

## EQUITY IN LAND LAW

In this article, an attempt will be made to highlight the uncertainties surrounding the application of English equity to land matters in Malaysia generally<sup>1</sup> and in doing so to suggest solutions and lay down certain conclusions where possible. The article will begin with a brief introduction on the structure of the Malaysian Torrens system and its underlying aims and objectives. This will be followed by a discussion on the relevant statutory provisions regulating the application of English land law and equity to land matters in Malaysia. Local decided cases on the matter will be considered next to determine whether the differences in attitude and approach adopted by the courts in dealing with the issue are in conformity with the underlying aims and objectives of the Malaysian Torrens system. The discussion will centre on selected areas of land law. The article will conclude on the future role of equity in its application to land matters in Malaysia generally.

### A. The Malaysian Torrens system: Structure, Aims and Objectives

The Malaysian Torrens system as embodied and codified in the Peninsular Malaysia National Land Code 1965, the Sarawak Land Code (Cap 81) and the Sabah Land Ordinance (Cap 68) is a system of registration of titles which is a totally different land law system from that found in England. Registration, is the corner-stone of the Malaysian Torrens system which not only makes provision for a system relating to registration of dealings in land but also for the substantive law governing such

<sup>1</sup>For earlier discussions, on the issue which continues to be the subject of controversy, see generally Jackson D, "Equity and The Torrens System: Statutory and Other Interests" (1964) 6 Mal LR 146; David S Y Wong, "Equitable Interests and The Malaysian Torrens System" (1966) 9 Mal LR 20 and Salleh Buang, "Equity and The National Land Code - Penetrating The Dark Clouds" [1986] 1 MLJ cxxv.

dealings and interests in land. The system seeks to provide simplicity and certitude in transfers of land.<sup>2</sup> To ensure certainty and security of title or interests acquired by an innocent purchaser, the Malaysian Torrens legislation contain provisions declaring the conclusiveness of the register as regards matters appearing therein.<sup>3</sup> There are also provisions declaring the indefeasibility of title or interest of the registered proprietor or of any person in whose name the interest is registered.<sup>4</sup> Such provisions in effect incorporate the "curtain" and "mirror" principles that persons dealing with the registered owner of the land need not be concerned to enquire behind the register to ascertain the validity of the information pertaining to the land as indicated thereon and the circumstances under which the proprietor came to be registered. As the register is everything,<sup>5</sup> all information pertaining to the land found in the register is held out to be complete and comprehensive.

Although the Malaysian Torrens system is based on the broad principles of the Australian Torrens system,<sup>6</sup> it should be borne in mind that the Australian system was introduced against a different background from that obtained in Malaysia. In Australia, English land law was already in force when the Torrens system was introduced there. As such the Torrens system which was later introduced has been held to be essentially a system of conveyancing only not intended to supersede pre-existing principles of English land law.<sup>7</sup> In *Butler v Fairclough*<sup>8</sup> Griffith CJ summed up the Australian position as follows

<sup>2</sup>See *Oh Hiam & Ors v Tham Kong* [1980] 2 MLJ 159 at 164; *Eng Mee Yong & Ors v V Leitchumanan* [1979] 2 MLJ 212 at 214 and *Lian Keow Sdn Bhd (In Liquidation) & Anor v Overseas Credit Finance (M) Bhd & Ors* [1988] 2 MLJ 449 at 463.

<sup>3</sup>See National Land Code 1965, s 89 and Sarawak Land Code (Cap 81), ss 115 and 133.

<sup>4</sup>National Land Code 1965, ss 92(1) and 340 and Sarawak Land Code (Cap 81), s 132.

<sup>5</sup>See *Teh Bee v K Maruthamuthu* [1977] 2 MLJ 7 at 12.

<sup>6</sup>Introduced by Sir Robert Torrens, a former Collector of Customs at Port Adelaide, Australia.

<sup>7</sup>See *Barry v Heider* (1914-15) 19 CLR 197.

<sup>8</sup>(1917) 23 CLR 78.

"It must now be taken to be well settled that under the Australian system of registration of titles to land the Courts will recognize equitable estates and rights except so far as they are precluded from doing so by the statutes."<sup>9</sup>

In Malaysia,<sup>10</sup> however, the existence of a local rather than an English land law system as a background to the introduction of the Torrens system, made it obvious that the English concept of equitable estates and interests in land which is recognised under the Australian system of registration of titles to land has no counterpart in the Malaysian Torrens system. As Lord Diplock said in delivering the judgment of the Judicial Committee of the Privy Council in *Registrar of Titles, Johore v Temenggong Securities Ltd*<sup>11</sup>

"But the temptation to regard the distinction between registered and unregistered interests in land under the National Land Code as similar to the difference in English law between legal estates and equitable interests in land should be resisted, for the analogy is not close and is liable to be misleading."

However, as was pointed out by his Lordship, the Malaysian Torrens system does not prevent or restrict the creation of beneficial interests in land whether under express trusts or under constructive or resulting trusts arising by operation of Malaysian law which in this respect is derived from the rules of equity in force in England in 1956.<sup>12</sup>

Seen in the light of the stated aims and objectives of the Malaysian Torrens system as set out above, it is clear that the English concept of legal and equitable estates and interests in land has no application to the Malaysian Torrens system and that any application of English equitable principles, which are of general application, to land matters in Malaysia must not do violence to or be inconsistent with such aims and objectives.

<sup>9</sup>*Ibid* at 91.

<sup>10</sup>With the exception of Penang and Malacca.

<sup>11</sup>[1976] 2 MLJ 44 at 45.

<sup>12</sup>*Ibid*. See also s 3 of the Civil Law Act 1956. This view of Lord Diplock was also quoted with approval by Syed Agil Barakbah SCJ in *Lian Keow San Bhd (In Liquidation) & Anor v Overseas Credit Finance (M) Bhd & Ors*, *supra* at 463.

## B. Civil Law Act 1956: Sections 3 and 6

The statutory provision dealing with the application of English land law to land matters in Malaysia is section 6 of the Civil Law Act 1956. Section 6 which categorically prohibits the application of English land law in Malaysia provides as follows

"Nothing in this Part shall be taken to introduce into Malaysia or any of the States comprised therein any part of the law of England relating to the tenure or conveyance or assurance of or succession to any immovable property or any estate, right or interest therein."

In *United Malayan Banking Corporation Bhd & Anor v Pemungut Hasil Tanah, Kota Tinggi*,<sup>13</sup> the Privy Council in dealing with the question whether English equitable rules relating to relief against forfeiture have any application to forfeiture of alienated land under the Code, expressed the view that the word "tenure" in section 6 is wide enough to embrace English rules of equity relating to the grant of relief against forfeiture which accordingly were precluded by the section from being applied. As their Lordships said

"Tenure, so it was maintained, meant only the mode of holding land, and the rules of equity were something different. But, in their Lordships' opinion, laws relating to the tenure of land must, applying the ordinary and natural meaning of these words embrace all rules of law which govern the incidents of the tenure of land, and among these incidents is the right, in appropriate circumstances, to the grant of relief against forfeiture."<sup>14</sup>

Section 3 of the Civil Law Act 1956, on the other hand, provides for the general reception of English equity in cases where there is a *lacuna* in the local law and where the application of English equity is suitable to local circumstances.<sup>15</sup> Where there arises question relating to the application of English equity to land matters, section 6 would apply to the exclusion of section 3 as the former is a specific provision dealing with the application

<sup>13</sup>[1984] 2 MLJ 87.

<sup>14</sup>*Ibid* at 90.

<sup>15</sup>S 3(1) reads: "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 -

of English land law to land matters in Malaysia. However, this would only be the case where the rules of English equity to be applied form part of English land law.<sup>16</sup> Where the application of rules of English equity is not prohibited by section 6 in that the rules<sup>17</sup> are of general application and do not form part of English land law, then in order that such rules of equity be applied to the land matter in question, the conditions laid down in section 3 must be satisfied so as to permit their application, namely that, there is a *lacuna* in the local law and that their application is suitable to local circumstances.

**C. *Haji Abdul Rahman v Mohamed Hassan*:<sup>18</sup> The Exclusiveness of the Statutory System of Land Dealings**

In Malaysia, the existence of a local rather than an English land law system as a background to the introduction of the Malaysian Torrens system coupled with early stringent Torrens legislation such as section 4<sup>19</sup> of the Selangor Registration of Titles Regulation 1891 formed the basis of an argument that

- (a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April, 1956;
- (b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 1st day of December, 1951;
- (c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 12th day of December, 1949, subject however to subsection (3)(ii):

Provided always that the said common law, rules of equity and statutes 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."

<sup>16</sup>Such as the English concepts of bare trust, constructive notice and equitable estates and interests in land. In this connection, see also *Chin Choy & Ors v Collector of Stamp Duties* [1981] 2 MLJ 47 at 48; *Registrar of Titles, Johore v Temenggong Securities Ltd* [1976] 2 MLJ 44 at 45 and *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 at 214.

<sup>17</sup>Such as the principle of equitable estoppel.

<sup>18</sup>[1917] AC 209.

<sup>19</sup>S 4 provided as follows:

"After the coming into operation of this Regulation, all land which is comprised in any grant ... whether issued prior or subsequent to the coming into operation of this Regulation, shall be subject to this Regulation and shall not be capable of being transferred, transmitted, mortgaged, charged, or otherwise dealt with except in accordance with the provisions of this Regulation, and every attempt to transfer, transmit, mortgage, charge, or otherwise deal with the same, except as aforesaid,

under this legislation only registered interests were recognised and that land was not capable of any other sort of dealings outside the statute. As was observed by Dr David Wong, the Selangor Registration of Titles Regulation 1891, was strict in approach.<sup>20</sup> Section 4 of the 1891 Regulation provided for dealings not in conformity with the statutory requirements of the Regulation to be null and void and of no effect. In *Haji Abdul Rahman v Mohamed Hassan*, the Privy Council interpreted section 4 as not capable of conferring any effect in equity on a transaction which was not carried out in accordance with the statutory requirements of the Regulation. In other words, the statutory system of land dealings provided for under the 1891 Regulation was exclusive in nature. In the instant case, the plaintiff had transferred his land to the defendant. The transfer was intended to be a security for a loan obtained by the plaintiff from the defendant. The parties entered into a collateral agreement by which the plaintiff was to repay the loan within a stipulated period of time whereupon the defendant would re-transfer the land back to the plaintiff. The plaintiff, however, failed to repay the loan within the agreed stipulated period of time until some eighteen years later when he took action against the defendant to redeem the land. Their Lordships in the Court of Appeal by a majority held that the transfer and the collateral agreement were in effect a mortgage of the land and applying the English equitable principle of "once a mortgage always a mortgage", allowed the plaintiff to recover the land in equity. The Privy Council, however, reversed the decision on appeal by the defendant. Their Lordships were of the opinion that the agreement in question did not have the effect of creating a mortgage which was not recognised under the 1891 Regulation. As the intended charge was not created in accordance with the provisions of the 1891 Regulation, it could not have effect as a valid charge thereunder as section 4 of the 1891 Regulation nullified all deal-

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shall be null and void and of no effect, and in particular the provisions of Part VII relating to the enforcement of charges shall extend and apply to mortgages of land which have been executed before the coming into operation of this Regulation so that the powers in such mortgages mentioned shall only be exercisable in accordance with the provisions of Part VII, or as near thereto as circumstances admit."

<sup>20</sup>Wong, SY *Tenure and Land Dealings in the Malay States* (1975) at 247-248.

ings in land which were not effected in accordance with its provisions. Although the agreement was still good as a contract and the only right in the plaintiff was to sue under the agreement, the plaintiff's claim was nevertheless statute-barred. With regard to the application of doctrines of English equity to the statutory system of land dealings provided for under the 1891 Regulation, Lord Dunedin in delivering the judgment of the Board had this to say

"It seems to their Lordships that the learned judges [in the Court of Appeal] have been too much swayed by the doctrines of English equity, and not paid sufficient attention to the fact that they were here dealing with a totally different land law, namely, a system of registration of title contained in a codifying enactment."<sup>21</sup>

#### **D. *Post-Haji Abdul Rahman*: The Application of English Concept of Equitable Estates and Interests In Land**

With the repeal of the stringent 1891 Regulation by the FMS Land Code 1926 (Cap 138) which was subsequently replaced by the present National Land Code 1965, the position seems to be one of moving away from the stringent prohibitive provision of section 4 of the repealed 1891 Regulation. The corresponding provision in section 55<sup>22</sup> of the repealed Land Code 1926 and section 205<sup>23</sup> of the present National Land Code 1965 do not go further to declare any purported dealing to be null and void and of no effect. Accordingly, many judicial decisions subsequent to *Haji Abdul Rahman's* case have departed from the strict judicial attitude adopted in that case.

<sup>21</sup>[1917] AC 209 at 216.

<sup>22</sup>S 55 of the FMS Land Code 1926 (Cap 138) provided thus:

"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 subsequently 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."

<sup>23</sup>S 205 of the National Land Code 1965 reads:

"The dealings capable of being effected under this Act with respect to alienated lands and interests therein shall be those specified in Parts Fourteen to Seventeen, and no others."

(i) **Contracts for Sale and Purchase of Land**

In contracts for land dealings, the courts have resorted to the English concept of equitable estates in holding that the purchaser has become the equitable owner of the land. In *Munah v Fatimah*<sup>24</sup> Raja Azlan Shah J (as he then was) held that the plaintiff who had under a contract taken possession of the land by paying the full purchase price without any interference by the beneficiaries who contracted to sell the land to her some nineteen years ago, had become the equitable owner of the land. The plaintiff had tried unsuccessfully to get the land formally transferred to her. As his Lordship said

"Relying on the contract the plaintiff went into occupation and did such acts as were necessary and relevant to show that she was in possession. She never got off the land. As from that time, it seems to me, that she was the *equitable owner* of the said land. What is required now is to clothe the *equitable estate* with a legal title ... In my opinion she is well entitled to the relief she claims."<sup>25</sup>

A similar decision had earlier been arrived at in *Kersah La'usin v Sikin Menan*.<sup>26</sup> In *Othman & Anor v Mek*,<sup>27</sup> it was held that as the purchaser under the agreement had paid the full purchase price within the stipulated period and had entered into possession of the land, he had become the equitable owner of the land whose rights as against the vendor to have the full title to the land formally transferred to him could not be lost by reason of mere delay or laches. Ong Hock Sim FJ was of the opinion that the purchaser having paid the purchase price in full was the true beneficial owner of the land and the vendor after receipt of the full purchase price merely held the legal title to the land as a bare trustee for the purchaser.<sup>28</sup> These cases in effect treated

<sup>24</sup>[1968] 1 MLJ 54.

<sup>25</sup>*Ibid* at 55.

<sup>26</sup>[1966] 2 MLJ 20.

<sup>27</sup>[1972] 2 MLJ 158.

<sup>28</sup>*Ibid* at 165.



a contract for land dealings as capable of conferring equitable ownership on the purchaser under a system of law requiring registration of title to land. The better view to take is that resort should not be had to English land law concept of equitable estates and interests in land in determining whether a party under a contract for land dealings has acquired a right to claim title or registrable interests in the land. This is in view of the fact that the National Land Code 1965 applies a modified form of the Torrens system of registration of titles to and registrable interests in land. Furthermore, section 6 of the Civil Law Act 1956 prohibits the application of any English land law concept to land matters in Malaysia.<sup>29</sup> It is trite law that a transfer of land or an interest therein, which has yet to be registered, gives the purchaser a right which rests in contract. In *Macon Engineers Sdn Bhd v Goh Hooi Yin*,<sup>30</sup> the Federal Court held that so long as there is in existence a valid agreement for sale of land, the purchaser can be said to be a person claiming a right to title to land which right is capable of being protected by the entry of a caveat under section 323(1)(a) of the National Land Code 1965. As Thompson J (as he then was) said in *Bachan Singh v Mahinder Kaur & Ors*<sup>31</sup>

"To my mind, many of the difficulties which appear to arise in these cases would not arise if we were to bear in mind throughout the distinction between rights *ad rem* or personal rights and rights *in rem* or real rights. Where there is a valid binding contract for the sale of land, the purchaser, when he has performed his side of the contract, acquires a right *ad rem* which is also a right *in personam*. In other words, he acquires a right to the land as against the vendor personally but not good against the world as a whole and, in due course, that right can become a real right good against the world as a whole on registration in accordance with the Land Code".

<sup>29</sup>In this regard, see also the observations of Lord Roskill in *Chin Choy & Ors*, *supra*, at 48 and Lord Diplock in *Temenggong Securities*, *supra*, at 45.

<sup>30</sup>[1976] 2 MLJ 53.

<sup>31</sup>[1956] MLJ 97 at 97-98. See also s 206(3) of the National Land Code 1965.

Similarly in *Chin Cheng Hong v Hameed & Ors*,<sup>32</sup> Buhagiar J said

"This agreement is a non-statutory and non-registrable instrument; such instruments do not create an estate or interest, legal or equitable, in the land but create a contractual right, a personal right of action; it passes no actual interest in the land that can be called an equitable estate in the ordinary sense, but an equitable interest of a contractual nature under the instrument consisting of a right to be registered as the owner of the interest purported to be conferred by the instrument ..."<sup>33</sup>

Hence, the reliance by the courts on English principles of equitable estates and interests in land in order to hold that the purchaser has acquired a right to the land or an interest therein should be avoided.<sup>34</sup>

(ii) **Security Transactions: Unregistered Charges and Purported Liens**

As for the effect of purported dealings such as liens and unregistered charges, the courts have also applied English equitable principles in holding that the National Land Code 1965 does not prevent the creation of equitable charges and liens. In *Mercantile Bank Ltd v The Official Assignee of the Property of How Han Teh*,<sup>35</sup> Raja Azlan Shah J (as he then was) held that failure to enter a lien-holder's caveat so as to create a statutory lien under the National Land Code 1965 will not necessarily deprive the lender of a right to an equitable lien so long as the prerequisite intention to so create a lien coupled with the deposit of the title to the land are present. As his Lordship said

<sup>32</sup>[1954] MLJ 169.

<sup>33</sup>*Ibid* at 170.

<sup>34</sup>See also S Y Kok, "Nature of Right, Title and Interest Under the Malaysian Torrens System: The Non-Application of English Equities and Equitable Interests to Malaysian Land Law" [1983] 1 MLJ cxlix.

<sup>35</sup>[1969] 2 MLJ 196.

"[A]lthough no lien is created under the Land Code until the caveat is registered, the court in the absence of express words in the statute is not prevented from doing justice between parties by giving effect to equitable rights by way of contract. In other words, although failure to lodge a caveat does not entitle the depositor with whom the issue document of title is deposited, to a lien under the Code, he still possesses a right to it in equity."<sup>36</sup>

It is to be noted that the National Land Code 1965 does not provide for the concept of equitable liens and it is, accordingly, doubtful whether an equitable lien can exist and be recognised under the Malaysian Torrens system.

In *Mahadevan s/o Mahalingam v Manilal & Sons (M) Sdn Bhd*,<sup>37</sup> Salleh Abas CJ (as he then was) relied on the observation of Raja Azlan Shah J in *Mercantile Bank* and held that the National Land Code 1965 does not prohibit the creation of equitable charges and liens. As his Lordship said

"Examination of court decisions clearly shows that the courts have resorted to equitable principles and consistently held that an agreement to secure a debt in favour of the creditor in respect of the debtor's land creates an equitable charge giving rise to an equitable right in favour of the creditor, although no charge or lien within the provisions of the National Land Code or the previous Code is executed or created. (See *Ngan Khong v Bamah bt Pakah Jamin & Anor* [1935] FMSLR 81; *Arunasalam Chetty v Teah Ah Poh Trading & Anor*, *supra*; *Vallipuram Sivaguru v Palaniappa Chetty* [1937] 6 MLJ 59 and *Mercantile Bank v Official Assignee* [1969] 2 MLJ 196)."<sup>38</sup>

In the instant case, the appellant had paid R two sums of money. Later the appellant sued the administrators of R's estate to recover the sum owing. The judicial commissioner found in favour of the appellant and held that the money was paid to R on the security of an equitable charge in respect of the land in question. He also held that the action was not barred by limitation. On appeal, Salleh Abas CJ (as he then was) in delivering the judgment of the Federal Court held that of the two

<sup>36</sup>*Ibid* at 197.

<sup>37</sup>[1984] 1 CLJ 286.

<sup>38</sup>*Ibid* at 289.

sums paid to R the larger amount was statute-barred and allowed the appeal. The above passage of Salleh Abas CJ should now be treated with caution in view of the fact that on appeal to the Privy Council,<sup>39</sup> their Lordships of the Judicial Committee, in allowing the appeal, restored the order of the judicial commissioner with the deletion of that part of the order which referred to the land in question as being given on the security of an equitable charge. In the subsequent case of *Manilal & Sons (M) Sdn Bhd v M Majumder*,<sup>40</sup> Lee Hun Hoe CJ referred to a letter containing the explanation of their Lordships as to why the deletion was made. As their Lordships explained

"... on the appeal the respondents had submitted that such a charge was not recognized by the law of Malaysia. Their Lordships heard no argument on this aspect of the appeal... [I]n view of the dispute upon whether an equitable charge is recognized in Malaysia, it would be inappropriate to affirm the judicial commissioner's order in this respect. The reference to the equitable charge was therefore deleted."<sup>41</sup>

The explanation of their Lordships above and the deletion of the reference in the order to equitable charge cast doubts on whether an equitable charge is recognised under the Malaysian Torrens system of registration. In any case, the matter must await future guidance from the local courts in the light of the explanation by their Lordships in the Privy Council.

### (iii) Unregistered Leases

In *Margaret Chua v Ho Swee Kiew*,<sup>42</sup> Thomson CJ held that a lease which was not registered, although void as a lease, was nevertheless good and valid as an agreement for a lease which was enforceable by a decree for specific performance. His Lordship referred to English cases dealing with leases, in particular *Parker v Taswell*,<sup>43</sup> *Zimbler v Abrahams*<sup>44</sup> and *Martin v Smith*<sup>45</sup>

<sup>39</sup>*Manilal & Sons (M) Sdn Bhd v Mahadevan & Anor* [1986] 1 MLJ 357.

<sup>40</sup>[1988] 2 MLJ 305.

<sup>41</sup>*Ibid* at 308.

<sup>42</sup>[1961] MLJ 173. cf *Ho Ying Chye v Teh Cheong Huat* [1965] 2 MLJ 261.

<sup>43</sup>(1858) 2 De G & J 559.

<sup>44</sup>[1903] 1 KB 577.

<sup>45</sup>LR Ex 50.

and applied the English equitable principle derived from the cases that a lease which is void for non-compliance with formal requirements may be construed as a contract to grant the lease as agreed. Similarly, in the Federal Court case of *Inter-Continental Mining Co Sdn Bhd v Societe Des Etains De Bayas Tudjuh*,<sup>46</sup> Gill FJ (as he then was) held that as the agreement between the parties in question was in substance a sublease though not in the statutory form, equity would treat it as an agreement for a sublease and specifically enforce it. His Lordship also relied on the English cases referred to by Thomson CJ in *Margaret Chua's* case. It is submitted that in view of the fact that the Malaysian Torrens system provides for a modified system of registration of titles to and registrable interests in land, the courts should have avoided reference to the equitable principle derived from the English cases dealing with leases and instead sought guidance from local decided cases. Regard could have been had to the local case of *Chin Cheng Hong*,<sup>47</sup> *supra*, where Buhagiar J's observation could have been relied upon to support the contention that such an agreement for a lease undoubtedly creates in favour of the person in question a right which is contractual in nature to be registered as the owner of the interest purported to be conferred by the agreement, being a right which he can enforce by a decree for specific performance. In this connection, it may be pertinent to note that section 206(3) of the National Land Code 1965 provides for the recognition of the contractual obligations of the parties under the agreement in the absence of registration.

#### E. Applicability of English Equitable Principles of General Application

The question which arises for consideration is: does the Malaysian Torrens system also seek to exclude the application of English equitable principles which are of general application to land matters in Malaysia? In *United Malayan Banking Cor-*

<sup>46</sup>[1974] 1 MLJ 145.

<sup>47</sup>See also *Bachan Singh v Mahinder Kaur*, *supra*, at 97-98.

*poration Bhd v Pemungut Hasil Tanah, Kota Tinggi*<sup>48</sup> their Lordships in the Privy Council expressed the view that

"The National Land Code is a complete and comprehensive code of law governing the tenure of land in Malaysia and the incidents of it, as well as other important matters affecting land there, and there is no room for the importation of any rules of English law in that field except insofar as the Code itself may expressly provide for this."<sup>49</sup>

Having regard to the above passage, does it now mean that in the absence of any provision in the National Land Code 1965 providing for the application of English equitable principles to a particular aspect of land law in Malaysia, resort may not be had to such equitable principles even where their application would not be inconsistent with the stated aims and objectives of the Malaysian Torrens system as embodied in the National Land Code 1965 and even where a lacuna exists? It is possible to argue that their Lordships were merely referring to rules of English law in the field of English land law which as was seen earlier is wide enough to embrace those rules of equity which are part of the English land law system. However, if the above passage is to be taken as referring also to English equitable principles of general application, then it would mean that the case of *UMBC* has now closed the door to the future application of English equity in land matters even where a lacuna exists! As will be seen below, the better view to take is that, notwithstanding *UMBC's* case, English equitable principles of general application are applicable to land matters in Malaysia so long as their application is not inconsistent with the stated aims and objectives of the Malaysian Torrens system as embodied in the express provisions of the National Land Code 1965. It is submitted that Lord Keith's observation on the National Land Code 1965 should be regarded as strictly *obiter dicta* especially since such a general observation on the National Land Code 1965 was unnecessary to dispose of the issue involved. His Lordship could have resolved the issue by examining the relevant provisions of section 133

<sup>48</sup>[1984] 2 MLJ 87.

<sup>49</sup>*Ibid* at 91.

and the grounds for appeal against forfeiture as set out in section 134 of the National Land Code 1965 which are exhaustive of the matter dealt with, regard being had to whether these provisions admit of the application of English equitable rules relating to the grant of relief against forfeiture in the light of sections 3(1) and 6 of the Civil Law Act 1956.

(i) **Inherent Jurisdiction of the Court**

That the courts have inherent jurisdiction to do equity in appropriate cases cannot be denied.<sup>50</sup> In *Oh Hiam & Ors v Tham Kong*,<sup>51</sup> the Privy Council exercised its jurisdiction to grant relief in a claim *in personam* founded in equity against the registered proprietor of the land. The parties in question had entered into a contract for the sale of certain pieces of land certified as rubber land in the written agreement. The transfer, however, dealt not only with the rubber lands but also with a land on which stood a house. In the High Court,<sup>52</sup> the learned trial judge set aside the sale and transfer of the land on which stood the house on the ground that there was a common mistake. On appeal to the Federal Court,<sup>53</sup> it was held that there was no mutual or common mistake and the appeal was allowed. One of the issues before the Privy Council was whether, in the circumstances of the case, the equitable remedy of rectification was available notwithstanding the transfer of the impugned lot to the purchaser who was now registered as proprietor thereof and the fact that his title was indefeasible under the relevant provisions<sup>54</sup> of the FMS Land Code (Cap 138).

In holding that the learned trial judge was correct in ordering rectification, Lord Russell of Killowen explained as follows

<sup>50</sup>See *The Motor Emporium v Arumugam* [1933-34] FMSLR 21 at 26.

<sup>51</sup>[1980] 2 MLJ 159. See also the observation of Syed Agil Barakbah SCJ in *Lian Keow Sdn Bhd (In Liquidation) & Anor v Overseas Credit Finance (M) Bhd & Ors*, *supra* at 464.

<sup>52</sup>*Oh Hiam & Ors v Tham Kong* [1967] 1 MLJ 65.

<sup>53</sup>*Tham Kong v Oh Hiam & Ors* [1968] 1 MLJ 44.

<sup>54</sup>Ss 42 and 43.

"Apart from authority their Lordships would not expect that the intervention of equity by a remedy *in personam* based upon a transaction to which the plaintiff and defendant were parties would be ousted by such provisions [conferring indefeasibility]. The Torrens system is designed to provide simplicity and certitude in transfers of land, which is amply achieved without depriving equity of the ability to exercise its jurisdiction *in personam* on grounds of conscience."<sup>55</sup>

His Lordship gave two other instances where the concept of indefeasibility will not preclude the court from exercising its jurisdiction *in personam* on grounds of conscience, namely, the court is not precluded from granting an order for specific performance of a contract entered into by the registered proprietor or for the enforcement of a trust created by the registered proprietor. The observations of Taylor J in *Wilkins & Ors v Kannamal & Anor*<sup>56</sup> that the Torrens system does not abrogate the principles of equity but alters the application of particular rules of equity in so far as is necessary to achieve its special objects were referred to with approval by Lord Russell of Killowen when delivering the judgment of the Privy Council in *Oh Hiam's* case. In this way, the court is entitled to exercise its jurisdiction *in personam* to insist upon proper conduct in accordance with equitable principles and norms. The courts will, however, not exercise such inherent jurisdiction where to do so would be to override expressly enacted legislative provisions in the Malaysian Torrens legislation. In *Pemungut Hasil Tanah, Kota Tinggi v United Malayan Banking Corporation Bhd*,<sup>57</sup> the Federal Court in dealing with the issue whether English rules of equitable relief against forfeiture were applicable in the instant case to set aside the forfeiture of alienated land effected by the State Authority, held that it could not exercise its inherent jurisdiction to do equity in the face of the express provisions contained in sections 133 and 134 of the National Land Code 1965. In their Lordships' opinion, to do so would be to negate and eradicate the very concept of certainty which the Code was enacted to introduce,

<sup>55</sup>*Ibid* at 164.

<sup>56</sup>[1951] MLJ 99. See also *Valliappa v Kesarmal & Anor* [1951] MLJ 117 at 118 where his Lordship expressed similar views.

<sup>57</sup>[1981] 2 MLJ 264.



reflect and preserve. On appeal to the Privy Council, the decision of the Federal Court was upheld. Their Lordships in the Privy Council took the view that it is necessary to examine the relevant substantive law (in this case section 134 which deals with appeals against forfeiture) to determine whether or not it permits the exercise by the court of its inherent jurisdiction to do equity. As the grounds provided for in section 134 for setting aside an order of forfeiture were exhaustive, there was, accordingly, no provision to enable them to grant relief against forfeiture. In other words, to apply English equitable rules of relief against forfeiture in the instant case would be to go against the express provisions of section 134 of the National Land Code 1965 and hence do violence to the aims and objectives of the Malaysian Torrens system as embodied therein. However, where the relevant provision of the Code itself, such as section 237 which deals with relief against forfeiture of leases and tenancies, provides for application to the court for relief against forfeiture, the court will be empowered to grant relief in accordance with these equitable rules.

**(ii) Principle of Equitable Estoppel**

That Malaysian courts have in appropriate cases apply English equitable doctrines to land matters may be seen below. In tenancy cases, the courts have, as in *Devi v Francis*,<sup>58</sup> applied the principle of equitable estoppel. In *Devi v Francis*, Chang Min Tat J (as he then was) held that the respondent could not, as the successor in title with notice, terminate the tenancy of the appellant by a month's notice until and unless the land had been offered to the appellant to purchase and she had refused. The learned judge rejected the contention that English equity was not applicable to land matters in Malaysia in view of section 6 of the Civil Law Ordinance 1956.<sup>59</sup> As his Lordship said

<sup>58</sup>[1969] 2 MLJ 169.

<sup>59</sup>Now the Civil Law Act, 1956 (Act 67 Revised 1972).

"The answer to this objection is that the land law of England is one thing and equity another matter and it is expressly provided in section 3(1) of the same Ordinance that the court shall apply the common law of England and the rules of equity ..."<sup>60</sup>

The above doctrine, sometimes referred to as the doctrine of a tenancy coupled with an equity, has also been applied in the Privy Council case of *Siew Soon Wah & Ors v Yong Tong Hong*,<sup>61</sup> a case dealing with a permanent tenancy granted by the landlord in favour of a tenant in consideration of the latter paying towards part of the cost of building certain premises on the land in question. In *Mok Deng Chee v Yap See Hoi & Ors*,<sup>62</sup> a Federal Court case dealing with the termination of a tenancy by a bare notice to quit where the doctrine was applied, Salleh Abas FJ (as he then was) has this to say of the doctrine known variously as a tenancy coupled with an equity or simply an equitable estoppel

"In the development of our law this principle was recognised as long ago as 1916 in the case of *MPRL Karuppan Chetty v Suah Thian*.<sup>63</sup> It was applied by Chang Min Tat J, as he then was, in *Devi v Francis*.<sup>64</sup> Finally it became a settled law as a result of the decision of the Federal Court in *Yong Tong Hong v Siew Soon Wah & Ors*,<sup>65</sup> which decision was subsequently confirmed by the Privy Council ..."<sup>66</sup>

In addition to tenancy cases, the doctrine of equitable estoppel, where appropriate, has also been held to be applicable to temporary occupation licence cases. In *Paruvathy v Krishnan*,<sup>67</sup> Salleh Abas CJ (Malaya) (as he then was) after referring to the principle of equitable estoppel as explained in *Ramsden v Dyson*<sup>68</sup> and *Inwards & Ors v Baker*<sup>69</sup> said

<sup>60</sup>*Ibid* at 172.

<sup>61</sup>[1973] 1 MLJ 133.

<sup>62</sup>[1981] 2 MLJ 321.

<sup>63</sup>(1916) 1 FMSLR 30.

<sup>64</sup>[1969] 2 MLJ 169.

<sup>65</sup>[1971] 2 MLJ 105.

<sup>66</sup>*Ibid* at 323.

<sup>67</sup>[1983] 2 MLJ 121.

<sup>68</sup>(1866) LR 1 HL 129 at 170.

<sup>69</sup>[1965] 1 All ER 446.

"[W]e do not agree with Mr Sri Ram's submission that the principle of equitable estoppel does not apply against a TOL holder. This submission is not supported by authorities and the *raison d'être* for the foundation of the principle, which is for the protection of a person who has expended money pursuant to the request and encouragement by the other. Whether the principle applies or not in this case depends entirely upon whether the respondent relied upon the appellant's request and nothing else, we are of the view that this principle should apply ..."<sup>70</sup>

In *Paruvathy's* case, it was held that on the facts equitable estoppel did not apply as there was no evidence to show that the respondent build the house in which he occupied at the request and consent of the appellant, the holder of the temporary occupation licence. However, in a proper case, the principle of equitable estoppel may be invoked against the holder of a temporary occupation licence as where a third party's right to occupy a house on the land as a tenant<sup>71</sup> is founded on his having expended money to build the house on the land at the request and encouragement of the licence holder thereby creating an equity in the third party's favour. So long as the right of the third party to remain on the land is not founded on an arrangement which violates section 68 of the National Land Code 1965, the principle of equitable estoppel may be invoked against the licence holder in such circumstances.

#### F. Doctrine of Constructive Notice

The doctrine of constructive notice is one of the English equitable doctrines commonly used by the Malaysian courts in resolving issues pertaining to land which run counter to the objectives of the Malaysian Torrens system of registration of titles. In resolving questions of priority of competing claims to unregistered interests in land, the Malaysian courts have looked to general law notice principles whereby the doctrine of constructive notice has been applied. By this doctrine, a purchaser of

<sup>70</sup>*Ibid* at 123.

<sup>71</sup>The mere letting out of a house on a monthly tenancy is permissible (see *Govindaraju v Krishnan* [1962] MLJ 334).

land is affected by notice of any instrument, fact or thing which would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him. In *Vallipuram Sivaguru v Palaniappa Chetty*,<sup>72</sup> it was held that the respondent who was the prior claimant to an interest in the land and with whom the registered proprietor had deposited the issue document of title as security for the repayment of a loan, was entitled to priority as against the appellant who was the subsequent purchaser of the same land. The court took the view that by having possession of the issue document of title to the land, the respondent had given sufficient notice of his prior claim to an interest therein to the subsequent purchaser. Similarly, in *United Malayan Banking Corporation Bhd v Goh Tuan Laye & Ors*,<sup>73</sup> the appellants, who were bankers, were held to be entitled to priority in respect of their claim to an interest in the land as against the respondents, who were subsequent purchasers of the same land. The court found that the appellants had done all they could to protect their interest by taking possession of the document of title to the land and accordingly could not be said to have misled the respondents to act to their prejudice. In *Haroon v Nik Mah & Anor*,<sup>74</sup> the court in holding that the first respondent was entitled to priority in respect of his claim to the land placed great emphasis on the fact that notice of one's prior claim can also be given by taking physical possession of the land. In the instant case, as the first respondent had taken *de facto* possession of the land, his claim to the land was entitled to priority over that of the other purchaser. The courts in all these cases have not treated the entry of a caveat on the register as the sole means by which notice may be given and have instead treated the failure to enter a caveat as one of the factors to be taken into account when deciding on issues of priority. Accordingly, notice other than by way of the entry of a caveat on the register, may also be given by way of the possession of the issue document of title

<sup>72</sup>[1937] MLJ Rep 59.

<sup>73</sup>[1976] 1 MLJ 169.

<sup>74</sup>[1951] MLJ 209.

to the land in question<sup>75</sup> or by taking physical possession of the land itself.<sup>76</sup> In this regard, it may be pertinent to take note of the rationale for having the system of caveats as provided for in the National Land Code 1965. As Lord Diplock succinctly put it in *Eng Mee Yong & Ors v V Letchumanan*<sup>77</sup>

"The system of private caveats is substituted for the equitable doctrine of notice in English land law ..."<sup>78</sup>

The system of caveats was introduced so as to do away with the application of the English doctrine of constructive notice in land matters which has given rise to insecurity and uncertainty of title. That one of the aims of the Malaysian Torrens system is to ensure certainty and security of title may be seen in the observation of Lord Diplock in *Eng Mee Yong* where his Lordship said

"The Torrens system of land registration and conveyancing, as applied in Malaya by the National Land Code, has as one of its principal objects to give certainty to title to land and registrable interests in land ..."<sup>79</sup>

Failure to caveat would, thus, jeopardize one of the aims of the Malaysian Torrens system, namely, to maintain the conclusiveness of the register<sup>80</sup> and this would in turn give rise to uncertainty and insecurity of title or interest acquired by an innocent third party purchaser in the mistaken belief that the registered proprietor had an unencumbered title. In addition, the indiscriminate application of the doctrine of constructive notice to questions of priority between competing claims to unregistered interests in land would undoubtedly undermine the role which the system of caveats is designed to play in this regard.

<sup>75</sup>As in the case of *Vallipuram Sivaguru v Palanappa Chetty*, *supra*. See also *United Malayan Banking Corporation Bhd v Goh Tuan Laye & Ors*, *supra*.

<sup>76</sup>As in *Haroon v Nik Mah & Anor*, *supra*.

<sup>77</sup>[1979] 2 MLJ 212.

<sup>78</sup>*Ibid* at 214.

<sup>79</sup>*Ibid*.

<sup>80</sup>As was pointed out by Ali Ag CJ (Malaya) in the Federal Court case of *Teh Bee v K Maruthamuthu* [1977] 2 MLJ 7 at 12, the register under the Torrens system is everything and is held out to be conclusive of all the matters contained therein pertaining to the land.

It may be noted that in situations involving priority between competing claims to unregistered interests in land, s 41 of the Singapore Land Titles Act (Cap 157)<sup>81</sup> provides that "... except in the case of fraud, the entry of a caveat protecting an unregistered interest in land ... shall give that interest priority over any other unregistered interest not so protected at the time when such caveat was entered ...". No such provision is to be found in the National Land Code 1965. The incorporation of such a provision would undoubtedly provide an incentive to enter caveats thereby ensuring that the register more accurately reflects the state of title of the land.

The application of the doctrine of constructive notice to land matters had earlier been criticized by Gill CJ in the Federal Court case of *Doshi v Yeoh Tiong Lay*<sup>82</sup> where his Lordship said

"But the doctrine of constructive notice ... is inapplicable, as a rule, to systems of registration in relation to transactions where priority and notice are governed by priority in or the fact of registration ... Where the effect of constructive notice would be to invalidate a transaction in relation to sale of land, the court will not readily apply the doctrine."<sup>83</sup>

This pronouncement of Gill CJ was also quoted with approval by Abdul Hamid FJ (as he then was) in the later Federal Court case of *Tai Lee Finance Co Sdn Bhd v Official Assignee & Co.*<sup>84</sup> In fact, the application of the doctrine of constructive notice had been disapproved of very much earlier by Innes ACJC in the Court of Appeal case of *Ong Tin & Anor v The Seremban Motor Garage*,<sup>85</sup> a case dealing with indefeasibility of title under the FMS Land Enactment 1911.

#### G. Doctrine of Bare Trust

Apart from the doctrine of constructive notice, the doctrine

<sup>81</sup>(1985 Revised Edition).

<sup>82</sup>[1975] 1 MLJ 85.

<sup>83</sup>*Ibid* at 88.

<sup>84</sup>[1983] 1 MLJ 81 at 84.

<sup>85</sup>(1917) 1 FMSLR 308 at 314.

of bare trust<sup>86</sup> has also been applied by Malaysian courts<sup>87</sup> on numerous occasions to land matters. Under English law, the vendor is regarded as a constructive trustee for the purchaser of the legal title to the land from the moment a specifically enforceable contract for sale is entered into until payment of the full purchase price, whereupon the vendor becomes a bare trustee for the purchaser. When the transfer of title is completed, the purchaser then becomes the legal owner of the land.<sup>88</sup>

The application of the doctrine of bare trust in cases of competing claims to title to or interests in land would result in the first purchaser, who has yet to present the instrument of transfer for registration, having priority to the land as against a subsequent *bona fide* purchaser for value who has taken the precaution of entering a caveat in respect of the land and who had made a search on the register and had found it clear. The first purchaser as he has performed his part of the agreement with the vendor such as paying the full purchase price for the land and executing the necessary documents, would be held to be entitled to the beneficial ownership of the land in respect of which the vendor now holds the legal title as bare trustee for him. This is so even though the first purchaser did not take the precaution of entering a caveat nor take possession of the issue document of title to the land so as to give prior notice of his interest therein. It is submitted that the application of the doctrine of bare trust in cases involving an innocent third party purchaser defeats one of the objectives of the Malaysian Torrens system, namely, to ensure the conclusiveness of the register so as to provide simplicity, certainty and security in conveyance.

Ali FJ in *Macon Engineers Sdn Bhd v Goh Hooi Yin*<sup>89</sup> provides an illustration of how the application of the bare trust concept can be inconsistent with the Torrens system as embodied in

<sup>86</sup>See *Shaw v Foster* (1872) LR 5 HL 321 and *Lysaght v Edwards* (1876) 2 Ch D 499.

<sup>87</sup>See *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224; *Temenggong Securities Ltd v Registrar of Titles Johore & Ors* [1974] 2 MLJ 45; *Karuppiah Chettiar v Subramaniam* [1971] 2 MLJ 116 and *Ng Kheng Yeow v Chiah Ah Foo & Ors* [1987] 2 MLJ 330.

<sup>88</sup>See Gray and Symes, *Real Property and Real People: Principles of Land Law* (1981) at 85-86.

<sup>89</sup>[1976] 2 MLJ 53.

the National Land Code 1965. In that case, the appellants sought to remove a private caveat entered by the respondent in respect of the land in question. The respondent had earlier entered into a contract with the vendors for the purchase of the land. The appellants contended that at the time the caveat was entered in respect of the land by the respondent, the vendors no longer had any interest therein, they having parted with their interest therein by executing the memorandum of transfer in respect of the land to the appellants. Accordingly, the vendors were bare trustees and had no interest in the land over which a valid caveat can be entered by the respondent. Ali FJ in rejecting the appellants' contention explained as follows

"[W]hat passes under a contract for sale is only the beneficial ownership. In saying that the vendor becomes in equity a trustee Jessel MR [in *Lysaght v Edwards*]<sup>90</sup> must have meant that the vendor who still holds the interest in the land does so hold as trustee and not as owner. This must be so as beneficial ownership does not carry with it any interest in land. Legal or registered ownership does carry with it an interest in land. Thus stated it is therefore clear that a vendor under a contract of sale does not part with his interest in land as contended by the appellants ..."<sup>91</sup>

The decision of Ali FJ in this respect is to be welcomed. As his Lordship pointed out, beneficial ownership is different from legal or registered ownership. The former does not carry with it any interest in the land whilst the latter does. Accordingly, a vendor under a contract of sale still has an interest in the land so long as registration has not been effected yet in favour of the purchaser (in the instant case, the appellants) and even though the beneficial ownership in respect of the land may have already passed under the contract of sale to the purchaser. Therefore, the vendor has an interest in the land which is still capable of being caveated against. This view of his Lordship is consistent with the concept of

<sup>90</sup>(1876) 2 Ch D 499.

<sup>91</sup>*Ibid* at 57.



the conclusiveness of the register and that only one form of ownership is recognised under the Malaysian Torrens system, that is, registered ownership.<sup>92</sup>

In *Karupiah Chettiar v Subramaniam*,<sup>93</sup> the doctrine of bare trust was also applied in total disregard of the relevant provisions of the National Land Code 1965. In the instant case, M, the registered proprietor of the land, sold his land to the respondent who entered a private caveat on the register document of title to the land in order to protect his interest. Subsequently, the appellant, who had earlier obtained judgment against M in a civil suit on a claim for the recovery of money lent, obtained a prohibitory order against the land in execution proceedings. The respondent intervened in the proceedings by taking out a summons in chambers for an order that the prohibitory order be set aside on the ground that M, the judgment debtor, had no beneficial interest in the land. At the hearing of the summons in chambers, the parties expressly agreed that the only issue to be determined was whether the respondent's unregistered transfer supported by the entry of the caveat affected the prohibitory order subsequently obtained and entered by the appellant. Their Lordships by a majority (Ali FJ dissenting) held that the prohibitory order should not be allowed to remain on the land as the appellant, as judgment creditor, could only take whatever interest M (the debtor) had in the land. As M had sold his entire interest in the land and received payment in full, he held the legal title to the land only as a bare trustee for the respondent, who was the equitable owner. M, accordingly, had parted with his whole interest in the land. It may be noted that there is nothing in the National Land Code 1965 which forbids the entry of a prohibitory order on the facts obtained in the above situation. The entry of a private caveat does not prohibit the subsequent entry of a prohibitory order.<sup>94</sup> Ali FJ, after examining the relevant provisions<sup>95</sup> of the National Land Code 1965, was of the view that the prohibitory order should be allowed to remain on the

<sup>92</sup>See s 215(2) of the National Land Code 1965.

<sup>93</sup>[1971] 2 MLJ 116.

<sup>94</sup>See s 322(2), (3) National Land Code 1965.

<sup>95</sup>Ss 292(1), 259(3)(a), 265(4)(a) and 322(3)(a).

land as the private caveat entered did not have the effect of prohibiting its entry. As his Lordship explained

"To set aside the prohibitory order merely on the ground that the land is affected by a private caveat previously entered by the respondent inevitably assumes that the caveator has proved or established that he is entitled to the interest in the land .... Regardless of what I may think of the merits of his claim, his (the respondent's) present interest in the land is only that of a caveator. A caveat is designed to protect his interest inasmuch as the prohibitory order is designed to protect the interest of a judgment-creditor. Neither has yet any established right to an interest in the land affected until it is determined by a court of law. In this way I cannot see the relevancy of discussing the equitable right of the respondent to the land or the effect of registration under the Torrens system. The question before the trial court, pure and simple, was whether the caveat *per se* has the effect of prohibiting the subsequent entry of the prohibitory order in question."<sup>96</sup>

Furthermore, in the instant case, Ali FJ observed that, having regard to the affidavits of the respective parties, there may well arise some allegation of fraud subsequently against the respondent when he applies to the court for a vesting order,<sup>97</sup> thus reinforcing his view that the appellant's prohibitory order should be allowed to remain on the register.

Ali FJ's approach is consistent with the provisions of the National Land Code 1965 as the prior removal of a judgment creditor's prohibitory order before a caveator-purchaser had established his claim to the land could very well prejudice the interest of the judgment creditor. This is especially so in cases where the purchaser does not succeed in establishing his claim to the land, say on account of fraud, and as the prohibitory order had earlier been removed, there is nothing to prevent the judgment debtor as proprietor of the land from further dealing with the land to an innocent third party to the detriment of the judgment creditor's interest.

In *Registrar of Titles, Johore v Temenggong Securities Ltd*,<sup>98</sup> the Federal Court applied the doctrine of bare trust to disallow

<sup>96</sup>*Ibid* at 122.

<sup>97</sup>*Ibid* at 123.

<sup>98</sup>[1976] 2 MLJ 44

the entry of a Registrar's caveat in respect of a piece of land which had earlier been sold by L Company to the respondent which had yet to be registered as the proprietor of the land. L Company was indebted to the Federal Government for income tax which was overdue. To prevent the company from disposing off its land before the recovery by the Federal Government of the income tax due from it, the Department of Inland Revenue requested the Registrar of Land Titles to enter the Registrar's caveat over the land. The caveat which was entered after the sale of the land to the respondent had been completed, prevented the registration of the transfer in the name of the respondent. The respondent did not succeed in the High Court to have the caveat removed and appealed to the Federal Court. Ong Hock Sim FJ, in delivering the judgment of the court, allowed the appeal and ordered the caveat removed on the ground that the caveat was wrongly entered over the land as, at the material time, L Company, as the vendor, had parted with all the beneficial interest therein and merely held the legal title to the land as a bare trustee for the respondent as purchaser. On appeal by the appellant to the Privy Council, their Lordships upheld the decision of the Federal Court in ordering the Registrar's caveat removed but on different grounds. In their Lordships' opinion, the interests of the Federation or the State Authority which are entitled to protection under section 320(1)(b)(i) of the National Land Code 1965 by the entry of a Registrar's caveat, are confined to interests in the land that are recognised by the Code as being either registrable or otherwise entitled to protection. As the arrears of income tax due from L Company to the Government was no more than an unsecured civil debt, it gave rise to no legal rights in or over any of the property of L Company nor to any remedies against L Company's property. Their Lordships, accordingly, held that it was a mere personal claim against L Company and did not come within the meaning of "interests" in section 320(1) of the Code. In not alluding to the doctrine of bare trust applied by the Federal Court, their Lordships in the Privy Council may be said to doubt its applicability to Malaysian land law. It may be pertinent to take note that Lord Diplock in delivering the judgment of the Board cautioned against applying principles

of English land law in matters governed by the National Land Code 1965 when he said

"But the temptation to regard the distinction between registered and unregistered interests in land under the National Land Code as similar to the difference in English law between legal estates and equitable interests in land should be resisted, for the analogy is not close and is liable to be misleading."<sup>99</sup>

In *Chin Choy & Ors v Collector of Stamp Duties*,<sup>1</sup> a Privy Council case on appeal from Malaysia, Lord Roskill had this to say of the bare trust concept

"... However, the principle that once a valid contract for sale is concluded the vendor becomes in equity a trustee for the purchaser of the estate sold is a peculiarity of *English land law*. But section 6 of the Civil Law Ordinance, 1956 of the Federation of Malaya expressly provides that nothing in that part of that Statute should be taken to introduce into the Federation "any part of the law of England relating to the tenure or conveyance or assurance of or succession to any immovable property or any estate, right or interest therein". It is not, however, necessary for their Lordships further to pronounce upon this question in the present appeal."<sup>2</sup>

Although his Lordship's view was only *obiter*, it nevertheless casts doubts on the suitability of applying the bare trust concept to land matters in Malaysia generally. As was also seen above, the argument based on the bare trust concept had been discredited by Ali FJ who rejected it in *Macon Engineers'* case.

#### H. Conclusion

It is obvious that English equity where appropriate, still has a useful role to play in resolving issues pertaining to land. Until such time that we are able to develop a comprehensive and self-contained Malaysian jurisprudential system of our own, there will still be a need to rely on English equity to supplement the Malaysian legal system. The passage that is often quoted to support the view that doctrines of English equity are not

<sup>99</sup>*Ibid* at 45.

<sup>1</sup>[1981] 2 MLJ 47.

<sup>2</sup>*Ibid* at 48.

applicable to land matters in Malaysia is that from the decision of the Privy Council in *Haji Abdul Rahman & Anor v Mahomed Hassan*<sup>3</sup> where Lord Dunedin in delivering the judgment of the Board said

"It seems to their Lordships that the learned judges, in these observations, have been too much swayed by the doctrines of English equity, and not paid sufficient attention to the fact that they were here dealing with a totally different land law, namely, a system of registration of title contained in a codifying enactment."<sup>4</sup>

It should be noted that the learned judges in the Court of Appeal below were applying the equity of redemption of a mortgage and the equitable principle of "once a mortgage, always a mortgage" which were totally alien in concept to the Malaysian Torrens system. Furthermore, the stringent provision of section 4 of the then Selangor Registration of Titles Regulation 1891 under which the case was decided declared all purported dealings outside the system to be "null and void and of no effect" whatsoever.<sup>5</sup> By contrast, the present National Land Code 1965 contains no such stringent corresponding provision. It is submitted that there is nothing in the above passage of Lord Dunedin which would go to suggest that English equitable principles of general application which are not inconsistent with the Malaysian Torrens system are not applicable at all to land matters in Malaysia. In any event, a system which seeks to be exclusive is seldom adequate and is prone to rigidity.

As the foregoing discussion had sought to illustrate, it would not be possible to take the extreme view that the Malaysian Torrens system as embodied in the National Land Code 1965 and section 6 of the Civil Law Act 1956 prohibit the application of *all* English equitable principles to land matters in Malaysia.

<sup>3</sup>[1917] AC 209.

<sup>4</sup>*Ibid* at 216.

<sup>5</sup>S 4 of the 1891 Regulation did not however prohibit the transaction from having effect in contract as between the parties. S 206 of the National Land Code 1965 expressly provides for the contractual obligations of the parties to the transaction to be recognised even though registration has yet to be effected.

On the contrary, the better view to take is that their application would be prohibited only to the extent that it is in conflict or is inconsistent with the stated aims and objectives of the Malaysian Torrens system as embodied in the National Land Code 1965.

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