Co Ltd* [1923] NZLR 1137; see also *Dan Sin Wah v. Chan Hai Swee* [1951] M.L.J. 189.

*Ong Chat Pang v Valiappa Chettiar*<sup>58</sup> Gill FJ emphasized that the term “operation of law” in Section 340 (4)(b) “is a generic term deliberately used by the legislature to grant relief in cases where contractual or conscientious obligation are undertaken by or imposed on the registered proprietor either at law or in equity”.

Perhaps, there is something we can learn from what was said by Baalman, “the Torrens system brought along a new ‘administrative philosophy’ in its own right or a new set of criteria for measuring fairness.”<sup>59</sup> In Malaysia, land legislation is a coded law thus whatever the decision must be made with appropriate consideration of the statute with reasonable consideration of the needs of the people and local circumstances.

Under the Torrens system, it is suggested that caveat is important in order to give sufficient notice to the whole world of the asserted right. Thus, failure to enter caveat will definitely undermine the conclusiveness of the register system where any interested purchaser will definitely believe that the proposed land is free from any encumbrances. Furthermore, the court has also relied on the doctrine of notice in order to determine priority between the competing claims of an unregistered interest. Certainly, this will result in the registration requirement under the Malaysian Torrens system as being ineffective. Lord Diplock has concisely explained that the purpose of the caveat system is to replace the English equitable doctrine of notice.<sup>60</sup> Prior to this, Gill CJ. has also criticized the doctrine of constructive notice, for the effect would deny the priority of the registered owner. In one of the case it is suggested that good faith under the proviso of section 340(3) of the NLC should imply the absence of notice. Based on that, a clear provision declaring priority for any interest which is protected by caveat is prominently required under the NLC as a way to preserve the security and certainty of the NLC.

Vast and fast development in the commercial world has also called for a quick legal answer to its problems. To any conveyance lawyers, any rule which clearly states the effect of any transaction be it void or valid is most welcomed. In fact it was suggested that a definite rule which upholds the immediate indefeasibility of title would, to a certain extent, boost the economic growth of the country. Under certain circumstances, the parties to an agreement chose to enter into a contract based on the notion of freedom of contract although such contracts would be in breach of certain provisions of other laws. Such conflicts will definitely require policy consideration from the legislator as well as the court to resolve it.

Under the Malaysian land law system of registration, any decision in allowing the parties to contract out of the provisions of the NLC will result in the system being ineffective. This point was stressed by the Supreme Court in the case of *Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Berhad & 3 Ors*<sup>61</sup>. In this case, the borrower’s company had executed two legal charges under the NLC and both were also registered under s 108 of the Companies Act, 1965. The borrower company had also executed a deed of debenture in favour of the bank to secure various banking facilities.

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<sup>58</sup> [1971] 1 MLJ 224

<sup>59</sup> Baalman, “Approach to the Torrens system” (1956-58), 2 Sydney Law Review, 87.

<sup>60</sup> *Eng Mee Yong & Ors v. Letchumanan* [1979] 2 MLJ 212

<sup>61</sup> [1997] 3 AMR 2361.



The issue in point revolves around the question whether the debenture, conferred on the bank a conventional power of sale exercisable independently of the relevant provisions of the NLC. The court held that, the provisions of the NLC as regard to rights and remedies of parties under a statutory charge over land as stated under Part XVI are exhaustive and exclusive, thus, any attempt at contracting out of those rights, unless expressly provided for in the NLC, would be void as being contrary to public policy. The decision indicates that the court is not willing to wither the strict application of the provision of the National Land Code even though there is a clear basis for it.

Apart from the challenges in the development of the substance, the Malaysian land system also faces challenges in its implementation i.e. land planning and land development. Legally speaking, both components come under two different jurisdictions and governed by two different laws i.e. the Town Country Planning Act 1976 and the National Land Code 1965 respectively. To a certain extent, these two laws are inter-related and complementing each other but procedurally, both have caused too many bureaucratic procedures, red-tape and delays. Previously, land development application may take about 2-5 years. The effort to improve the delivery system in land and housing management recently is a great relief though its effectiveness is yet to be measured especially as to what extent the amendment as well as the regulation help the present and future house buyers. The establishment of the one stop centre for land development for example, is much awaited and save time for both the developer and the house buyers. It is hoped that the effort will make land alienation, land development as well as land approval more transparent, less red-tape and the most important that to give a better image to real property sector players. This is in line with the aim of the Malaysian Torrens system to provide a speedy clean system but secured and certain.

When land development is made easy with various incentives as launched by the government, the important element to be observed by the property developer is integrity and responsibility to deliver only the best to the customer. Problems such as abandoned housing project, house defect, flood due to lack of proper drainage system and no strata title are the common outcomes caused by unscrupulous property developer. The agenda of sustainable development should become the main objective of all parties involved in land development and not only shouldered by the government. Though the government is expected to tighten the laws and increase the enforcement, the efforts will be more effective and meaningful when all parties give the full support and commitment towards a reality of sustainable development in Malaysia. With this move, the Malaysian land system will be seen as a reliable, speedy, secured, save and suitable to meet all future challenges.

## Conclusion

Despite all the criticisms, many still agree that the Torrens system of registration is the best land system in the world. It provides fast and cheap land management system despite challenges laid siege to it. However, the law must accommodate and be prepared to accept the changes in the society. In view of this, the supporter of the system should

always be prepared to equip themselves mentally and physically as well as financially to keep up with the upcoming development. A rethinking of the common acceptance and the refurbishment of the accepted principles as well as revamping the old principles are necessary in order to prepare for a better Malaysian Torrens system. Amendment of the relevant provisions for a better security of tenure especially to safeguard the land owner from any fraudster is high time and crucial.

There is a need to create a certainty in the Malaysian position affecting the rights of the registered party. The phrase "registration is everything" should uphold the earlier registered interest rather than approving the newly acquired registered interest as a bona fide purchaser who has obtained the title through improper manner. The law can be amended to rectify; rather than to wait for another Federal Court judgement to correct the error.

Equity is there in the system. One has just to look at s. 206(3) of the NLC. 'Equity follows the law'. Its presence gives life to the legal system and the Malaysian land law is not an exception. Whatever justification given for its recognition viz. justice, fairness and good conscience, or unconscionability or even 'in personam', the underlying principle is that the NLC shall be upheld to impart justice unless proven to produce otherwise. The uncertainty effect must be minimized or rectified with a better and clearer policy. Similarly, the wide application of equity for justice must be applied in a broad manner taking into consideration the sensitivity as well as the public policy principle.

Land development shall be straightforward and trouble free with a better commitment from all. The Malaysian Torrens system should reflect the need of the local and certainly, after over 100 years, one needs to consider a few amendments and reforms in order to remain relevant with the time.

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