

THE CENTENARY OF THE TORRENS SYSTEM IN MALAYSIA

edited by

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(Singapore: Malayan Law Journal Pte Ltd 1989

xxvi + 285 pp. Hardcover M\$160)

The Centenary of the Torrens System in Malaysia edited by Tan Sri Datuk Professor Ahmad Ibrahim and Judith Sihombing is indeed a valuable addition to the legal literature currently available on the Malaysian Torrens system. It is a valuable source of reference to those who seek to undertake research on certain aspects of the Malaysian Torrens system.

The book commences with an introductory chapter on the Malaysian Torrens system raising queries as to the origin of the Torrens system, the suitability of applying English equitable principles to land matters under the system and the perceived justification for not providing for the assurance fund under the system. The issue relating to the application of English equity has always posed a difficult question under the Malaysian Torrens system made more so by the failure of the majority of judges to comprehend the philosophy, aims and objectives underlying the Malaysian Torrens system.¹

Chapters 2 and 3 traced the development of the land tenure system and the land legislation in the former Federated Malay States up to the period before the introduction of the National Land Code 1965 on 1 January 1966.² The

¹See David S Y Wong, "Equitable Interests and The Malaysian Torrens System" (1966) 9 Mal LR 20; Kok, S Y, "Nature of Right, Title and Interest Under the Malaysian Torrens System: The Non-Application of English Equities and Equitable Interests" [1983] 1 MLJ cxlix; Salleh Buang, "Equity and The National Land Code - Penetrating The Dark Clouds" [1986] 1 MLJ cxxv; Sihombing J, "The Bare Trust Syndrome in the Peninsular Malaysian Torrens System - A Harbinger of Total Commitment to Equity or the Means of a Return to Torrens Concepts?" [1977] JMCL 269 and Teo, K S, "Equity In Land Law" [1988] JMCL 57 and Sethu, R R, "Equity in Malaysian Land Law: Scope and Extent" [1989] 1 SCJ 37.

²See LN 474 of 1965.

main features of the respective land tenure enactments, based on the Torrens system, are highlighted and commented upon. Valuable information on policy decisions which led to the drafting of certain provisions of the legislation then in force were obtained from the original documents themselves which are kept in the National Archives. Judicial interpretation of the pre-1928 land legislation³ and that of the former FMS Land Code (Cap 138) are also analysed and discussed. The uncertainty as to the extent to which these legislation were exclusive so as to prohibit the application of English equity could be seen in the various differing judicial opinions.⁴

In Chapter 4, a lucid and interesting account of the development of land legislation in the former Unfederated Malay States up to the year 1966 is given. Incidents of Malay tenure are comprehensively described and brought into focus. The basic features of these legislation which were not based on the Torrens system but on Malay tenure and the problems encountered thereunder are also discussed. These legislation subsequently gave way to the National Land Code 1965 which introduced the Torrens system in the former Unfederated Malay States. It would have been more complete if case law developments on the interpretation of these legislation have been incorporated.

Unlike the former Federated and Unfederated Malay States, Penang and Malacca were subjected to the English land tenure system. Chapter 5 traced comprehensively and with clarity the early land tenure system then in force in Penang and Malacca before the coming into force of both the National Land Code (Penang and Malacca Titles) Act 1963 and the National Land Code 1965. The 1963 Act came into force on the same date⁵ as that of the 1965 Code, namely, 1 January 1966. The 1963 Act, in essence,

³Such as the Selangor Registration of Titles Regulations 1891 and the Registration of Titles Enactment 1911 (FMS).

⁴See, for example, *Haji Abdul Rahman v Mohamed Hassan* [1917] AC 209, 216; *Ong Tin v The Seremban Motor Garage* (1917) 1 FMSLR 310, 314; *Loke Yew v Port Swettenham Rubber Co Ltd* [1913] AC 491, 505; *Wilkins v Kannammal* [1951] MLJ 99, 100 and *Margaret Chua v Ho Swee Kiew* [1961] MLJ 173, 175.

⁵See LN 475 of 1965.

makes provisions for the conversion of the system of registration of deeds practised prior to 1 January 1966 in Penang and Malacca to the Torrens system provided for in the 1965 code. Interesting accounts are given as to the practice of the system then in force in Penang and Malacca. However, due to the complexity of the deeds system then in force coupled with the attendant problems and difficulties inherent in it, and the need to achieve uniformity of the land tenure system in the whole of Peninsular Malaysia, the 1963 Act was enacted to introduce the Torrens system in Penang and Malacca, being a system which had been successfully implemented in the Malay states.

Although a matter of format and style, one would, nevertheless, have thought that the discussions on the development of land law in Sabah and Sarawak would be next so as to give an overall picture of the whole land tenure system in Malaysia. Comparisons, where relevant, could then have been made between the land tenure system in Peninsular Malaysia and that of Sabah and Sarawak. By placing the discussion on the development of land law in Sabah and Sarawak in Chapters 13 and 14 respectively, one can't help but think that the land system in these two states is in the "backwater" of Malaysian land law. The little that has been written on the land system in these two east Malaysian states could be partly due to the fact that not much importance has been accorded to the land system of these two states. It is also appropriate to discuss the land tenure system in these two states next as the various other chapters on strata titles, restraints on dealings in land, leases and tenancies, status of parties pending registration are equally applicable to these two states. Notwithstanding the above comments, Chapters 13 and 14 represent a most valuable contribution to the meagre literature currently available on the land tenure system in the states of Sabah and Sarawak respectively. The discussion is most comprehensive and makes for interesting reading.

Chapter 6 deals with the early historical development of *jual janji* and the development of the law on *jual janji* through the cases. It traces the judicial attitude of the courts from the earliest reported case of *Haji Abdul Rahman*

v *Mohamed Hassan*⁶ to the more recent Federal Court decision in *A Kanapathi Pillay v Joseph Chong*.⁷ It is unfortunate that no reference was made to section 4(2)(a) of the National Land Code 1965 in the discussion on how *jual janji* could be accorded recognition within the existing legislative framework of the 1965 Code. There is also the failure to address the issue whether the Malay customary security of *jual janji*, if accorded recognition, should be extended to transactions involving non-Malays. The case of *Karupiah Chettiar v Subramaniam*⁸ was referred to in footnote 76 to support the proposition that the lender under a *jual janji* transaction will be protected even if he did not obtain registration of the land in his name as he is in possession of the issue document of title. It is submitted that *Karupiah Chettiar's* case is no authority for such a proposition as the legal principle enunciated in that case has no relevance to the subject-matter under discussion. In fact, in *Karupiah Chettiar's* case, the issue document of title was never in the possession of the person having the prior claim to the land. As authority for the above proposition, it would have been more appropriate to refer to cases on competing equities such as *Vallipuram Sivaguru v Palaniappa Chetty*⁹, *Haroon v Nik Mah*¹⁰, *UMBC v Goh Tuan Laye & Ors*¹¹ and *Ng Kheng Yeow v Chiah Ah Foo & Ors*.¹²

The application of English equity to leases and tenancies under the Malaysian Torrens system forms the subject-matter of the discussion in Chapter 7. Decided cases are analysed with a view to pin-pointing the inadequacies underlying certain of the decisions. On page 99, it seems to be

⁶[1917] AC 209.

⁷[1981] 2 MLJ 117. See also the most recent High Court case of *Ahmad bin Omar v Haji Salleh* [1987] 1 MLJ 338 where it was held that the borrower, who had repaid the loan after the expiry of the original time period stipulated under the *jual janji* transaction in question, could recover the land from the lender as time was no longer of the essence in the repayment of the loan.

⁸[1971] 2 MLJ 116.

⁹[1937] MLJ Rep 55.

¹⁰[1951] 17 MLJ 209.

¹¹[1976] 1 MLJ 169.

¹²[1987] 2 MLJ 330.

suggested in the fourth paragraph that section 6 of the Civil Law Act 1956 has the effect of prohibiting general principles of English equity. For the avoidance of doubt, it should be made clear that section 6 only prohibits the application in Malaysia of English *land* tenure and any rules of equity which form part thereof.¹³ It does not prohibit the application of general principles of English equity. For that, section 3 of the Civil Law Act 1956 must be considered. On page 100, it was suggested in the third paragraph that section 206(3) of the 1965 Code should have been considered by the Privy Council. If one were to read what the Board had said, it was obvious that section 206(3) was irrelevant. The Board made it quite clear that if any rules of English law is part of "... that field ..." (meaning, in the field of English land law), then its application would be prohibited by section 6 of the Civil Law Act 1956. The question whether it is necessary to consider section 206(3) (and section 3 of the Civil Law Act 1956), accordingly, does not arise. One other matter which, perhaps, should be made clear on pages 101 and 102 is that the *UMBC*'s case did not, at any time, lay down as a principle that English equitable principles of general application (such as the doctrine of equitable estoppel) cannot be applied to land matters in Malaysia. The Board in that case merely held that if an equitable principle such as that relating to relief against forfeiture, forms part of English *land* law, then it cannot be applied to land matters in Malaysia by virtue of section 6 of the Civil Law Act 1956 and this is also the rule where provisions are expressly provided for in the 1965 Code to deal with a particular matter. Other than these qualifications and provided further that the application of a particular rule of English equity is allowed by section 3 of the Civil Law Act 1956, there seems to be no valid reason to disallow its application more so where its application is not inconsistent with the aims and objectives of the Malaysian Torrens system as embodied in the 1965 Code.¹⁴

¹³See *Chin Choy & Ors v Collector of Stamp Duties* [1981] 2 MLJ 47, 48 and *UMBC v Penungut Hasil Tanah, Kota Tinggi* [1984] 2 MLJ 87, 90-91.

¹⁴See *Oh Hiam v Tham Kong* [1980] 2 MLJ 159, 164 and *Siew Soon Wah v Yong Tong Hong* [1973] 1 MLJ 133.

In Chapter 8, the status of the vendor and purchaser pending registration is comprehensively discussed.¹⁵ The position under English law and under the Torrens system in other jurisdictions are compared with the position under Malaysian law. On page 103 in the first paragraph, it may not be quite appropriate to state that the 1965 Code deals only with registered or registrable interests. Tenancies and statutory liens which are non-registrable interests are also dealt with by the 1965 Code.¹⁶ It may indeed be inappropriate to refer to cases from other Torrens jurisdictions such as Australia, New Zealand and Canada to support the proposition that equitable principles are applicable, without qualification, under the Malaysian Torrens system. In the Australian case of *Butler v Fairclough*,¹⁷ Griffith CJ made it quite clear that the application is not without qualification. As his Lordship 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.*"¹⁸

In Malaysia, section 6 of the Civil Law Act 1956 would prohibit the application of the English land law concept of equitable estates and rights including the concept of the bare trust.¹⁹ It is indeed surprising to note that the critical views of Ali FJ in *Macon Engineers Sdn Bhd v Goh Hooi Yin*²⁰ on the applicability of the bare trust concept under the Malaysian Torrens system were not discussed in the chapter itself, being undeservingly relegated to a mere footnote in the chapter.²¹ The suggestion on page 111 in the second paragraph that the observations in *Chin Choy's* case on the

¹⁵The discussion forming this chapter is taken from Chap 6 pp 199-220 of Sinnadurai, *Sale and Purchase of Real Property in Malaysia* (1984) (Butterworths).

¹⁶See the National Land Code 1965, ss 213, 220, 223, 281, 330, 331 and 316.

¹⁷(1917) 23 CLR 78.

¹⁸*Idem*, at 91. (My own emphasis).

¹⁹See *Chin Choy v Collector of Stamp Duties* [1981] 2 MLJ 47, 48 and *Macon Engineers Sdn Bhd v Goh Hooi Yin* [1976] 2 MLJ 53, 57.

²⁰*Ibid.*

²¹See Chap 8 fn 10.

applicability of the bare trust were *obiter* is only correct insofar as it relates to the applicability of the bare trust to the Malaysian Torrens system. It is, nevertheless, the ratio of *Chin Choy's* case that the bare trust is part of English *land* law. Accordingly, its application is prohibited by section 6 of the Civil Law Act 1956 and the decisions of judges based on the bare trust concept can be said to have been decided *per incuriam*. The submission on page 110 in the second paragraph that "... it is too late in the day to argue for the non-application of equitable principles under the National Land Code" can only be supported if by the expression "equitable principles" is meant those equitable principles which are of general application and which are not inconsistent with the National Land Code 1965. On no account can it be taken to mean those equitable principles (such as the bare trust and the rules relating to relief against forfeiture of land) which are part of English *land* law.²² To contend otherwise, would be to go against the aims and objectives of the Malaysian Torrens system as embodied in the National Land Code 1965.

The position relating to strata titles in Malaysia is discussed in Chapter 9. The basic features of a strata scheme are highlighted and commented upon. The relevant legislation are also comprehensively discussed. Matters pertaining to real property gains tax, joint venture agreements, the contract of sale between the developer and the purchaser and the lease for piped liquefied petroleum gas are discussed in detail. However, the discussion in the chapter pertaining to provisions in the Strata Titles Act 1985 must now be read in the light of the various major amendments brought about by the Strata Titles (Amendment) Act 1990.²³

Restraints on dealings in land are discussed in Chapter 10. The discussion begins with a brief description of the various dealings provided for under the 1965 Code. Restraints by way of the various types of caveat and a prohibitory order are discussed comprehensively and in depth. The position of *lis pendens* and Malay Reservation land are also

²²*Chin Choy & Ors v Collector of Stamp Duties* [1981] 2 MLJ 47, 48 and *UMBC v Pemungut Hasil Tanah, Kota Tinggi* [1984] 2 MLJ 87, 90-91.

²³Act A753 which came into force on 23 February 1990. See Teo, K. S., "The Strata Titles (Amendment) Act 1990—Overcoming Teething Problems And More" [1990] MLJ lxxxi.

touched upon. On page 141 in the third paragraph, there is an omission to state tenancies as one of the dealings which may be effected under the 1965 Code. As opposed to the view given on page 151 that a registered proprietor may enter a private caveat against his own land, the recent case of *Eu Finance Bhd v Siland Sdn Bhd*²⁴ has now decided that a registered proprietor may not be permitted to do so.

In Chapter 11, a brief historical survey of Malay customary tenure is undertaken. The position of Malay customary tenure in the Straits Settlements and in the Malay states are examined in depth. The discussion concludes that the principles of Malay customary tenure are in essence very much influenced by Islamic law and that "... the time has come for the law on customary land tenure of the Malays to be re-written with a totally new approach, highlighting its Islamic origin."²⁵

A comparison of Islamic land law concepts and that of the present land law system in Malaysia is undertaken in chapter 12. The various types of land holdings under Islamic law are discussed. Early Malay land law is also touched upon.

Chapter 15, the concluding chapter, is most appropriately devoted to problems of land administration. In this chapter, problems pertaining to matters such as the preparation of the registers, errors in the registration process, cancellation of documents, registration of titles, observance of court orders, identification of lands, forfeiture and many others are highlighted and discussed. Under the sub-heading which lists out the various legislation which a land officer deals with, there is an omission to mention the Strata Titles Act 1985.

In the course of reviewing the book, a number of omissions and errors have been noted. On page 43, in the sentence beginning with "a. The 1965 continues ...", the word "Code" should be added immediately after the year 1965. On the same page, 100 acres should read 10 acres. With the passing of the National Land Code (Amendment) Act 1984,

²⁴[1989] 1 MLJ 195, 196.

²⁵See Chap 11 at 188.

it should now read 4 hectares. On page 89 in footnote 75, section 232(1)(a) should read section 323(1)(a). On pages 93 and 94, a tenancy should be a demise for three years and less rather than a demise of less than three years.²⁶ On page 262, under "Offences", the word "Registrar" in paragraph (b) should read "Register".

Notwithstanding the above comments and criticisms, the various contributors must be congratulated for their efforts in putting together a work of high quality. Seen in the light of the little that has been written on some of the areas covered in the book, any Torrens lawyer and student alike should find the book most valuable.

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²⁶See National Land Code 1965, ss 213 and 223.

