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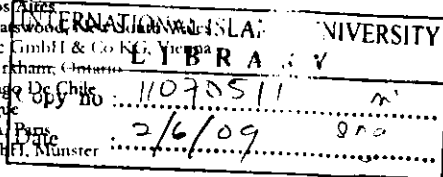
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ANALYSING THE EQUITABLE SPIRIT OF SECTION 206(3) OF THE NATIONAL LAND CODE

by

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Abstract

Section 6 of the Civil Law Act 1956 provides for the prohibition of the importation of any part of the British land tenure system into Malaysian land law. The equitable principles — originally British — promote justice and fairness with all parties involved in a legal dispute and have been adopted with mixed feelings. The silence of the NLC on the issue of equity and the emphasis on the comprehensiveness of the National Land Code 1965 add more confusion to the polemic. Even though equitable principles can be applied in the Malaysian land system, their application is restricted to what does not undermine the sanctity of the National Land Code. This dilemma has prompted several efforts to justify the application of equity, one of them being s 206(3) of the National Land Code which allows a more liberal interpretation of equity as a legal principle.

INTRODUCTION

In a land law case¹ s 206(3) provided the basis for a liberal application of equity under the Malaysian land law. In other cases the Malaysian courts were ready to apply the equitable principles to the Malaysian land matters, and this despite the clear prohibitive provision of s 6 of the Civil Law Act 1956.² The dynamic spirit of this provision has received mixed response from the academic as well as the legal fraternity. The application of English equitable principles based on s 206(3) is regarded an encroachment to the provision of the National Land Code 1965. It is argued that any uncertainty could be minimised

1 *Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1993] 1 MLJ 443.

2 (Revised 1972) Act 67; The applicability of English common law and equitable principles is subject to s 3 of the Civil Law Act 1956 which was the cut-off date for West Malaysia, Sabah and Sarawak. This section states that the application of UK common law, rules of equity and certain statutes, 'save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the court shall in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on 7 April 1956'. In Sabah, the court has to apply the common law of England and the rules of equity together with the statutes of general application, as administered or in force in England on 1 December 1951. In Sarawak, the court must apply

with a clear guideline as to what extent the equitable principles can be applied in land matters in Malaysia. For this purpose, a clear understanding on the concept of equity which promotes the universal concept of justice in any legal system should be emphasised. The main obstacle to the interpretation of equity as a basis of providing justice lies in s 3 of the Civil Law Act 1956 itself. Its interpretation is confined to the word 'equity' derived from English law of England. Thus, it is taken to be understood that the phrase 'when there is any conflict between common law and equity, equity shall prevail' refers to English equity.

SECTION 206 (3) AND ITS RELATION TO SECTION 3 OF THE CIVIL LAW ACT 1956

Section 206(2) states that no instrument shall operate until registered. The question which arises here is: What is meant by 'operate' and what is the effect of a non-registration of the dealing? There is no direct referral to the effect of non-compliance with the provision. There are circumstances in which the law provides exemption for the requirement under s 206(1), such as tenancy exempts from registration and lien. Here the NLC provides how the transactions may entitle for benefit offered by the NLC. In sub-s (3) it is stated that nothing mentioned in sub-s (1) may affect the contractual operation of any transaction relating to land or interest therein. Sub-section (3) applies equity when it recognises an unregistered land contract. In fact, major provisions of the Specific Relief Act 1950 cater for detailed procedures to claim equitable remedies for breach of contract in particular land contracts.

The above illustrates how equity provision under s 3 of the Civil Law Act 1956 must be understood. It should not be confined to English equity but to the universal concept of equity that promotes justice, fairness and good conscience. Such a step seems to be justified

the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 12 December 1949, subject however, to sub-s (2)(ii). This provision states that the said common law, rules of equity and statute of general application 'shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary'. Section 3(2) provides that 'subject to the express provisions of this Act or any other written law in force in Malaysia or any part thereof, in the event of conflict or variance between the common law and the rules of equity with reference to the same matter, the rules of equity shall prevail'.

in light of more and more cases which take 'unconscionable' as a basis to invalidate land transaction. Any unregistered right or interest can still be recognised because of the conscientious obligation that has to be observed by either parties in a contract.³ Emphasis should be laid on the condition that any application of English common law or equity must be done with special consideration of the needs of local circumstances. The differing backgrounds of the earlier land laws and the multi-racial nature of Malaysian society require a careful approach of the interpretation as well as the implementation of these laws. Lately, there have been many calls for a better consideration for the Malaysian common law and recognition of Islam as a basis of equity. Sooner or later legal experts are expected to provide solutions for these problems.

THE IMMUNITY OF THE 'CONTRACTUAL OPERATION' PERTAINING TO LAND

Section 206(3) has to be read with a clear understanding of s 206(1) and (2) of the Code. Section 206⁴ provides that a proper instrument of dealing has to be duly registered. The registration for the dealing must be done using the prescribed form under the NLC.⁵ However, s 206(2) of the Code further provides for the exception to the sub-s (1) where in the case of lien and tenancies no such registration is required. A separate sub-s under s 206(3) specifically emphasises that 'nothing in sub-s (1) shall affect the contractual operation of any transaction relating to alienated land or any interest therein'. The presence of this provision concerning contractual operation in land matters gave rise to discussion.

3 See *Ho Hon Wah v UMBC* [1994] 2 MLJ 398.

4 Section 206 (1) provides that subject to the following provisions of this section —

Every dealing under this Act shall be effected by an instrument complying with the requirements of ss 207 to 212; and no instrument effecting any such dealing shall operate to transfer the title to any alienated land or, as the case may be, to create, transfer or otherwise affect any interest therein, until it has been registered under Pt Eighteen.

(2) The provisions of sub-s (1) shall not apply to the creation of, or other dealings affecting, tenancies exempt from registration (which may be effected, instead, as mentioned in sub-s (2) of s 213); or b) the creation of liens (which may be created, instead, as mentioned in s 281).

(3) Nothing in sub-s (1) shall affect the contractual operation of any transaction relating to alienated land or any interest therein.

5 Section 206(1).

Studies on the historical development of Malaysian land legislations have shown that s 206(3) only applies under the National Land Code.⁶ Judith opined that its inclusion means a 'logical progression' of the recognition of the role of the law of contract in Malaysian land law.⁷ Previous laws stipulated that any contract which failed to comply with the provisions of the enactment was considered to be 'null and void and of no effect'.⁸ As a result, the courts were strict in interpreting the provisions of the law and refused to consider any compromise⁹ in this matter. On cases of *jual janji* the Privy Council remarked that the courts in the Malay States were too much swayed by the principle of equity and refused to invoke equity to recognise the right of purchasers who failed to comply with the time date stipulated in the contract for sale and purchase of land. Under the Malay customary tenure, a form of flexible security transaction was practiced to give a reasonable extension period for borrowers who had failed to settle their debts.¹⁰

The importance of the law of contract in land cases is not confined to dealings. The National Land Code 1965 only addresses matters and effect of land transactions after registration of the dealing and not

6 The above provision was not available under the regulations for Registration of Titles for the first FMS. It also did not exist under the later Land Code of 1911 as well as 1928.

7 *The National Land Code: A Commentary* Malaysian Law Journal, 1977, XIX, 1051.

8 See the Selangor Land Code 1891; Registration of Titles Enactment of Negeri Sembilan 1898; Registration of Titles Enactment of Perak 1897; Registration of Titles Enactment of Pahang 1897.

9 For example, Innes J in *Ong Tin & Anor v The Seremban Motor Garage* (1917) 1 FMSLR 308, at p 316 said that '... it being so clear that the legislature has striven to compel compliance with the directions of the law as to the registration of title and as to the prescribed procedure accompanying it, it should be the first concern of these courts to pass no judgment or order which may militate against this policy'. The same judge also observed in the case of *Ramasamy Chetty v Fan Seng Yew* [1918] 3 FMSLR 354 at pp 356-357 '... English doctrine of equity for the purpose of putting persons who have not complied with the law in the same position as those who have done so it seems to me that the clear intention of the Legislature will be nullified. These courts have consistently, except in a few cases where it has been a question of preventing the law being employed to assist fraud, refused to engraft upon the plainly worded local law of registration English equitable doctrines for the purpose of relaxing the stringency of the law'.

10 See for example the Privy Council decision in the case of *Haji Abdul Rahman v Hasan* [1917] AC 209.

before. Matters pertaining to transactions or contracts arising before the registration are not governed by the Code. Because of this the presence of s 206(3) is very crucial for a vibrant and progressive approach to the essential spirit of the Code.

It has been suggested in some of the cases that s 206(3) is viable and effective only in cases where all the elements of the enforceable and valid contract¹¹ are fulfilled.¹² The consequence of such agreement has been shown by Thomson J. When a purchaser has fulfilled his side of the contract he acquires a right *ad rem* which is also a right *in personam*.¹³ In other words, a purchaser who has entered into a valid contract but is yet to register it can only sue the vendor on his personal basis based on the contract. However, once he acquires a good title to the land through registration he has the right to sue any party for any infringement of his rights in the land. Not fulfilling any of the requirements for a valid contract would certainly postpone the right of the parties in contract and thus fail the land transaction. Again, though the Code is said to be a comprehensive code,¹⁴ nevertheless, there are a certain stages of land transaction that are not covered by it.

THE SCOPE OF SECTION 206(3) OF THE CODE

Section 206(1) provides that every dealing under this Act shall be effected by an instrument as prescribed in s 207 until s 212 of the Code. This particular instrument must be registered according to Pt 18 of the Code. It is obvious that s 206(1) covers dealings which have specific meaning under the Code. In *Kwong Hing Realty Sdn Bhd v Malaysia Building Society Bhd* [1997] 5 MLJ 670, the High Court held that sub-s 3 of s 206 must be read in light of sub-s (1). As sub-s (1) speaks of the 'dealings under this Act' sub-s 3 only saves the contractual operation of dealings under the Code. The easement

11 According to George Jessel MR in *Lysaght's* case at p 507, '... valid contract means in every case a contract sufficient in form and in substance, so that there is no ground whatever for setting aside as between the vendor and purchaser'.

12 See, *Kim Lin Housing Developers Sdn Bhd (appointed receiver and liquidator) (in liq) v Bank Bumiputra (M) Bhd* [1997] 2 MLJ 805; *Murugappa Chettiar Lakshamanan v Lee Teck Mook* [1995] 1 MLJ 782; *Abdul Rahim bin Syed Mohd v Ramakrishnan Kandasamy* [1996] 3 MLJ 385. *Heller Factoring Sdn Bhd v Metalco Industries (M) Sdn Bhd* [1995] 2 MLJ 153. See also *Wong Ah Yab (P) & Anor v Lee Joo Eng (P) & Anor* [1996] MLJU 67; [1997] 1 CLJ Supp 282.

13 *Bachan Singh v Mahinder Kaur & Ors* [1956] MLJ 97, at p 98.

14 *UMBC v PHT Kota Tinggi* [1984] 2 MLJ 84.

transaction was contracted in 1957 and the court held that it has no effect under the present National Land Code as the dealings were confined to Pt 14 to 17 of the Code.

It is observed that the word 'nothing' results in denying not only the requirement of registration but also the coverage of contract pre or post NLC. Whilst the general definition of 'dealing' under s 5 of the NLC includes 'any like transaction effected under the transaction of any previous land law', s 206(1) of the NLC explicitly limits it to dealings under the NLC only. Section 206(1) prevails over the general definition in s 5 by virtue of the qualification therein unless the context otherwise requires.¹⁵ The question is whether s 206(3) expressly provides that it merely concerns with 'dealings' under the Code. Does a failure to follow the requirements prescribed by the Code cause the dealings to be postponed to another registered interest? In the absence of any clear provision one may hold that s 206(3) covers a wider scope and includes all kinds of contract involving alienated land or any interest therein.¹⁶ The word 'nothing' at the beginning of the phrase indicates the intention of the legislature to deny the effect of sub-s 1 of the 206 to any contract pertaining to any alienated land or interest therein.

This test was adopted by the Federal Court in *Ong Chat Pang & Anor v Valliappa Chettiar*.¹⁷ The recognition of equity within the four walls of the NLC is provided by s 206(3), which states that the provisions of the NLC requiring dealings to be effected in the statutorily prescribed manner shall 'not affect the contractual operation of any transaction relating to alienated land or any interest therein'. This is significant as the foundation of equitable estoppels is either a contract or the existence of some fact which the legal owner is estopped from denying¹⁸ even though it does not provide for any proprietary interest arising from the contract. It is implicated that any land contract would create a kind of land interest. Thus, in case of a breach of the contract, the innocent party would be entitled for a kind of relief that is just and reasonable in the eyes of the law and according to equity. In charge transactions relief outside the Code should be offered to parties who are not qualified to pursue their remedies under the Code. Section 206(3) could be used to assert that in the

15 See p 679C-H.

16 This has triggered a question pertaining to the recognition of 'equitable easement' which has been given 'life' by the Supreme Court in *Templeton's case*.

17 [1971] 1 MLJ 224.

18 See *Canadian Pacific Railway Co v R* [1931] AC 414.

absence of illegality indulging the contract the court has the discretion to enforce the terms of the contract.¹⁹

Allowing contract outside the Code — however reluctantly — suggests a need for more flexibility in land contracts which are essential for trade and commerce. British courts acknowledge interest in lands to be created without formal consideration on the basis of equity. The emergence of proprietary estoppels has been adopted. These estoppels are based on the prevention of insistence of strict legal rights by the landowner.²⁰ In Malaysia, the basic elements of justice were described by Justice Salleh Abas in *Paruathy d/o Murugiah v Krishnan s/o Doraisamy*.²¹ His Lordship said:

The principle is an equitable principle created for the protection of a person who has expended money because of his reliance upon the encouragement by the other. It is because of his reliance upon the encouragement by the other. It is because of the expenditure and encouragement that the parties are brought into a legal relationship.²²

SECTION 206(3): ROOMS FOR A WIDER BASIS FOR LAND REMEDY

It is generally accepted that s 206(3) merely provides an avenue for the parties in the contract to sue in personam. However, the latest development in the law has seen efforts to fully utilise the potential scope of application of this section.²³ The same is taking place under the spectrum of the law of contract in general. For example, the contractual remedy resulting from breach of contract is now extended to the breach of obligation. In the event of a breach for a valid land contract the usual remedy is a 'specific performance'.²⁴ Specific performance is a discretionary remedy which is also granted subject to other

19 *Tengku Abdullah ibni Sultan Abu Bakar v Mohd Latiff* [1996] 2 MLJ 265; *Boustead Trading (1985) Sdn Bhd v Arab-Malasian Merchant Bank Bhd* [1995] 3 MLJ 331; *Rasiah Munusamy v Lim Tan & Sons Sdn Bhd* [1985] 2 MLJ 291; *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd* [1996] 1 MLJ 113.

20 Judith Sihombing, *NLC a Commentary* (3rd Ed) Malayan Law Journal, Kuala Lumpur, p XXI 125.

21 [1983] 2 MLJ 121.

22 *Ibid.* p 123.

23 See *Boustead Trading Sdn Bhd v Arab-Malaysian Merchant Bank Berhad* [1985] 3 MLJ 331 in which the court initiates a right for proprietary interest in land. See also *Templeton & Ors v Low Yat Holdings* [1993] 1 MLJ 443.

24 Section 11(2) of the Specific Relief Act 1950.

factors.²⁵ For example, s 21(2)(a) of the Specific Relief Act the court may refuse to grant the relief of specific performance to the plaintiff if it involves unforeseeable hardship for the defendant. However, damages in equity will be granted when the court chooses not to grant specific performance or the specific performance per se is not enough to give justice to the case.²⁶ A pre-requisite for the remedy is the presence of an enforceable and valid contract to operate upon.²⁷

The basis for specific relief in land contract is equity in cases where the common law damages are found to be insufficient. For these reasons s 206(3) provides a legal basis in equity. The main objective is to provide justice for the parties in contract. The Malaysian legal background must also be taken into account. It is proposed that the decision to provide remedy for illegal contract as practiced in Australia may not be fitting and should not be adopted under the current Malaysian land system.²⁸

The above mentioned suggests a new and wider interpretation of s 206(3). The idea of allowing the claim in personam under this section supports the idea of the exclusiveness of registration of titles mooted by Torrens, and such a recognition would not run against the concept of indefeasibility of title under the Malaysian land system. According to Vijayalakshmi the main reason why equity is sought in land contract is that 'if an interest is recognised by the law of equity, the interest is no longer a personal or contractual interest but the

25 In *Sekemas Sdn Bhd v Lian Seng Co Sdn Bhd* [1989] 2 MLJ 155, the Court of Appeal held that specific performance was a discretionary remedy. Although s 20(1)(a) of the Specific Relief Act 1950 provides that a contract will not be specifically enforced if the non-performance of it can be adequately relieved by compensation in money, s 11(2) of the Act clearly says that there is a presumption that in contracts for the sale of immoveable property monetary compensation cannot be an adequate remedy.

26 Section 18 of the Specific Relief Act 1950 (Act 137).

27 *Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liq) v Bank Bumiputra (M) Bhd* [1997] 2 MLJ 805; *Murugappa Chettiar Lakshmanan v Lee Teck Mook* [1995] 1 MLJ 782.

28 See *Tinsley v Milligan* [1993] 3 All ER 65. In this case, **although** we may agree with the decision to provide leniency in interpreting the illegal contract, the Malaysian court nevertheless, should exercise extra caution in interpreting what sort of illegal contract may fall under the exception to the general rule particularly under the Malaysian religious and cultural beliefs.

interest is converted into a proprietary interest'.²⁹ Proprietary estoppel is a product of equity invoking to combat any act of 'unconscionability'.³⁰

It has been highlighted above that contract and equity complements each other. In this regard, s 206(3) has been mooted in several cases to be a basis for a liberal application of equity.³¹

SECTION 206(3): ROOM FOR INVOKING EQUITY?

It was long thought and frequently upheld that the Torrens system — being a system with the objective to eliminate the derivative titles — would not allow the principles of equity; however, the decision in *Barry v Helder*³² proposed otherwise where it was argued that none of the Torrens statutes were running opposite the fundamental doctrines of the court of equity.³³ In other words, since the Torrens system only recognises registered title and interest, equity remains a

29 A Vijayalakshmi Venugopal, *The Controversial Contribution of Equity to Land Law in Malaysia*, (2002) INSAF XXXI No 1, 156 at p 160.

30 Refer to *Boustead's* case.

31 *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd* [1989] 2 MLJ 202; *Yong Tong Hong v Siew Soon Wah & Ors* [1971] 1 LNS 161; *Mercantile Bank Ltd v The Official Assignee Of The Property Of How Han Teh* [1969] 1 LNS 106; *Inter-continental Mining Co Sdn Bhd v Societe Des Etains De Bayas Tudjuh* [1974] 1 LNS 51; *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1992] 1 LNS 7; *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1994] 3 MLJ 90.

32 (1914) 19 CLR 197. See also in *Butler v Fairclough* (1917) 23 CLR 78, at p 79 Griffith CJ observed: 'It must now be taken to be well settled that under the Australian system of registration of titles to land the courts will recognise equitable estates and rights except so far as they are precluded from doing so by the statutes. This recognition is, indeed, the foundation of the scheme of caveats which enable such rights to be temporarily protected in anticipation of legal proceedings'. The above statement of the law was approved by the Privy Council in *Abigail v Lapin* [1934] AC 419 in which Lord Wright delivering the judgment of Their Lordships said at p 500: 'The Real Property Act 1900, of New South Wales, embodies what has been called, after the name of its originator, the Torrens system of registration of title to land. ... it has long been held that equitable claims and interests in land are recognised under the Real Property Acts. ... for the protection of such equitable interests or estates, the Act provides that a caveat may be lodged with the registrar by any person claiming as *cestui que* trust, or under any unregistered instrument or any other estate or interest'.

33 See the statement of Isaac J at p 213.

basis for relief in the pre-registration stage of transaction. How far this principle is adopted in the Malaysian land system remains uncertain, yet the use of 'contractual operation' under s 206 (3) may give room for equitable principles to operate hand in hand with the registration system as a basis of providing justice to the parties in the contract. In *Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor*,³⁴ Edgar Joseph Jr — after tracing the history of the application of the rules of equity in Malaysia — concluded that s 206(3) provides for the statutory authority for the acceptance of equity under the Malaysian land law. Such a statement may give rise to other problems. Sinnadurai for example, questioned the role of contractual principles in settling competing claims between the first purchaser and the subsequent purchaser over a same piece of land as to how the purchasers should protect their rights.³⁵ The first purchaser may also find difficulty in protecting his claim against other parties who may have a claim against the vendor. The problem is also obvious in cases of death of the vendor or purchaser. Similarly, who will bear the risk of the property being destroyed or compulsorily acquired?³⁶

Some of the questions raised above may be answered by the full force of the caveat system. Any unregistered interest should be protected by caveat and proper notice given to any person wishing to deal with the land. If uncertainty over the rights of the parties in contract persists, equity can play an important role in land law. The court may consider ways to give way to equity over the strict provision of the NLC.

Furthermore, the provisions of the Code show that only the registered proprietor's rights are well prescribed by the Code. The purchaser only has the right to enter caveat to protect his interest. It is necessary to look at other laws outside the NLC in order to address the apparent *lacunae* in the law. The present query revolves around the question whether it is right to apply English equitable principles to the Malaysian land system when we have a clear inhibitive provision under s 6 of the Civil Law Act 1956. These English equitable principles include the concepts of bare trustee and beneficial owner.

Here, the application of equitable principles at the pre-registration stage seemed unavoidable. Irrespective of the caveat system suggested in substitution for the notice for unregistered interest,³⁷ the courts do not seem to be able to disassociate themselves from the

34 [1993] 1 MLJ 443.

35 Sinnadurai, *Sale and Purchase of Real Property Law*, p 200.

36 *Ibid*.

37 *Butler v Fairclough & Anor* (1917) 23 CLR 78 at p 91.

English equitable principles. Whilst Kok has used s 206(3) as a basis to apply the *in personam* rules, Judith has invoked this section further and argued that it also forms a ground for the application of equitable principles as proposed by the new equity.³⁸ In other words, the same section presents both parties with arguments for and against the idea of applying equity to the Malaysian land law. Azlan Shah reminded the courts that independent of the land legislation, the courts recognised equitable and contractual interest in land.³⁹ The Lordship seems to suggest that although there are various opinions and interpretations possible in regard to the place of equity in land legislation, the application of equitable principles have been adopted by the courts. In *Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor.*,⁴⁰ Edgar Joseph Jr J ruled out that sub-s (3) of the 206 grants statutory authority for a liberal interpretation of equity whenever there is a basis for that.⁴¹ Thus, it is important to determine what the bases for the liberal application of equity are. Certainly, Joseph Jr J did not suggest the free and unqualified application of the principles of equity, more so since they are originally British. The emphasis should be on the universal nature of equity which can accommodate local elements, such as culture, religion and ethnic diversity.

Prior to the above case, the Federal Court in *Karuppiiah Chettiar v Subramaniam*⁴² attempted to invoke s 206(3) when it held that the respondent was the equitable owner of the land. A, who owned a two-sixths undivided share of a piece of land, deposited the issue document of title of the land as security for loans granted to him by the appellants. The appellants did not lodge a lien holders caveat against the land. Subsequently, A sold his share in the land to the respondent who was not able to register it due to unavailability of the IDT. The respondent entered a private caveat after the execution of the memorandum of transfer, and A executed a second memorandum of transfer in favor of the appellants in respect to the same land. On inspection of the register document of title, the appellant got to know

38 The basis of the application of new equity will be discussed at the end of this chapter.

39 *Mercantile Bank v The Official Assignee* [1969] 2 MLJ 196 at p 198.

40 [1993] 1 MLJ 443.

41 In this case, the Lordship relied on *Yong Tong Hong v Siew Soon Wah & Ors* [1971] 2 MLJ 105; *Mercantile Bank Ltd v The Official Assignee of the Property of How Han, The* [1969] 2 MLJ 196; *Inter-continental Mining Co Sdn Bhd v Societe Des Etains De Bayas Tudjuh* [1974] 1 MLJ 145; *Margaret Chua v Ho Swee Kiew & Ors* [1961] MLJ 173.

42 [1971] 2 MLJ 116.

of the respondent's caveat and issued a prohibitory order against the land pursuant to a judgment previously obtained against A. The question arose whether the appellant's right based on the prohibitory order or the respondent's earlier interest based on the memorandum of transfer would prevail. The appellant contended that the respondent had only a right in personam against A as he had not obtained registration of his transfer as prescribed under s 206(1) of the NLC. However, the court held that the respondent was the *equitable* (emphasis added) owner of the land, and thus his interest prevailed.

Gill FJ asserted that the answer to the appellant's contention was laid down in sub-s (3) of s 206 of the NLC which states that 'nothing in sub-s (1) shall affect the contractual operation of any transaction relating to alienated land or any interest therein'. And since the transaction was a contract of sale and purchase in relation to the interest of land where the memorandum of transfer was executed without any alleged fraud, the effect of the transaction was to give the respondent an equitable state or at least an equitable right to the land.⁴³ His Lordship stated that 'such equitable estates and rights are recognised under the Torrens system of registration of titles to land and is not open to question.' He quoted Taylor J in his judgment in the Court of Appeal in *Wilkins v Kannamal*⁴⁴ in which Foster Sutton CJ and Wilson J concurred that, 'the Torrens Law is a system of conveyancing; it does not abrogate the principles of equity'. Here, it should be noted that the case was decided prior to NLC in which the statutes⁴⁵ contained stricter provisions compared to the NLC in regard to any transaction not in accordance with the statutes. Furthermore, Taylor J justified his opinion about equity on the basis of conveyancing. According to *Black's Law Dictionary*,⁴⁶ conveyancing is an 'act of performing the various functions relating to the transfer of real property'. The significant word here is 'transfer', which indicates that the Torrens system as a conveyancing system is a method of transfer of land from one person to another. This opinion

43 *Ibid*, at p 118.

44 [1951] MLJ 99, at p 100.

45 See ss 55 and 96 of the Land Code 1926 (Cap 138). All land which is comprised in any grant, lease of State Land, certificate of title or entry in the *mukim* register, whether registered prior or subsequent to the commencement of this Enactment, shall be subject to the provisions of this Enactment, and shall not be capable of being transferred, transmitted, charged or otherwise dealt with except in accordance with the provisions of this Enactment.

46 Henry Campbell Black, *Black's Law Dictionary* (5th Ed).

should be contrasted with the view that the Torrens system is a system of land tenure by method of land holding. It is submitted that reference to equitable principle is inevitable and vital in a system of conveyancing in contrast with its existence in a system of land holding. From the above it is clear that, by virtue of the memorandum of transfer, the respondent obtained an equitable title to the land.

Malaysian land law does not apply the English equitable principles without reserve. In the case of bare trust the Malaysian courts did not blindly follow the English bare trust principles. There are cases where the court over-emphasised the application of the English principles of equity.⁴⁷ Such misconception could arise from the English land system. Kok — after referring to Sinnadurai on the categories of interest in land — proposed that any interest could be described in reference to the rights for caveat as provided under s 323(1) of the NLC.⁴⁸ He suggested that the interest could be referred to as 'a claim to a right to title to land', a claim to title to land, a claim to a right to registrable interest in land and a claim to the same.⁴⁹ Kok's suggestion is worthy of consideration, especially in order to cover any contract at the pre-registration stage and to fulfil conscientious obligation in the contract.

A second opinion is that s 206(3) serves to preserve the contractual obligations between the parties. Such an approach would fail to appreciate the role of equity in competing with a fast and vast development of commercial matters. It is difficult for any law to keep pace with the rapid innovations in commerce. Therefore, the rules of equity could become one of the best alternatives to serve justice to dissatisfied parties and indirectly ensure that land law remains dynamic, lively and responsive to change.

In cases of executed contract, s 206(3) could also be invoked as a basis for a better remedy for any aggrieved party whose right or interest is challenged or overruled by another party claiming priority. The aggrieved party can make use of s 206(3) and contend that by virtue of that section, being a party who has complied with all the contractual elements under a valid and enforceable contract, the principles of equity would give it priority against any other later

47 For example, as discussed in cases involving *jual janji* and easement it is found that the court has simply invoked the principle of equity despite there being a clear provision for easement. While in cases of *jual janji*, special attention should be given to the customary nature of *jual janji* rather than to invoke the principles of English equity.

48 SY Kok, *Equity in Malaysian Land Law*, (1996) Part II, MSLJ 84.

49 *Ibid*, p 110.

claims.⁵⁰ Based on *Shaw v Foster*⁵¹ and *Lysaght v Edward*⁵² a party can invoke the bare trust principle if it can prove that the condition precedents⁵³ for a valid contract are present. The Malaysian courts impose a similar emphasis.⁵⁴ In the majority of cases heard the courts do not underscore on payment of full purchase price but lay emphasis on the undivided willingness and full effort on the part of the vendor to transfer the property to the purchaser.⁵⁵

Another pertinent issue is whether s 206(3) undermines the concept of indefeasibility of title, which stands as one of the main feature of Torrens system. Tracing the effect of registration, its objective is to give indefeasibility to any registered title. As an indefeasible title, the validity of the title cannot be denied or challenged unless under several grounds as provided by the Code. The question whether s 206(3) allows an unregistered interest or right to be influential on any indefeasible right or not invites dispute. According to Judith,⁵⁶ the effect of s 206 (3) is to show that there is a marked difference between the unregistered *registrable* interest and the unregistered *unregistrable* interest. Thus, to maintain that equitable principles can be used to protect the unregistered *unregistrable* interest will not certainly defeat the objective of the Torrens system. It is submitted that in any system, there should be a provision that prescribes the right of any interest which does not comply to the law. Therefore, the interpretation of s 206(3) with an emphasis on any contractual elements should not be perceived as one of the ways to defeat the concept of indefeasibility of title ascribed by

50 *Vallipuram Sivaguru v Palaniappa Chetty* [1937] MLJ Rep 59; *Ng Kheng Yeow v Chiah Ab Foo & Ors* [1987] 2 MLJ 330; *Haroon v Nik Mab* [1951] MLJ 20.

51 (1872) LR 5 HL 321.

52 (1876) 2 Ch D 499.

53 There are: (a) that a valid contract was entered into (b) when the executory contract was executed, a title to the unregistered land (the subject matter of the sale) has been established by the vendor or accepted by the purchaser; (c) the vendor is contractually obliged to execute a deed of conveyance of the unregistered land in favor of the purchaser.

54 See *Vallipuram Sivaguru v Palaniappa Chettiar* [1937] MLJ 59, *Ng Kheng Yeow v Chiah Ab Foo* [1987] 2 MLJ 330; *Haroon v Nik Mab* [1951] MLJ 209.

55 See *Leong Ah Chee v Lee Chong Hai & Anor* [1994] 2 MLJ 614; *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12.

56 Judith S, *The NLC a Commentary* (3rd Ed 1997), XIX 504.

the Torrens system. In fact, the insertion of the section into the NLC after s 6 of the Civil Law Act 1956 is in operation should be taken into account in understanding the intention of the legislature.

Although the meaning of equity reflects the wide and indefinite nature contained in it, it has interacted with the notion of indefeasibility in various manners. One of the most significant ways is to liberalise the strict notion of the effect of registration. Thus, it will help in making the role of law to uphold justice and fairness a reality. However, a compromise between the two systems is needed so that the whole concept will effectively complement each other.

In the words of Privy Council in *Frazer v Walker*⁵⁷ the term 'indefeasibility' was defined as 'a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys'.⁵⁸ Although the concept is central in the system of registration, it does not deny the possibility of the registered proprietor being attacked against any later claim. There are provisions by which the entry the proprietor relies on may be cancelled or corrected, or he/she may be exposed to claims in personam. These are the matters which should not be overlooked when a total description of rights is required. As a registered proprietor — and as long as he/she remains as such — no adverse claim (except as specifically admitted) may be brought against him/her. Indefeasibility is achieved under the Malaysian Torrens system from registration of an instrument in a statutory form. Until an instrument is registered, it has no effect in creating an interest in land. However, once registered the title is guaranteed immunity from attack subject to the relevant provisions of the law. The NLC under s 340(2) does not provide any definition as to what is meant by indefeasibility under the Malaysian Torrens system,⁵⁹ but it does describe the effect of registering a land interest under the Malaysian land law.

57 [1967] 1 All ER 649 at p 652.

58 *Ibid.*

59 On this point, Raja Azlan Shah in *PJTV Denson (M) Sdn Bhd v Roxy (M) Sdn Bhd* [1980] 2 MLJ 136 (in delivering the judgment of the court) stated that the concept of indefeasibility is so deeply embedded in our land law system that it seems almost trite to restate it, yet the concept does need definition especially because recent decisions have questioned the type of indefeasibility in force in Malaysia.

alternative systems to complement the present system. Thus, as far as land contract is concerned, s 206(3) should not only serve as a statutory recognition for any contractual operation relating to land. The time has come to widen the scope to include the application of equitable principles as long as those principles support the aims and objectives of the Torrens system.

SECTION 206(3) AS A MEANS OF REGULATING LAND CONTRACTS

The sale and purchase of land in Malaysia involves a significant period of time between the execution of a contract and the completion of the sale with the formal registration of the title in the name of the purchaser. Thus, when the contract of the sale of land is challenged, the provisions under the law of contract and the Specific Relief Act 1950 as well as the general principles of laws are applicable. However, if the title of the registered owner is challenged, the provisions of the NLC are applicable.⁶³ Hence, most of the textbook writers on land law seem to agree that equity merely interferes with the pre-contract stage under the Torrens system.⁶⁴ Except for Judith,⁶⁵ most of the other writers do not provide an in depth explanation of s 206(3).⁶⁶ Judith's contention that s 206(3) is a sound basis for invoking equity should be welcomed under the present approach of modern equity.⁶⁷ The idea behind the new development of principles of equity is to protect an individual against the unconscionable acts of other parties.⁶⁸ The inception of this development should be accepted positively especially under the Malaysian land law where no special legislation is enacted to govern matters pertaining to contract for sale and purchase of land.

63 When the challenges are also subject to other laws, there were attempts not to give priority to NLC. See *Kim Lin's* case, above.

64 David SY Wong in *Tenure and Land Dealings in the Malay States* at p 267 referred to the decision in *Inter-Continental Mining Co Sdn Bhd v Societe des Etains de Bayas Tudjuh* [1974] 1 MLJ 145 said that the court in general have treated a contract of land dealing as capable of giving rise to a kind of equitable proprietary right or interest in land; See also, SY Kok, *Equity in Malaysian Land Law* Pt II, [1996] MSLJ, at p 84.

65 Judith S, *The NLC a Commentary*, passim.

66 In their attempts to look at the position of equity under Malaysian land law, most of them did not discuss s 206(3) of the Code.

67 Sometimes the modern approach of equity is referred as the new equity.

68 Stephen Goldstein (ed), *Equity and Contemporary Legal Development, First International Conference on Equity* 1990, Jerusalem, at p 17.

It has been shown that the incorporation of s 206 in general and sub-s (3) in particular gives a great impact on land contract. Previously, there was no clear recognition of the position of contractual operations under the Torrens system.⁶⁹ On this point, the researcher disagrees with Kok⁷⁰ when he said that s 206(3) was in *pari materia* with s 4 of the Selangor Registration of Title Regulation 1891. It is submitted that s 206(3) was incorporated in the NLC 1965 in order to give some leniency to the strict effect of the provision of the earlier land enactment. It is also submitted that although the earlier land enactments did provide for a strict interpretation of the law, there were no provisions which expressly dismissed transactions outside the provisions of the land enactments. On the contrary, the recognition was given by the NLC which came into effect on 1 January 1966.⁷¹ The same sections are also used to justify the application of any equity to the Malaysian land law.⁷²

Section 206(3) also expands the basis of applying equity in land contract. It can be argued that s 206(3) provides a basis for the parties in land contract to invoke the principle of estoppels whenever there is a basis to do so. In fact, the parties' rights are not only confined to the principles of promissory estoppels but also to proprietary estoppels.⁷³ Besides the new development in estoppels, the

69 Refer to Land Titles Enactment 1891, Perak Registration of Titles of 1897, Land Code of 1928.

70 SY Kok, *Equity in Malaysian Land Law*, (1996) Part II, MSLJ 84 at p 88.

71 In this thesis, it is argued earlier that s 347(2), s 340(4)(b) and also s 206(3) provides a basis for a general application of equitable principles under the Malaysian land law.

72 The Malaysian courts are now willing to apply the expansive new equity and the new estoppels. See the statement of Gopal Sri Ram JCA at p 294 in *Tengku Abdullah ibni Sultan Abu Bakar v Mohd Latiff bin Shah Mohd* [1996] 2 MLJ 265. A courageous initiative was made by Edgar Joseph Jr in *Alfred Templeton v Low Yat Holdings Sdn Bhd* [1989] 2 MLJ 202. In this case, the rule of estoppel was used as a means of doing 'perfect' justice.

73 There are controversies on this issue whether there is a distinction between promissory estoppels and proprietary estoppels. In *Crabb v Arun District Council* [1976] Ch 179 (CA), Scarman LJ, said that he did not find helpful the distinction between promissory estoppels and proprietary estoppels. He opined that 'the distinction may indeed be valuable to those who have to teach or expound the law; but I do not think that, in solving the particular problem raised by a particular case, putting the law into categories is of the slightest assistance'. Snell shared the same view '... the distinction between promissory and proprietary estoppel is a valid one', *Snell's Equity*, p 570.

revitalisation of equity or 'new' equity also focused on the concept of 'unconscionability' as a basis of justice. Although previous research has come to the same conclusions,⁷⁴ it offers to expand the concept of equity in land matters so long as those principles will not be in conflict with the objectives of the Torrens system. Unconscionability has become an accepted basis for equitable interest in the Malaysian land law.⁷⁵

CONCLUSION

Although all arguments for equity are viable and valid, a certain degree of caution should be observed. The use of equitable principles should not undermine the inviolability of the National Land Code. In personam claims in equity and estoppels ask for a re-consideration of the place of equity under the Malaysian land law. Section 6 of the Civil Law Act 1956 should be subscribed to with reservations. Justice and fairness is embedded in the universal concept of equity.

74 See Judith S, *The National Land Code a Commentary*, (3rd Ed), XIX [1001] p 129.

75 For example, forfeiture for deposit was refused on the basis of unconscionability, see Chap 5 pp 7, 8 & 9; or in some cases 'notice' was taken into account also on the reason that it is unconscionable to ignore 'notice' of the later registered purchaser of the earlier interest.