

SOME ASPECTS OF INDEFEASIBILITY OF TITLES UNDER THE MALAYSIAN TORRENS SYSTEM

A recent Malaysian Federal Court decision, *Ong Chat Pang v. Vallippa Chettiar*,¹ raises a number of important issues regarding the effect of registration of titles under the Malaysian Torrens system. They pertain to three basic aspects of the system: (a) the question as to who are entitled to the benefit of indefeasibility of title, (b) the relationship between equity and the Torrens system with regard to the protection of a registered proprietor against equitable interests or claims, and (c) the powers of the Court in adjudicating rights relating to land under the Torrens system. Hitherto the above aspects (a) and (c) had received but little judicial consideration in local decisions. This recent case has now enabled a more substantial discussion of them. The aspect (b) has in particular been highlighted in this case in which certain relevant problems arising from local statutory provisions were brought to the forefront. This article will discuss these three aspects of the Malaysian Torrens system in the light of the decision.

I. *Ong Chat Pang v. Vallippa Chettiar*¹

In this case, A, a registered proprietor, contracted to sell his land to B, who subsequently, on hearing that A was in financial difficulties, presented a caveat to protect his claim under the contract of sale. About a week after its presentation, B was informed that the caveat had been rejected; and on the same day, the Registrar of Titles registered a transfer of the same land by A in favour of C. The transfer to C was prima facie executed two weeks before its registration in pursuance of a sale, and on the day B presented his caveat, C had approached B with an offer to pay him a sum if he would withdraw the caveat. B petitioned to the High Court, under s. 237 of the former F.M.S. Land Code, Cap. 138, against the rejection of the caveat, and successfully obtained an order directing the Registrar to enter his caveat "as on the date of its presentation". The Registrar was also directed to remove the caveat four weeks from the date of the order unless B had earlier instituted an action for the specific performance of his contract of sale or for damages against A, the action "to be an action joining the interested party as second defendant". Within the time given, B filed the present suit against A and C. He claimed specific performance against A and accordingly also for an order to have the registered transfer in favour of C cancelled and to have the transfer to himself registered.

1. [1971] 1 M.L.J. 224.

pointed out, that it was open to the Court in the present suit "to adjudicate on the rival claims of the parties" and "if the justice of the case require [d]" to remove *C* from the register to give place to *B*. The Judge then went on to consider the rival claims of *B* and *C*, depicting the position on the day *B* presented his caveat⁴ to be "a race between them to get on the register". This race was won by *C* with the consequence, as his Lordship held, that section 42 operated to make *C*'s registered title "*prima facie* indefeasible". Proceeding accordingly to adjudicate on the rival claims under this section his Lordship observed that there was no fraud on the part of *C*, but somehow confined his attention only to section 42 (iv), which explicitly dealt with the case of a registered proprietor who had taken from his predecessor in title where the latter's registration was procured in circumstances stated in subsection (ii) or (iii). In such cases, the subsequent proprietor would acquire an indefeasible title only if he had taken "*bona fide* for valuable consideration". In this connection, it seems, Suffian F.J. brought in section 26 of the Specific Relief (Malaya States) Ordinance, 1950, which reads:

Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against

(a) either party thereto;

(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;

After stating a well-settled point of law under this section that the onus is always on the subsequent transferee to prove himself to be within the exception, the Judge held that the onus was on *C* in the instant case to prove that he was "a *bona fide* purchaser for value". His Lordship then found that *C* had failed during the trial to produce evidence to establish his "*bona fides*", and also observed that there was insufficient evidence even as to whether or not *C* had paid the full purchase price. Moreover, his Lordship inferred from *C*'s failure to call for evidence or his "silence" that he had been "less than honest" in his conduct, and thereupon dismissed his appeal.

Gill F.J. seems to have derived his decision, also dismissing the appeal, from two grounds. As his starting point, his Lordship also upheld the validity of the order made upon *B*'s petition for the entry of his caveat, stating its effect to be that of enabling *B* "to retain the matter in *status quo* until his claim was adjudicated upon". His first ground of decision seemed to follow an acceptance of a general principle, as he put it, that

so long as land stands registered in the name of a particular person such registration constitutes conclusive evidence that that person is in fact the

4. From the report, it is evident that on that date *B* and *C* had come to know of the other being interested in the land.

registered proprietor of the land unless and until his registered title is cancelled or set aside in accordance with some relevant provision of the law.

Accordingly he referred to section 42 of the former Land Code as “such relevant provision of the law in relation to the present case”. The implication was that as the transfer to *C* had actually been registered, his registered title could only be set aside under section 42; and this seemingly led to his Lordship’s construction of the section. Here he took a view different from that of Suffian L.J. He pointed out that section 42 (iv) was irrelevant as *C* did not take from a proprietor whose registration was obtained in any of the circumstances set out in sub-sections (ii) and (iii). Tacitly Gill F.J. regarded *C* as a *de facto* registered proprietor whose title was indefeasible by virtue of sub-section (i) subject to the exceptions provided for in sub-sections (ii), (iii) and (vi). It was sub-section (vi) which his Lordship held applicable on the facts of the instant case to make *C*’s title liable to cancellation. This sub-section was worded as follows:

Nothing in this section shall be construed so as to prevent the title of any proprietor being defeated by operation of law.

Alluding to the wide expression “by operation of law”, his Lordship said:

The term “operation of law”...is a generic term deliberately used by the legislature to grant relief in cases where contractual or conscientious obligations (importing a breach of duty to which equity has attached its sanction) are undertaken by or imposed on the registered proprietor either at law or in equity.

The Judge then opined that *C* in the instant case could not be said to be “under no conscientious obligations which [could] be imposed on [him] either at law or in equity”. Presumably it was in reference to such obligations in equity that his Lordship observed that before the registration of the transfer in favour of *C*, a mere unregistered instrument of transfer did not by itself confer on *C* any “superiority in equity” over the earlier equity of *B* under the latter’s contract of sale. In addition, his Lordship also seemed to have in contemplation such obligations at law by his reference to section 26 of the Specific Relief (Malay States) Ordinance, 1950, noted earlier. He also held that *C* had failed to discharge the onus of proving himself to be “a *bona fide* purchaser for value without notice” so as to be entitled to the exception under that section 26. The Judge followed this up by a re-assertion of a general principle under the Torrens system that

the pre-existing admitted equitable right may be defeated by a *bona fide* supervening title obtained by a registered transfer, the rule being that one who succeeds in the scramble to get on the register emerges victorious.

But he concluded that “on the evidence and all the surrounding circumstances of the case” *C* could not be said to have obtained a *bona fide* supervening legal title by his registered transfer.

The reasoning of Gill F.J. noted so far was concerned with the liability of *C*'s registered title to be defeated within the exception under sub-section (vi). The Judge however seemed to put forth a separate ground for his decision in the concluding paragraph of his judgment. There his Lordship reverted to the effect of the order for the entry of *B*'s caveat, saying that its effect was to restore the *status quo* as between *B* and *C* on the date of the presentation of the caveat, "notwithstanding the fact that the transfer in favour of [*C*] had in fact been registered". In discounting the *de facto* registration, his Lordship proceeded to adjudicate upon their rival claims on the issue of priority between two equities; and applying the maxim "*qui prior est tempore potior est jure*", he decided in favour of *B*.

The decision of the Federal Court is apparently capable of giving rise to various implications. Although it was a decision under the former Land Code, it may be noted that the present National Land Code, 1965, contains similar provisions. Section 340 of the present Code was modelled on section 42 of the former F.M.S. Land Code. Like the former section 42 (i), the present section 340(1) declares in general terms the indefeasibility of every registered title. Its sub-section (2) spells out the specific circumstances in which a registered title shall not be indefeasible. Sub-section (3) is the equivalent of the former section 42(iv).⁵ And the present section also provides by sub-section (4) (a) that "nothing in this section shall prejudice or prevent...the determination of any title or interest by operation of law".

II. WHO ARE ENTITLED TO THE BENEFIT OF INDEFEASIBILITY OF TITLE?

The first issue which may be raised in the light of the above decision is whether the Malaysian Torrens system confers the benefit of indefeasibility of title only on a registered proprietor who is a purchaser for value.

Section 340(3) clearly provides in the affirmative with regard to a registered proprietor who has taken a title which is subsequent to one that was defeasible by reason of any of the circumstances specified in section 340(2).⁶ But section 340(1), which declares every registered title to be indefeasible, does not draw any discriminative distinction as to whether its registered proprietor is a purchaser or a volunteer.

5. Their wordings are different. The present sub-s. (3) reads: "Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2) —
 - (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
 - (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for time being vested: Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser."
6. For a further consideration of this sub-section, see p. 288, below.

On its face, section 340(1) thus permits a literal interpretation that it extends in the first instance the benefit of indefeasibility to purchasers and volunteers alike. In a Canadian case *McKinnon v. Smith*,⁷ a decision under the Manitoba Real Property Act, Cap. 220, a proprietor of land who acquired his registered title without fraud, subsequently defrauded his wife by transferring the land to his daughters, It was held that the daughters who were volunteers obtained an indefeasible title which was good against the rival claim of the wife. This decision turned on the construction of section 63 of the Manitoba Act which confers indefeasibility of title upon registered owners of land in general terms. Trueman J.A. expressed his view as follows:

Its terms, read as they must be in their literal sense being free from ambiguity, make no distinction between purchasers and volunteers, and do include the latter. It is beside the point and outside the province of the Court to seek to construe the provision by speculating on its object and to consider that because purchasers for value should be given protection while volunteers are not entitled to it, the Legislature did not mean to include the latter. The section is not a provision to protect priorities according to rules of equity except in the case of purchaser for value and in good faith, but to establish the conclusiveness of the register by providing that in no case shall a certificate of title be attacked except where the owner has got on the register by fraud. The subject matter of the section is conclusiveness of the certificate of title, with fraud as the one exception.⁹

It should be added that the Manitoba Act, by another provision (section 67), does discriminate against volunteers. This latter section is concerned with the protection of registered proprietors against an action for possession or recovery of land; it provides by way of exceptions to the effect that such an action would lie against a person who derived his title "otherwise than as a transferee *bona fide* for value" from a proprietor who was registered through fraud or in cases of misdescriptions of land or boundaries. Apparently, the Court in *McKinnon's* case was of the opinion that, except as expressly qualified in specified cases, the plain generality of section 63 should be construed in favour of volunteers as well.

However, the literal interpretation may not be desirable from a policy viewpoint. As Baalman has expressed it:

The Torrens System of land registration is predominantly a purchaser's system. Its aim is to facilitate the transfer of land as a commercial commodity by removing most of the risks of financial loss which beset purchasers under the general law. As a transferee who does not give value for his land is not exposed to that risk, there is no need to protect him. But the Torrens statutes have not always said so in plain words; in many of them it has simply been left to necessary implication.¹⁰

7. [1925] 4 D.L.R. 262; [1925] 3 W.W.R. 290.

9. *Ibid.*, at pp. 306-307.

10. The Singapore Torrens System, p. 86.

Though one may not agree that volunteers are excluded by “necessary implication”, the policy contention seems compelling.

Such a policy interpretation would appear to have received judicial endorsement in some other Torrens jurisdictions. For example, in Saskatchewan, where the relevant provisions in its Land Titles Act, Cap. 65,¹¹ are substantially similar to those of the Manitoba Act above referred to, their Court of Appeal has preferred the policy contention in *Imperial Bank v. Esakin*.¹² In this case, an insolvent proprietor of land transferred his land by way of a gift to his father, who later devised the land to the wife of the insolvent. After the father’s death, the land was duly transferred by his executor (who was in fact the insolvent himself) to and became registered in the name of the wife. It was held that the wife held the land as trustee for the insolvent’s creditors to the extent of their claims. The Court simply derived its decision from the principle that a voluntary transferee (irrespective of his not being a party or privy to the fraudulent conveyance nor having any notice of any equities affecting his predecessor in title) should not be entitled to the benefit of indefeasibility of title as against the creditors of an insolvent transferor. In the circumstances of the case, the Court felt strongly that to hold otherwise would mean all that an embarrassed debtor would have to do in order to defeat his creditors would be to transfer his land to an innocent transferee.

Although this decision would most probably meet with general approval in other Torrens jurisdictions (even, perhaps, in Manitoba)¹³ in the same sort of cases so as not to undermine the object of the common legislation dealing with fraudulent conveyancing and preferences,¹⁴ it seems clear that such decision is based at its very root on the premise that draws a general discriminative distinction between volunteers and purchasers.

In an Australian case, *King v. Small*,¹⁵ it was held by Adam J. that the Victoria Land Transfer Act, 1954, does not confer on a registered proprietor, being a mere volunteer, a title free from a prior equity raised by a competing deed of arrangement. There are some other Australian cases which may be cited in support of the view which places a volunteer-proprietor in an inferior position,¹⁶ but the issues

11. See ss. 67 and 290(1) thereof.

12. [1924] 2 D.L.R. 675; [1924] 2 W.W.R. 33.

13. Cf. *Petryshyn v. Kochan* [1940] 2 D.L.R. 796; [1940] 2 W.W.R. 353.

14. See, e.g., *Goyan v. Kinash and Kinash* [1945] 1 W.W.R. 291; [1945] 2 D.L.R. 749. (Alberta); *In re Fraudulent Preferences Act: In re Commercial Securities Corp. Ltd.* [1937] 3 W.W.R. 711. (British Columbia).

15. [1958] V.L.R. 273.

16. Baalman, favouring such a view, has referred to these cases: *Biggs v. McElister* (1880) 14 S.A.L.R. 86 (affirmed on appeal, 8 App. Cas. 314); *Crow v. Campbell* (2884) 10 V.L.R. (E) 286; 6 A.L.T. 34; *Hamilton v. Iredale* (1930) 3 S.R. 535; 20 W.N. 164. See *The Torrens System In New South Wales*, p. 150.

under consideration cannot be said to have been authoritatively settled.¹⁷ In *Gibbs v. Messer*,¹⁸ Lord Watson has stated the object of a Torrens statute in terms of its protection in favour of "everyone who purchases, *bona fide* and for value from a registered proprietor and enters his deed of transfer or mortgage in the register".¹⁹ But, in a number of other Privy Council decisions, e.g. *Frazer v. Walker*,²⁰ the same Court talked about the Torrens system conferring indefeasibility of title upon "a registered proprietor" without further distinction.

It may be noted that the Singapore Land Titles Act, Cap. 276, which is a relatively recent Torrens statute,²¹ has by way of an express provision subscribed to the policy of not extending the protection of indefeasibility of title to registered proprietors who claim otherwise than as a purchaser in good faith and for valuable consideration.²² But, as has been noted, the Malaysian National Land Code, 1965, has substantially inherited its indefeasibility provision from the former F.M.S. Land Code, Cap. 138, which provision is not explicit as to whether the indefeasibility benefit extends to volunteers or not.

Prior to *Ong Chat Pang v. Vallippa Chettiar*,²³ this issue seemed to arise in a local case in its first instance decision based on facts which the Court of Appeal found to be otherwise in reversing the decision. The case, *Jabel v. Maruan*,²⁴ involved, as criticised by the higher Court, much confusion and irregularities in the evidence produced and recorded in court. The facts concerned the sale of a piece of land by two co-proprietors *A* and *B* to *C*. It would appear that *C* subsequently acquired a registered title with respect to *A*'s undivided half share and sold it to another person. The dispute concerned the other undivided share. Somehow *B* left the country and was never to be heard of, and the land became (upon an application for rectification by *A*) registered in the name of *A* and her brother *D*. The issue in the lower Court was whether *C* was entitled to the share as against *A* and *D*. But in the higher Court, it was revealed from the evidence that a third party *P* had in fact purchased and become the registered proprietor of the share in dispute, and the Court therefore held simply that *C*'s claim could not be given any effect with respect to the share to which *P* had obtained an indefeasible title. However, in the lower Court, the

17. None of the cases cited in the above footnote are conclusive though in one way or another implication may be drawn from these decisions to support the policy contention. It may also be noted that in New Zealand, the issue is not dealt with in *Garrow's Real Property In New Zealand* nor by Adam in *Land Transfer Act, 1952*.
18. [1891] A.C. 248 (P.C.).
19. But such a general statement does not necessarily mean an unqualified discrimination against volunteers, and may only be concerned with explaining the position of purchasers in the circumstances of that case.
20. [1967] A.C. 569, at p. 580.
21. The Act, formerly Land Titles Ordinance, was enacted in 1956.
22. See s. 34(3) and s. 4 (definition of "purchaser") thereof.
23. [1971] 1 M.L.J. 224.
24. (1962) 28 M.L.J. 45. For Court of Appeal decision, see *Maruan v. Jabel* (1962) 28 M.L.J. 319.

Judge who took no account of *P* whatsoever was led into a decision in which he held that as between *C* and *D*, *D*'s title must be rectified in *C*'s favour. Thus, if taken in light of the facts as acted upon by the Judge, it would appear that the Judge did not regard the title of the volunteer as indefeasible.

The recent Federal Court decision, holding that in order that a registered proprietor may claim the protection of indefeasibility of title he must first prove himself to be a *bona fide* purchaser for value, clearly carries the implication that the Malaysian Torrens system only extends the indefeasibility benefit to purchasers. This seems to be the tacit assumption of Suffian F.J. as reflected in his ignoring the distinction between subsections (i) and (iv) of section 42 of the former Land Code. Gill F.J. alluded to the specific scope of subsection (iv) and its irrelevancy in the circumstances of the case, but arrived at the same conclusion by resorting to subsection (vi) in which he found a basis for qualifying the generality of subsection (1). What seems open to some doubt is whether or not their decision can be confined to imposing the qualification only in cases where a registered proprietor is confronted with a claim by someone with whom the previous proprietor had earlier contracted to sell the land. This would depend on the extent to which one would regard the Judges' references to section 26 of the Specific Relief (Malay States) Ordinance as substantively relevant to their decision.²⁵ But, from a conceptual viewpoint, it does not seem tenable to distinguish between claims under a contract of sale and other claims on the basic issue as to who are entitled to the protection of indefeasibility. It can hardly be justified in principle that a registered proprietor, otherwise than being a *bona fide* purchaser for value, may yet be protected against an adverse claim which binds the previous proprietor if it happens not to have arisen under a contract of sale. It is thus submitted that the Federal Court decision should be accepted as a general authority that only purchasers are entitled to indefeasibility protection under the Malaysian Torrens system.

It will be realised that in the foregoing discussion the expression "*bona fide* purchasers for value" has been used synonymously with "purchasers" in contra-distinction with "volunteers". This expression is however charged with technical connotations in English land law which have much to do with certain concepts and rules in equity. While for good policy reasons one may be in favour of discriminating against volunteers, a contention in terms of limiting the benefit of indefeasibility to "*bona fide* purchasers for value" may by reason of this expression appear logically objectionable to those who may take these words to mean engrafting certain equitable concepts or rules onto the Torrens system. On the other hand, an uncritical use of the expression in favour of the policy discrimination could cause confusion leading to fallacious reasoning and views which run counter to the basic principles of the Torrens system. As will next be discussed, *Ong Chat Pang's* case seems to be so entangled with such problems regarding the relationship between equity and the Malaysian Torrens system.

25. See discussion at p. 284, below.

III. EQUITY AND INDEFEASIBILITY OF TITLE

“Indefensibility of title”, as Lord Wilberforce has put it, “describes the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys”.²⁶ His explanation signifies a historical and logical approach to the understanding of the principle of indefeasibility. The Torrens system originated primarily as a conveyancing reform in the context of English law of realty. It is with reference to English general land law that the superior force statutorily attributed to a registered title is rightly conceived in terms of “immunity” in the sense that its holder is not subject to attack by adverse claims in many of the circumstances where the general law would, had he acquired his title by a deed under the system of private conveyancing, render his title open to such attack. This is where the Torrens system has largely superseded Equity—in particular, the Torrens system has ousted the equitable rules of priority governing the relationship between legal estates and equitable interests or claims. Legal estates being replaced by registered estates or titles, the latter may only be affected by an adverse equitable interest or claim in specified circumstances which are statutorily provided for as exceptions to indefeasibility.²⁷ With respect to one such exception “fraud” which is found in all Torrens statutes, many of these statutes explicitly provide that mere notice by itself does not amount to “fraud”.²⁸ To quote a celebrated Privy Council statement,²⁹

by fraud in these Acts [i.e. Torrens statutes] is meant actual fraud—that is, dishonesty of some sort; not what is called constructive or equitable fraud—an unfortunate expression and one very apt to mislead, but often used for want of a better term to denote transaction having consequences in equity similar to those which flow from fraud.

This restrictive demarcation of the meaning of “fraud”, as will be realised, is logically linked with the exclusion by the Torrens system of the equitable rules of priority and the inseparable doctrine of notice. Obviously, much of the purpose of so restricting the ambit of “fraud” as an express exception to indefeasibility would be pointless if a registered proprietor could yet be bound by a prior equitable interest or claim by reason of his having notice of the latter.

The Torrens system was introduced into the Malay States against a different legal background. The English law of realty as such and the system of private conveyancing by deeds had never been imported into these States; and accordingly the English notion of legal estates

26. *Frazer v. Walker* [1967] A.C. 569, at p. 580.

27. It should be noted that a registered proprietor is always bound by personal equities. See, e.g., *Wilson v. McIntosh* [1894] A.C. 129, p. 134; *Frazer v. Walker*, *ibid.*, at p. 585.

28. See, e.g., New South Wales Real Property Act, 1900, s. 43; Singapore Land Titles Act, Cap. 276, s. 35.

29. *Assets Co. v. Mere Roihi* [1905] A.C. 176, at p. 210.

and rules defining their relative force *vis-a-vis* equitable interests or claims could have no place in these States. This may account for the reasons why the local Torrens legislation, present as well as past, does not in its provisions conferring indefeasibility elaborate on this superior quality of a registered title by reference to any general law (which would be the English general land law in many other Torrens jurisdictions) to the effect that such general law would be inoperative as regards the priority relationship between a registered title and any other adverse interest.³⁰ It may also be noted that the local legislation does not contain the "notice" provision, the one providing that mere notice does not amount to "fraud". This being so, the inapplicability of equitable rules of priority to registered titles seems all the more a straight forward position under the Malaysian Torrens system.³¹ While this general position needs to be further considered later in the light of certain provisions of the Specific Relief (Malay States) Ordinance,³² it can hardly be doubted that no Torrens statute could, without its main objective being undermined, permit encroachments upon the indefeasibility of a registered title by rendering it open to attack by adverse claims to the same extent as a legal estate would be under English general law.

"Bona fide purchaser for value"

It is in view of the above feature of the Torrens system that one ought to examine with great care the expression "*bona fide* purchaser for value" where it is employed in relation to the operation of the system. Under English general land law, the words "*bona fide* purchaser for value without notice" have been used inseparably from the equitable rules of priority. So much so that the notion "*bona fide*" in such a context is explained in a leading text book³³ as follows:

The purchaser must act in good faith. Any fraud or sharp practice will forfeit the privileges of a purchaser in the eyes of equity. But the requirement of good faith mainly serves to emphasize that the purchaser must be innocent as to notice....

If these connotations of the words "*bona fide*" are not qualified when used to describe a purchaser whom a registered proprietor must prove himself to be in order to claim an indefeasible title, it will mean that, even in the absence of fraud, notice of any prior equitable interest or claim will deprive a registered purchaser of the protection of indefeasibility. Such a position should undoubtedly be ruled out as being

30. Compare, e.g., New South Wales Real Property Act, 1900, s. 42; Singapore Land Titles Act, s. 34.

31. It should be noted that the above does not concern the matter of priorities between non-registered interests or claims. As between them, the local Courts have resorted to English equitable rules to settle their priorities. See, e.g., *Haroon bin Guriaman v. Nik Mah binti Mat* (1951) 17 M.L.J. 209; *Tek Teck Huay v. Thor Hor Chooi* (1954) 20 M.L.J. 227; *Vallipurum Sivaguru v. Palaiappa Chitty* [1937] M.L.J. 59. Also cf. *Paramoo v. Zeno Ltd.* [1968] 2 M.L.J. 230; *Chin Cheng Hong v. Hameed* (1956) 20 M.L.J. 169.

32. See p. 284, below.

33. Megarry and Wade, *The Law of Real Property*, 3rd. ed., p. 121.

squarely opposed to the fundamentals of the Torrens system. It may further be pointed out a registered purchaser should nonetheless be entitled to such protection even where he may be guilty of "constructive or equitable fraud" which however falls short of amounting to "actual fraud" by way of an express exception to indefeasibility. This clearly shows the impropriety and undesirability of borrowing the expression "bona fide purchaser for value" without careful qualifications when one is dealing with the Torrens system.

On the other hand, when the expression is used to describe the class of persons who are entitled to the indefeasibility benefit, it is submitted that the words "bona fide" should perhaps mean no more than that such a person is a *genuine* purchaser for value, one who has actually given valuable consideration for the transfer of the land in his favour.

In *Ong Chat Pang's* case, this narrow meaning of "bona fide" seems to have underlined Suffian F.J.'s finding that the subsequent purchaser had failed to establish his *bona fides* when his Lordship substantiated it by observing that no sufficient evidence was produced as to the actual payment of the purchase price.³⁴ Although the Judge further inferred from this subsequent purchaser's "silence" in court that he must have been "less than honest" in his conduct in relation to the transfer of the land to him, this additional observation could merely pertain to the doubt as regards whether the transfer was at all in pursuance of a genuine sale.

However, Suffian F.J.'s judgment is not free from some ambiguity arising from his reference to section 26 of the Specific Relief (Malay States) Ordinance, 1950. It could be that the Judge, having tacitly favoured the policy view of extending the indefeasibility benefit only to *bona fide* (i.e. genuine) purchasers for value, made the reference merely in connection with the question of onus of proof. But it is not clear whether his reference might not go as far as implying that a registered proprietor must prove himself to be a *bona fide* purchaser for value without notice as set out in that section which is clearly derived from the English equitable rules of priority. The relationship between the Specific Relief legislation and the Torrens legislation in the Malay States will be considered later.³⁵ Presently, it need only be noted that the wider implication might well have prompted his Lordship's observation as regards the "less than honest" conduct of the subsequent purchaser. The Judge might have been contemplating the existence of some circumstances which could constitute some kind of an "equitable fraud" on the part of the subsequent purchaser in negation of his *bona fides* (in the unqualified sense) with the effect of excluding him from the protection of indefeasibility. This would mean that even a genuine purchaser could not acquire an indefeasible title in the absence of "actual fraud" if he was somehow "less than honest". Such a view should not, it is urged, be read into Suffian F.J.'s judgment.

34. See p. 274, above.

35. See p. 285, below.

Gill F.J.'s approach was different. As has been noted, his Lordship resorted to section 42 (vi) of the former F.M.S. Land Code (now section 340 (4) (b) of the National Land Code) which rendered a registered title liable to be defeated "by operation of law". There the Judge seemingly went all the way to bring in equitable considerations in the context of English general land law. This would appear from his Lordship's unreserved observation that the words "by operation of law" were wide enough to envisage the defeat of a registered title where "conscientious obligations (importing a breach of duty to which equity has attached its sanction)...are imposed on the registered proprietor either at law or in equity." Taken in this light, when the Judge used the expression "*bona fide* purchaser for value", he was presumably taking the view that for a registered purchaser to acquire an indefeasible title as against a prior equitable interest or claim, he must be as worthy of such protection in the eyes of equity as a purchaser of a legal estate under English law. It is submitted that, if this is the implication one may gather from Gill L.J.'s judgment, it would mean undermining the very existence of the Torrens system. Plainly, the provision which makes a registered title indefeasible "by operation of law" ought not to be read literally in isolation but needs to be carefully construed on the basis of the fundamental Torrens principle.

Gill F.J. however did not only resort generally to equity; his Lordship also referred to section 26 of the Specific Relief (Malay States) Ordinance. In the context of the very wide meaning the Judge ascribed to the words "by operation of law", this statutory provision would readily come within the meaning of the word "law" to the effect that the indefeasibility of title should be subject to its operation. This would then mean that no registered proprietor could obtain a title free from the claim of a previous purchaser unless he was himself a purchaser for value in good faith and without notice. Although such a view which practically reverts a registered proprietor back to the position of a holder of legal estate under English general land law can hardly be correct, it does call for some further consideration on the relationship between the Specific Relief legislation and the Torrens legislation in the Malay States.

Specific Relief (Malay States) Ordinance, s. 26.

The Specific Relief legislation was first introduced into the former Federated Malay States in 1903.³⁶ It was modelled on an Indian statute of 1877.³⁷ Through a number of subsequent re-enactments and sundry amendments, they have become succeeded by the present Ordinance in 1950. This legislation provides to a very large extent the same sorts of equitable remedies as are available under English law. These include specific performance of contracts, declaratory judgment, rectification and cancellation of instruments. Needless to add, such legislation has thereby also "codified" the English equitable principles which under-

36. The Specific Relief Enactments: Perak, No. 10 of 1903; Selangor, No. 9 of 1903; Negeri Sembilan, No. 16 of 1903; and Pahang, No. 10 of 1903.

37. The Indian Specific Relief Act, No. 1 of 1877.

- (g) A buys certain land with notice that B has already contracted to buy it. A is a trustee, within the meaning of this Enactment, for B, of the land so bought.

Lord Moulton, in delivering the opinion of the Privy Council, set out this illustration and unreservedly held that in this case the purchaser was therefore trustee for that third party “for all the rights of which [he] had notice”. This clearly implied that the Privy Council regarded the 1891 Selangor Torrens legislation as being subject to the subsequent Specific Relief legislation, and their second ground of decision meant that a purchaser who acquired a registered title with notice of a prior claim would be bound by it by way of trust.

Within a year of the above decision, the Court of Appeal in the Federated Malay States was confronted with the issue as to the effect of notice in *Wong Fatt v. Chong Ng*.⁴¹ In this case, the plaintiff who became the holder of a registered sub-lease of a mining land sought to eject the defendant who was in occupation of the land. The defendant relied on two separate grounds of defence: First, he contended that the sub-lease had been obtained without compliance with certain statutory procedural requirements and therefore the plaintiff had no valid title on which the action for ejectment could be based; secondly, he claimed to be in occupation under a verbal agreement for a lease of which the plaintiff was alleged to have notice and relied on *Loke Yew's* case. The Court of Appeal held against the plaintiff on the first ground, but all the Judges refrained from making any decision on the second issue.

Then, in a 1917 case, *Ong Tin v. The Seremban Motor Garage*,⁴² the same Court of Appeal (with Innes A.C.J.C. and Earnshaw J.C.) upheld the action of a registered purchaser to eject a third party who had been in occupation of the land under a written agreement by which the vendor had purportedly granted him a lease and of which the purchaser had notice. Innes A.C.J.C. distinguished *Loke Yew's* case by saying that the Privy Council was there concerned with the case of a transfer having been obtained by “deliberate fraud”, and observed that he was “unable” to regard the Privy Council judgment “as furnishing a reason for grafting upon the land and Registrations Enactments of these States...the doctrine of notice as understood in England, or as qualifying except in cases of deliberate fraud the words of section 4 of the Specific Relief Enactment” (i.e. the provision excluding the operation of the Enactment to “registration of documents”).

However, in a subsequent case *Yap Tai Cheong v. Wong Kam*,⁴³ which was also a decision of the Court of Appeal but consisting of different Judges (Farrer-Manby A.C.J.C. and Whitley J.C.), it was held, following *Loke Yew's* case, that an unregistered mining sub-lease of which a subsequent registered purchaser of the head lease had actual

41. (1914) 1 F.M.S.L.R. 142.

42. (1917) 1 F.M.S.L.R. 308.

43. (1921) 2 F.M.S.L.R. 244.

Accordingly the words "by operation of law" should not be construed to give the Specific Relief legislation an overriding force of operation as Gill F.J. seems to have done in *Ong Chat Pang's* case.

Limited application of doctrine of notice

It should be pointed out that what has been discussed above relates to the inapplicability of equitable rules governing the priorities between legal estates and equitable claims to the Torrens system *in general*. This does not necessarily preclude their application to registered titles in certain specified circumstances by way of a limited express exception to indefeasibility. Indeed, many Torrens statutes appear to have made such a limited concession. The common provision is to the effect that where a registered proprietor obtained his title by fraud, his title would remain defeasible until and unless it is subsequently acquired by a "*bona fide* purchaser for valuable consideration".⁴⁵ The Malaysian National Land Code also contains a corresponding provision, i.e., section 340 (3), noted earlier.⁴⁶ This sub-section clearly provides that where a title is defeasible by reason of any of the circumstances specified in section 340 (2), only a subsequent "purchaser in good faith and for valuable consideration" can acquire it free from its defeasibility. These words being statutorily employed, they may carry the implication that in the specified circumstances the transferee of a registered title is placed in a position similar to that of the transferee of a legal estate subject to like equitable intervention. Thus, probably, if a purchaser acquires a title with notice (actual or constructive) of the title being defeasible in the hands of his vendor, he would not be regarded as a purchaser "in good faith".⁴⁷ There has not been any local decision on the point. But, it may further be observed that section 340 (3) does not appear to go as far as to make a subsequent registered purchaser bound by any equitable interest or claim of which he had notice. The vulnerability of his title may only be confined to attack by persons as against whom his predecessor's title was defeasible by reason of any of the specified circumstances.

The ratio decidendi of Ong Chat Pang's case

Then, subject to the qualification under section 340(3), it has been urged that equitable rules of priority governing legal estates and equitable interest should have no place under the Malaysian Torrens system, this being really a necessary premise for the operation of all Torrens

45. See, e.g., New South Wales Real property Act, 1900-1956, s. 135; Victoria Transfer of Land Act 1958, s. 44; New Zealand Land Transfer Act, 1952, ss. 63, 183.

46. See fn. (5), above. Formerly s. 42 (iv) of F.M.S. Land Code, Cap. 138.

47. The Singapore Land Titles Act has gone as far as to provide expressly that nothing in its indefeasibility provision (s. 34) shall confer on a proprietor claiming otherwise than as a purchaser in good faith and for valuable consideration any better title than held by his immediate predecessor (ss. 34(3) and (4)). *Quaere*: How far may these words "in good faith and for valuable consideration" employed by the Singapore Act be construed to warrant application equitable notions and rules?

systems. While as a general principle it seems self-evident that the local Specific Relief legislation should not be allowed to upset the system, this has in fact been shown to be the legislative intention in view of the amendments effected by the former Land Code to that legislation. Although the judgments in *Ong Chat Pang's* case are indeed not free from implications which seem to run counter to the basic Torrens principles, it is submitted that, accepting the Federal Court decision on the facts of the case, the decision may preferably be taken to mean (a) that the protection of indefeasibility under the Malaysian Torrens system only extends to "purchasers" as distinguished from "volunteers", (b) that the onus is on the person who claims the protection to prove that he has acquired a registered title as a genuine (or "*bona fide*" in this narrow sense) purchaser for value, and (c) that the registered transferee in this case failed to discharge this onus of proof and that, thus not being so protected, he was bound by the claim under a prior contract of sale as a "volunteer" would be.

IV. POWER OF THE COURT AND THE TORRENS SYSTEM

The third issue to be considered concerns the power of the court to adjudicate on rights relating to land under the Malaysian Torrens system.

In *Ong Chat Pang's* case, this issue was involved in the dispute as to the effect of the order made on the petition against the Registrar's rejection of the caveat. While there ought to have been no doubt that the caveator could petition under section 237 of the former Land Code (corresponding to section 418 of the present Code), the problem arose from the situation that the order was made instructing the Registrar to enter the caveat "as on the date of its presentation" although in the meantime after that date the land had become transferred to a third party. Had such an order not been further qualified, it would have neatly raised a question as regards the effect of the registration of the transfer in favour of the third party, it being registered in defiance of the prohibition imposed by the back-dated caveat. If the caveat could not affect the *de facto* registration, such an order would serve no useful purpose. But if it had the effect of rendering the registered transfer inoperative as against the caveator, this would mean imposing some kind of an overriding limitation on the indefeasibility provision otherwise than by way of the express exceptions thereunder. Has the court the power to make such an order to the effect of overriding the indefeasibility provision ?

This basic issue was however somewhat blurred in the instant case as the order for the entry of the caveat also contained other instructions which contemplated the institution of subsequent litigation between all the parties concerned to have their rival claims determined. Suffian F.J. took in effect the view that the back-dated entry of the caveat subject to litigation was not by itself prejudicial to the position of the transferee, and accordingly proceeded to adjudicate upon the claims under the indefeasibility provision as if the litigation were simply an action

by a person claiming under a contract of sale against a subsequent registered transferee. But the Judge also made the following observation:

Did Shepard J. have power to direct the Registrar of Titles to register the plaintiff's caveat and with effect from the date of its presentation, so as to nullify the appearance on the register as proprietors of the third and fourth defendants [the third parties]? I think that he had because subsection (iii) of section 237 provided that the court had jurisdiction to hear the plaintiff's petition and "shall make such order as the circumstances of the case may require"; and clearly the circumstances of the case required that the dispute between the parties be litigated. Shepard J. did not in so many words order the deletion of the names of the third and fourth defendants from the register, *though his order had that effect*;⁴⁸ but I think had he wished to do so he could have done it because section 240 expressly provided that "in any proceedings...in respect of any caveat...the court may...direct the registering authority...to do such acts...as *may be necessary to give effect to the... order of the court*."⁴⁹

This is a very wide statement. The power of the court to alter the register was acknowledged by the Judge without any qualifying reference to the substantive basis on which the court could do so.

As has been noted, Gill F.J. also in effect adjudicated upon the dispute under the indefeasibility provision in his first ground of decision. However, in what would appear to be an alternative ground of his decisions, His Lordship treated the order of the entry of caveat as having the effect of restoring the status quo as between the caveator and the third party on the date of the presentation of the caveat despite the subsequent *de facto* registration of the transfer to the third party. Consequentially the litigation was reduced to one over an issue of priority between two competing equities. It should be realised that even where the third party was a *bona fide* purchaser for value, he would not be in any better position with the *de facto* registration discounted against him. This means that he was deprived of the protection of indefeasibility in favour of an adverse equitable claim which as a matter of fact was not protected by a caveat at the time of the registration of the transfer to him.

Thus behind the question as to whether the court has the power to make an order to so deprive him of the protection, there is the question: on what substantive law does the court base its exercise of the power thereby ascribing to that substantive law an overriding force over indefeasibility provisions? In other words, is not the power of the court, however wide may be the wording of the relevant empowering provisions, to be nonetheless circumscribed by the basic principles of the Torrens system?

48. My own emphasis. In the context of Suffian P.J.'s judgment, the meaning of this clause seems unclear.

49. The emphasis is original.

The main provision which deals with the jurisdiction of the court in the present National Land Code is section 417(1), which reads:

The Court or a Judge may by order direct the Registrar or any Collector to do all such things as may be necessary to give effect to any judgment or order given or made in any proceedings relating to land, and it shall be the duty of the Registrar or Collector to comply with the order forthwith.

No equivalent of such wide provision is found in many other Torrens statutes. For example, in the New Zealand Land Transfer Act, 1952, the only provision conferring jurisdiction on the court to cancel or correct the register is its section 85 which is worded thus:

Upon the recovery of any land, estate or interest by any proceeding in any Court from the person as proprietor thereof, the Court may, in any case in which such a proceeding is not expressly barred, direct the Registrar to cancel any certificate of title or other instrument or any entry or memorial in the register relating to the land and to substitute such certificate or title or entry as the circumstances of the case require, and the Registrar shall give effect to the order accordingly.

This New Zealand provision has received interpretation by the Privy Council in *Assets Co. Ltd. v. Mere Roihi*⁵⁰ and also in *Frazer v. Walker*⁵¹ with regard to the extent of the power it confers on the court. In the words of Lord Wilberforce who delivered the judgment in the latter case,

...the power is carefully circumscribed. It arises upon the recovery of any land, estate or interest by any proceeding in any court from the registered proprietor but only in any case in which such a proceeding is not expressly barred. This is a clear reference to section 63, which, as has been said, bars proceedings against a registered proprietor in all but the excepted cases [i.e. in cases of express exceptions to indefeasibility]. The effect is that the power of the court to cancel or correct does not extend beyond those cases in which adverse claims against the registered proprietor are admitted by the Act.

Although the New Zealand provision is restrictively worded, it may be contended that what lies beneath the Privy Council's interpretation of the provision is a fundamental substantive principle which should hold good for all Torrens system. Under the Torrens system, the validity and force of a registered title as against other persons is governed by statutory provisions, and it should plainly follow that in adjudicating on any issue of title or rights to land, the court is to administer the law as laid down by these statutory provisions. Where a registered title is indefeasible and is not liable to be defeated or otherwise adversely affected in any of the circumstances expressly excepted or permitted by the Torrens statute, the court evidently should have no power to upset the statutory law by making an order to the effect of defeating the title on some other ground.

50. [1905] A.C. 176, 195.

51. [1967] A.C. 569, 581.

If the above view may be accepted as one of general validity, it is submitted that the Malaysian provision, as wide as it is, does not confer on the court an unqualified power to disregard the principle of indefeasibility, but that the power of the court does not extend beyond those cases in which the indefeasibility provision permits a registered title to be affected by adverse claims. Accordingly, it seems desirable to treat *Ong Chat Pang's* case as an authority only for the *ratio decidendi* as contended earlier.

However, this case does indicate a local judicial attitude in favour of reserving to the court a jurisdiction of a wide and unclear ambit without being tied down by the Torrens principles. Such an attitude seems to have already been demonstrated in another quite recent decision of the same Federal Court, *Sungei Biak Tin Mines v. Saw Choo Theng*.⁵² In that case, the plaintiff had succeeded in an earlier suit and obtained a judgment on appeal to the Federal Court declaring that a sub-lease of mining land of which he was the sub-lessee had been wrongfully cancelled under the Mining Enactment, Cap. 147. Pending the appeal in the earlier suit, it happened that his lessor granted a new sub-lease to another person, which was duly registered. In the present proceedings, the plaintiff applied for an order to restore his own sub-lease on the register and also to have that subsequently registered sub-lease cancelled. The Court unanimously allowed the application. In rejecting the subsequent sub-lessee's contention that he had acquired an indefeasible title, the Court observed that when he took the new sub-lease he had knowledge of the plaintiff's appeal in the earlier suit, and that to permit him to stay on the register would be to allow him "to thumb his nose at a judgment of the Federal Court." Although the Court did not explicitly refer to any question of fraud, it would appear that the actual knowledge of the subsequent sub-lessee and his conduct in the circumstances of the case might well have been treated by the Court as amounting to a fraud. Nonetheless, the Court resorted to section 417 of the present Code as the basis for making an order to have the subsequent registered sub-lease cancelled. Suffian F.J. (with whom the other two Judges concurred) stressed, in that case, that this section "clearly says that the court has power to direct the Collector to do all such things as may be necessary to give effect to its judgment or order". It was therefore held that as the judgment in the earlier suit was to the effect that the plaintiff's sub-lease should not have been cancelled, the court was not powerless to get the subsequent sub-lessee off the register simply because the lessor had granted a new sub-lease while he could not have done so had the plaintiff's sub-lease not been wrongfully cancelled.

Taking this limb of the decision on its own, it seems to suggest that the court may order rectification of the register "to give effect to its judgment or order" irrespective of whether or not a third party may in the meantime have acquired a registered title which would otherwise be indefeasible by virtue of section 340. The more desirable view, it is submitted, is to regard this Federal Court decision as being concerned with the specified exception "fraud", and that the order

52. [1970] 2 M.L.J. 226.

which the Court made for the cancellation of the subsequent sub-lease was based on this substantive ground and at the same time was within the jurisdiction conferred on the Court under section 417.

Lastly, it needs to be added that the view in favour of regarding the court as being given a very wide jurisdiction may appear, on the face of it, to be commendable in terms of the court being thereby enabled to do justice in appropriate cases where individual hardships call out for remedies. But this should be weighed against the primary policy purposes of the Torrens system which is meant to facilitate dealings with land by way of, *inter alia*, providing protection to purchasers who have relied on the register. As it is the purchaser who last appears on the register on whom the benefit of indefeasibility is conferred afresh, there is inherent in the working of the system the risk of persons being deprived, without any fault of their own, of their titles, interests or claims in favour of a subsequent purchaser.

Thus, the Torrens system from its very inception has found a solution to this problem by the provision of a fund for the purpose of compensating the victims of such deprivation in certain circumstances. The Malaysian Torrens system is, however, without such a compensation scheme. It leaves the loss where it falls. Any person who, even though without his own fault, has been deprived of his title or right to land, may only look to the civil remedies in contract or tort against the person at fault. Furthermore, under the Malaysian Torrens system, if the loss has been occasioned by an act or omission on the part of the registering authority, his right to claim damages against the State as liable for the wrongs of its servants is very considerably restricted by statutory provisions.⁵³ This being so, the hardships which may be visited upon individuals whose rights have been injured without any available recourse to remedies, may attract judicial sympathy and perhaps even intervention to restore their rights somehow.

Nevertheless, in submitting that the power of the court to adjudicate upon disputes over titles and rights to land under the Torrens system ought to be circumscribed by the principle of indefeasibility, it is to uphold the indispensable policy of the system to protect purchasers, and to maintain that a purchaser may always rely on the protection the extent and limitations of which are exclusively set out by the substantive statutory provisions relating to the indefeasibility of title.

S. Y. WONG*

53. See National Land Code, 1965, s. 22; Government Proceedings Ordinance, 1956, ss. 5 and 6.

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