

ROLE OF EQUITY AND THE APPLICATION OF ENGLISH LAND LAW IN THE MALAYSIAN TORRENS SYSTEM

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ABSTRACT

This paper looks at the applicability of English land law and general equitable principles in the context of the Malaysian Torrens system. Notwithstanding section 6 of the Civil Law Act 1956 and some observations to the contrary in case law, it is argued that relevant aspects of English land law may continue to apply. As for general equitable principles, their application is supported by statutory provisions and case law. This is subject to their application not being in conflict with the principle of indefeasibility and the caveat system provided for in the Malaysian Torrens statutes.

I. INTRODUCTION

The extent to which English land law and general equitable principles are applicable in the Malaysian Torrens system is a vexed question. As a starting point, s 3, which is found in “Part II (General)” of the Civil Law Act 1956,¹ provides, *inter alia*, for the general reception of English common law, rules of equity and statutes of general application in Malaysia in the circumstances specified therein.² However, s 6 of the same Act qualifies s 3 and categorically prohibits the application of English land law and equitable principles relating thereto. Section 6 reads as follows:

Nothing [in Part II (General)] 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

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1 Act 67 (Revised 1972).

2 Reception of the said common law, rules of equity and statutes of general application is allowed 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. As provided in s (3)(1) of the Civil Law Act 1956, the cut-off date for reception in Peninsular Malaysia is 7 April 1956. For Sabah and Sarawak, the cut-off dates are 1 December 1951 and 12 December 1949 respectively. English cases decided after the respective cut-off dates will only be of persuasive authority and not binding as such on Malaysian courts. See also, generally, Andrew Phang, *Cheshire, Fifoot and Furniston's Law of Contract – Singapore and Malaysia Edition* (2nd ed, Butterworths Asia, Singapore, 1998) at 37.

assurance of or succession to any immovable property or any estate, right or interest therein.

As will be seen, case law does not take a uniform position on the application of English land law and general equitable principles in the Malaysian Torrens system. In addition, the lack of clarity in the pronouncements by the courts exacerbates the problem.

In *Tan Wee Choon v Ong Peck Seng*,³ the High Court opined as follows:⁴

[The] common law and equitable rights previously procurable in this country are no longer available since the passing of ss 3(1) and 6 of the Civil Law Act, 1956 and the National Land Code, 1965. ... This intention to preclude the continued importation of common law and equitable rights into this country is further substantiated in s 6 of the Civil Law Act ...

This view that rights arising out of common law or the rules of equity which relate to land are no longer applicable in Malaysia was shared by the High Court in the subsequent case of *Oriental Bank v Chup Seng Restaurant (Butterworth) Sdn Bhd*.⁵

The question which arises, however, is whether the prohibition is absolute and so applies even where there is a lacuna in a land matter and the application of English land law and general equitable principles is not inconsistent with the aims and objectives of the Malaysian Torrens system.

It is suggested below that the solution may be to evaluate whether the application of English land law and general equitable principles in a particular situation goes against the policy objectives of the Malaysian Torrens system. If not, they should continue to apply.

II. JUDICIAL PRONOUNCEMENTS ON PROHIBITED APPLICATION

The policy objectives of the Malaysian Torrens system of land registration embodied in the Peninsular Malaysia National Land Code 1965⁶ and the Sarawak Land Code (Cap 81)⁷ seek to provide for certainty and security of title and interests in land. In *Eng Mee Yong v Letchumanan*,⁸ a case on

3 *Tan Wee Choon v Ong Peck Seng* [1986] 1 MLJ 322.

4 At 323-324.

5 *Oriental Bank v Chup Seng Restaurant (Butterworth) Sdn Bhd* [1990] 3 MLJ 493 at 495.

6 Peninsular Malaysia National Land Code 1965, Act 56.

7 The Sabah Land Ordinance (Cap 68) embodies a modified Torrens system of land registration which does not confer indefeasibility of title or interests in land which is a feature of central importance in the Torrens system of land registration. See the Sabah cases of *Sia Hiong Tee v Chong Su Kong* [2015] 4 MLJ 188 at [29]-[31] and *Sabindo Nusantara Sdn Bhd v Majlis Perbandaran Tawau* [2011] 8 MLJ 653 at [15].

8 *Eng Mee Yong v Letchumanan* [1979] 2 MLJ 212.

appeal from Malaysia, Lord Diplock, in delivering the judgment of the Privy Council, affirmed that:⁹

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.

On the prohibited application of English land law and equitable principles related thereto, the Privy Council in *United Malayan Banking Corporation Bhd v Pemungut Hasil Tanah, Kota Tinggi*¹⁰ exhorted as follows:¹¹

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 in so far as the Code itself may expressly provide for this.

Indeed, as early as 1917, in *Haji Abdul Rahman v Mohamed Hassan*,¹² Lord Dunedin, in delivering the judgment of the Privy Council, had this to say of the then Selangor Registration of Titles Regulation 1891 which was modelled on the Torrens system of land registration:¹³

It seems to their Lordships that the learned judges ... 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 ...

The essence of Lord Dunedin's speech would appear to be that the system of registration of title and land dealings contained in a codifying enactment does not permit the application of the doctrines of equity relating to English land tenure to land matters in Malaysia.

In a similar vein, on the applicability of the bare trust concept to a vendor/purchaser situation in the Malaysian Torrens system, the Privy Council in *Chin Choy v Collector of Stamp Duties*,¹⁴ in view of s 6 of the Civil Law Act 1956, had, by way of *obiter*, expressed reservation that:¹⁵

9 At 214. And for that matter, the Sarawak Land Code (Cap 81) as well.

10 *United Malayan Banking Corporation Bhd v Pemungut Hasil Tanah, Kota Tinggi* [1984] 2 MLJ 87.

11 At 91.

12 *Haji Abdul Rahman v Mohamed Hassan* [1917] AC 209.

13 At 216.

14 *Chin Choy v Collector of Stamp Duties* [1981] 2 MLJ 47.

15 At 48 (emphasis added).

... 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.

These Privy Council cases would suggest that, given the prohibition contained in s 6 of the Civil Law Act 1956 and that the National Land Code 1965 is a complete and comprehensive code of law governing the tenure of land in the Malaysian Torrens system, to allow the application of English land law and equitable principles related thereto would only serve to erode the policy objectives of the Malaysian Torrens system as noted above.

In *Eng Mee Yong*, the Privy Council was troubled by the continued application of the equitable doctrine of notice in place of the system of caveats. Lord Diplock stated the rationale for having the system of caveats in the National Land Code 1965 as follows: "The system of private caveats is substituted for the equitable doctrine of notice in English *land* law ..."¹⁶

This is an authoritative statement that the equitable doctrine of notice is part of English land law. Constructive notice is an example of the equitable doctrine of notice. Its application leads to insecurity and uncertainty of title and interests acquired by an innocent third party purchaser in the mistaken belief that the registered proprietor has an unencumbered title. Failure to caveat would, thus, jeopardise one of the aims of the Malaysian Torrens system, namely, to maintain the conclusiveness of the register and this would in turn give rise to uncertainty and insecurity of title and interests in land dealings. In addition, the application of the doctrine of constructive notice would undermine the role which the system of caveats is designed to play in this regard. In *Holee Holdings (M) Sdn Bhd v Chai Him*,¹⁷ the High Court also expressed its concerns that acceptance of such an equitable doctrine would rock the very foundation of the National Land Code 1965, given its indefeasibility provisions and the caveat system provided therein.¹⁸ Hence, the application of the equitable doctrine of notice should not be permitted as it is inconsistent with the policy objectives of the Malaysian Torrens system.¹⁹

In *United Malayan Banking Corporation Bhd*, the registered proprietor had failed to pay the rent due in respect of the land to the State Authority. Prior to this, the land was mortgaged to UMBC bank. The State Authority subsequently forfeited the land pursuant to the provisions of the National Land Code 1965. Both the registered proprietor and the bank brought proceedings in respect of the forfeiture. The issue was whether the English rules of equity dealing with relief against forfeiture had any application to forfeiture of alienated land duly brought about under the provisions of the

16 *Eng Mee Yong v Letchumanan*, above n 8, at 214 (emphasis added).

17 *Holee Holdings (M) Sdn Bhd v Chai Him* [1997] 4 MLJ 601.

18 At 645.

19 For Federal Court cases which have also criticised the application of the equitable doctrine of notice to Malaysian land law matters, see *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85 at 88; *Tai Lee Finance Co Sdn Bhd v Official Assignee and Co* [1983] 1 MLJ 81 at 84 and the Court of Appeal case of *Ong Tin v The Seremban Motor Garage* (1917) 1 FMSLR 308 at 314.

National Land Code 1965. The Privy Council found that the forfeiture was properly brought pursuant to the provisions of the National Land Code 1965. Their Lordships rejected the contention that the English equitable rules as to relief against forfeiture were not part of the law of England relating to the tenure of immovable property. In their 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. Among these incidents was the right, in appropriate circumstances, to the grant of relief against forfeiture,²⁰ the application of which was prohibited by s 6 of the Civil Law Act 1956. In addition, s 3(1) of the same Act could not be relied upon, given that the matter of forfeiture for non-payment of rent was exhaustively dealt with by the National Land Code 1965 which is a complete and comprehensive code of law governing the tenure of land in the Malaysian Torrens system in this respect.

In *Haji Abdul Rahman*, the Privy Council similarly cautioned against applying doctrines of English equity indiscriminately. Their Lordships took the view that the phrase “equity of redemption” was inappropriate under the then Torrens-modelled Selangor Registration of Titles Regulation 1891.²¹ The concept of a conveyance in security amounting to a common law mortgage was inapplicable in the circumstances as the 1891 Regulation recognised only a Torrens mortgage. This is because, under the latter, there is no transfer of the title to the land to the mortgagee who acquires only a registered interest therein. The legal title to the land remains vested in the mortgagor (registered proprietor). Upon default by the mortgagor, the mortgagee has a statutory right to enforce his security by way of a sale of the land or to take possession thereof. By contrast, in a common law mortgage, legal ownership is conveyed to the mortgagee with the mortgagor having only a right in equity to redeem the land upon repayment of the loan to the mortgagee.²² Thus, to speak of the equity of redemption for a mortgage under the 1891 Regulation (and now the National Land Code 1965) was clearly technically and legally incorrect.

That the bare trust concept is a peculiarity of English land law, as observed by the Privy Council in *Chin Choy*,²³ and, hence, incompatible with the Malaysian Torrens system, was explained by the Federal Court in *Macon Engineers Sdn Bhd v Goh Hooi Yin*.²⁴ What passes under a contract for sale is only the beneficial ownership which the purchaser has and which entitles the land to be transferred to him. The beneficial ownership does not carry with it any interest in land, whereas the legal or registered ownership, which the vendor has, does. Thus, it is clear that a vendor under a contract of sale

20 *United Malayan Banking Corporation Bhd v Pemungut Hasil Tanah, Kota Tinggi*, above n 10, at 91.

21 *Haji Abdul Rahman v Mohamed Hassan*, above n 12, at 216. The current Torrens statute applicable in Selangor is the National Land Code 1965.

22 See also *Malayan United Finance Bhd v Tay Lay Soon* [1991] 1 MLJ 504 at 507-508.

23 *Chin Choy v Collector of Stamp Duties*, above n 14, at 48.

24 *Macon Engineers Sdn Bhd v Goh Hooi Yin* [1976] 2 MLJ 53.

does not part with his interest in land²⁵ so long as registration has not been effected in favour of the purchaser. The vendor's interest in the land is capable of being caveated to prevent further dealings with the land so as to protect the purchaser's right therein. Notwithstanding this material difference which exists in English land law and the Malaysian Torrens system, subsequent Malaysian cases²⁶ have continued to apply the bare trust concept with impunity. The Federal Court has also declared in a subsequent case that "... it is too late now to question the applicability of the concept of the bare trust in a vendor/purchaser situation in Malaysia...".²⁷ This indiscriminate (and inconsistent) application of the bare trust concept leads to confusion and uncertainty in the Malaysian Torrens system.

The Privy Council in *Registrar of Titles, Johore v Temenggong Securities Ltd*²⁸ also advised against:²⁹

... 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 ... for the analogy is not close and is liable to be misleading.

This is because, under the Malaysian Torrens system, a purchaser of land under an agreement cannot have any registrable interest therein, unlike a purchaser in English land law who has an equitable interest in the land where the remedy of specific performance is available.³⁰ In contrast, all a purchaser has under the National Land Code 1965 is a right to the land against the vendor personally, that is, a right *in personam*, which entitles him to sue under the agreement for specific performance. The purchaser's right will only become one *in rem*, that is, good against the whole world, when he is registered as proprietor. Registration of the transfer vests in the purchaser the legal title to the land.³¹

25 At 57.

26 See, for example, *Chua Hee Hung v QBE Supreme Insurance Bhd* [1990] 1 MLJ 480; *Hon Ho Wah v United Malayan Banking Corp Bhd* [1994] 2 MLJ 393; *J Raju v Kwong Yik Bank Bhd* [1994] 2 MLJ 408; and *M and J Frozen Food Sdn Bhd v Siland Sdn Bhd* [1994] 1 MLJ 294.

27 *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12 at 28.

28 *Registrar of Titles, Johore v Temenggong Securities Ltd* [1976] 2 MLJ 44.

29 At 45.

30 *Lysaght v Edwards* (1876) 2 Ch D 499 at 506. See also Harpum and others (eds) *Megarry and Wade: The Law of Real Property* (8th ed, Sweet and Maxwell, London, 2012) at 15-052.

31 *Bachan Singh v Mahinder Kaur* [1956] 1 MLJ 97.

III. APPLICABILITY OF ENGLISH LAND LAW AND EQUITABLE PRINCIPLES IN APPROPRIATE CIRCUMSTANCES

From the cases discussed above, it would appear that there is no room for the application of English land law concepts and equitable principles relating thereto where such application would fly in the face of the policy objectives of the Malaysian Torrens system as embodied in the statutory provisions of the relevant Malaysian Torrens statutes and s 6 of the Civil Law Act 1956. The question, however, is whether there is any room for such importation and, if so, the circumstances under which it will be permitted? The answer to this question is explored below in relation to: easements, leases, proprietary estoppel and beneficial interests in land.

A. Elements of an Easement

In *Alfred Templeton v Low Yat Holdings Sdn Bhd*,³² the plaintiffs had obtained a mandatory injunction requiring the defendants to execute and register an easement of way over the latter's land so as to provide access from the plaintiffs' land to a public highway. When the defendants failed to comply with the order, the plaintiffs applied to the High Court for further orders.³³ The High Court stated that, in making the order for the grant of an easement of way in the earlier proceedings, it was satisfied that the common law prerequisites for a right to arise as an easement had been fulfilled. As the learned judge explained:³⁴

[A]ll the four requirements for the creation of an easement of way are satisfied and these are:

- (1) there must be dominant and servient lands;
- (2) the easement must accommodate the dominant land;
- (3) the dominant and servient land-owners must be different persons; and
- (4) the right granted must be capable of forming the subject matter of a grant.

These four basic characteristics of an easement, laid down in *Re Ellenborough Park*,³⁵ the *locus classicus* on the subject, were also referred to with approval in the subsequent case of *Qiristar Bricks Contractor Sdn Bhd v*

32 *Alfred Templeton v Low Yat Holdings Sdn Bhd* [1989] 2 MLJ 202.

33 *Templeton v Low Yat Holdings Sdn Bhd* [1993] 1 MLJ 443.

34 At 458.

35 *Re Ellenborough Park* [1956] 1 Ch 131 at 140.

Loo Ngan Keong,³⁶ where the High Court held that the plaintiffs had proved all the necessary elements and established their claim for an easement.

In contrast, the provisions³⁷ in the National Land Code 1965 on easements do not clearly and comprehensively set out the prerequisites for a right to arise as an easement. While it is clear that a legal easement under the National Land Code 1965 can arise only if it is registered,³⁸ this has to do with the methods of acquisition of a right as an easement which is different from having to first establish that a right has the essential characteristics of an easement. Thus, recourse to English land law for the essential elements of an easement is necessary as the National Land Code 1965 lacks clarity in this respect.

B. Elements of a Lease

Similarly, the National Land Code 1965 does not spell out some of the essential elements of a lease, such as exclusive possession. The definition of a lease in s 5 of the Code³⁹ is not particularly helpful for this purpose. Again, recourse must be had to English land law for the essential characteristics of a lease.⁴⁰ To constitute a lease, the occupier must be granted exclusive possession for a fixed or certain periodic term in return for a payment.⁴¹ This is subject to special circumstances which may negative any intention to create a lease or tenancy.⁴²

The Federal Court, in *Woo Yew Chee v Yong Yong Hoo*,⁴³ laid down the principle that whether a particular transaction amounts to a lease depends on the intention test. The nature and quality of the occupancy must be looked at to determine whether it is intended that the occupant should have an interest in the premises occupied or whether he should have only a personal privilege.⁴⁴ Having regard to the facts and evidence before it (such as the terms of the relevant agreement), the Federal Court found that the intention of the parties was to create a relationship of landlord and tenant. The intention test was

36 *Qiristar Bricks Contractor Sdn Bhd v Loo Ngan Keong* [2013] 10 MLJ 363 at [46].

37 National Land Code 1965, ss 282 and 283.

38 Section 284. Accordingly, the common law method of acquiring an easement by long use is not recognised under the National Land Code 1965 as decided in *Datin Siti Hajjah v Murugasu* [1970] 2 MLJ 153 and *Cottage Home Sdn Bhd v Wong Kau @ Wong Kon Lin* [2014] 3 MLJ 580. Cf the different position under the Sabah Land Ordinance (Cap 68) which is not based on the Torrens system (see *Wangsa Timber Industries Sdn Bhd v Adulfast Anthony Robert* [2001] 4 MLJ 438 and *Tam Kam Cheong v Stephen Leong Kon Sang* [1980] 1 MLJ 36.)

39 That is, “lease” means a registered lease or sub-lease of alienated land.

40 In this regard, see *Street v Mountford* [1985] AC 809.

41 At 818.

42 See, for example, *Facchini v Bryson* [1952] 1 TLR 1386 at 1389 (such as a family arrangement, an act of friendship or generosity).

43 *Woo Yew Chee v Yong Yong Hoo* [1979] 1 MLJ 131.

44 At 133.

also applied in the subsequent Federal Court case of *Mohamed Mustafa v Kandasami*.⁴⁵

It is to be noted that the above Malaysian Federal Court cases were decided before the intention test was overruled by the House of Lords in *Street v Mountford*.⁴⁶ Subsequent Malaysian cases decided after *Street v Mountford* have used the reformulated test laid down in that case.⁴⁷ Although the intention of the parties is an important consideration in determining the relationship of landlord and tenant, as in all other contractual relationships, in every case the intention must be sought not from the mere words of the agreement but from its substance and from the conduct of the parties and the surrounding circumstances. A material circumstance in the consideration of the relationship of landlord and tenant is exclusive possession of the property enjoyed by the occupier. Indeed, exclusive possession is an essential requirement of a tenancy. Thus, the intention of the parties is judged entirely on an objective basis and the primary consideration is exclusive possession. If it is established that exclusive possession was given (with no special circumstances present), the court will make a finding of a tenancy notwithstanding the expressed intention that the arrangement only created a licence.

On the requirement of certainty of term, the Privy Council in *Siew Soon Wah v Yong Tong Hong*,⁴⁸ a case on appeal from Malaysia, relying, *inter alia*, on the English case of *Sevenoaks, Maidstone & Tunbridge Ry Co v London, Chatham & Dover Ry Co*,⁴⁹ held that there was no such thing in law as a lease in perpetuity.⁵⁰ Thus, a lease which has no definite time of commencement or period of duration is void for uncertainty. However, in the case before them, their Lordships found that the agreement entered into between the landlords and tenant was not so vague and uncertain as to be void for uncertainty. The intention clearly was that the landlords should let the premises to the tenant for as long a period as it was within their power to do so and that they should not be able to eject the tenant so long as the latter paid the stipulated rent and that the tenant should be entitled to occupy the property so long as he wished and so long as he paid the rent. In the result, specific performance of the agreement was granted in favour of the tenant.

These cases demonstrate that, in the absence of clarity in the Malaysian case law and the National Land Code 1965, the existence of a lease in Malaysia is still very much based on English land law principles.

⁴⁵ *Mohamed Mustafa v Kandasami* [1979] 2 MLJ 109 at 118. On appeal to the Privy Council, no comments were made with regard to the test adopted (see *Kandasami v Mustafa* [1983] 2 MLJ 85).

⁴⁶ See *Street v Mountford* above n 40.

⁴⁷ See the Court of Appeal case of *Lim Cheang Hock v Tneh Poay Lan* [2007] 4 MLJ 228 and *Tan Chee Lan v Dr Tan Yee Beng* [1997] 4 MLJ 170.

⁴⁸ *Siew Soon Wah v Yong Tong Hong* [1973] 1 MLJ 133.

⁴⁹ *Sevenoaks, Maidstone & Tunbridge Ry Co v London, Chatham & Dover Ry Co* (1879) 11 ChD 625 at 635.

⁵⁰ *Siew Soon Wah v Yong Tong Hong*, above n 48, at 134.

C. Doctrine of Proprietary Estoppel

This doctrine of proprietary estoppel has been applied in the Malaysian Torrens system where it is appropriate to do so in the circumstances. It is a branch of equitable estoppel.⁵¹ The courts will not allow a right in equity arising out of the conduct and relationship of the parties giving rise to an expectation in respect of property to be defeated where it would be inequitable to do so.

In *Devi v Francis*,⁵² the High Court had this to say of the application of proprietary estoppel in Malaysia:⁵³

The answer to this objection [that English equity is not applicable to land matters in Malaysia in view of s 6 of the Civil Law Ordinance 1956] is that the land law of England is one thing and equity another matter and it is expressly provided in s 3(1) of the same Ordinance that the court shall apply the common law of England and the rules of equity and in s 3(2) that in the event of conflict the rules of equity shall prevail.

In *Devi*, the tenant had bought a house with a tenancy of the ground and had a clear expectation of a right to purchase the land. The High Court held that equity would prevent the landlord from terminating the tenancy on a month's notice until and unless the land had been offered to the tenant to purchase and she had refused.⁵⁴

The application of proprietary estoppel finally became settled law in Malaysia in the decision of the Federal Court in *Yong Tong Hong v Siew Soon Wah*,⁵⁵ which was subsequently affirmed by the Privy Council.⁵⁶ The father of the landlords agreed to let certain premises to the tenant in consideration not only of rent but also of a lump sum payment. After the transfer of the reversion to the landlords, they sought to eject the tenant. Apart from holding that the lease was not void for uncertainty, the Privy Council went on to hold that there arose in the tenant's favour an equity or equitable estoppel protecting his occupation because the tenant had paid the lump sum and rent thereafter in accordance with his lease.⁵⁷

The basis of the prevailing law on proprietary estoppel in Malaysia is the approach adopted in *Taylors Fashions Ltd v Liverpool Victoria Trustee*

51 This equitable principle arose from the dissenting speech of Lord Kingsdown in *Ramsden v Dyson* (1866) LR 1 HL 129 at 170 where a land owner whose conduct has raised an expectation of his tenant of being allowed to stay on and thereby inducing him to spend money in respect of the tenancy is prevented from taking any action contrary to that expectation.

52 *Devi v Francis* [1969] 2 MLJ 169.

53 At 172. See also Sinnadurai *The Sale and Purchase of Real Property in Malaysia* (Butterworths, Singapore, 1984) at 210.

54 *Devi v Francis*, above n 52, at 173.

55 *Yong Tong Hong v Siew Soon Wah* [1971] 2 MLJ 105.

56 *Siew Soon Wah v Yong Tong Hong*, above n 48.

57 At 135.

*Co.*⁵⁸ Thus, the current approach in England is the law in force in Malaysia. Subsequent cases have consistently applied this equitable principle whenever the circumstances called for it.⁵⁹

In *Tg Choong Yuan Sdn Bhd v Yeap Geok Kee Sdn Bhd*,⁶⁰ the plaintiff, a developer/contractor, was encouraged to build on the defendant's land at its own expense. The understanding between the parties was that the plaintiff could remain on the land until both parties had jointly developed the land. The plaintiff subsequently had possession of the buildings upon completion and paid the defendant monthly rental for use of the land. In the circumstances, the High Court held that the doctrine of proprietary estoppel applied to protect the plaintiff's equitable interest in the buildings. The defendant's claims for vacant possession, trespass and damages, accordingly, had no merit.

Similarly, in *Guindarajoo all Vegadason v Satgunasingam all Balasingam*,⁶¹ proprietary estoppel operated in favour of the plaintiff. The plaintiff was promised the property by his mother as long as he kept certain promises to her, which he did. The plaintiff's mother subsequently died intestate and the property in question was transferred to the defendant on the basis that he was her lawful heir. The High Court found that the plaintiff had kept his promises right up to the time of his mother's death and that there was an *inter vivos* gift of the property by the mother during her lifetime to the plaintiff. In the circumstances, it would be unjust and unconscionable to deny the plaintiff his interest in the property.⁶² English authorities⁶³ on proprietary estoppel were appropriately referred to and applied.

In light of the discussion above, there is little doubt that the doctrine of proprietary estoppel is now firmly entrenched in the Malaysian Torrens system. As observed by the High Court in *Bhagwan Singh & Co Sdn Bhd v Hock Hin Bros Sdn Bhd*:⁶⁴

... it is too late now, to question the proposition that the English doctrine of equitable estoppel applies and, that as a result, equitable rights or interests in land may arise outside the statutory system of registration of title.

58 *Taylors Fashions Ltd v Liverpool Victoria Trustee Co* [1981] 1 All ER 897 at 915.

59 See, for example, *Mok Deng Chee v Yap See Hoi* [1981] 2 MLJ 321; *Cheng Hang Guan v Perumahan Farlim (Penang) Sdn Bhd* [1993] 3 MLJ 352 and *Amar Singh all Sundar Singh v Jivanjit Kaur d/o Sohan Singh* [2010] 6 MLJ 771.

60 *Tg Choong Yuan Sdn Bhd v Yeap Geok Kee Sdn Bhd* [2011] 9 MLJ 551.

61 *Guindarajoo all Vegadason v Satgunasingam all Balasingam* [2010] 4 MLJ 842.

62 At [23].

63 Such as *Thorner v Major* [2009] 3 All ER 94; *Wayling v Jones* (1993) 69 P and CR 170; *Greasley v Cooke* [1980] 1 WLR 1306 and *Taylors Fashions Ltd v Liverpool Victoria Trustee Co*, above n 58.

64 *Bhagwan Singh & Co Sdn Bhd v Hock Hin Bros Sdn Bhd* [1987] 1 MLJ 324 at 327.

D. Creation of Beneficial Interests in Land

In *Lian Keow Sdn Bhd (in liquidation) v Overseas Credit Finance (M) Sdn Bhd*,⁶⁵ the then Supreme Court, in commenting on the circumstances and the extent to which equitable principles are applicable *vis-a-vis* the National Land Code 1965, observed that the Malaysian Torrens system does not prevent or restrict the creation of beneficial interests in land by way of express, implied, constructive or resulting trusts arising by operation of law by virtue of s 3 of the Civil Law Act 1956.⁶⁶ This aligns with what the Privy Council had similarly observed in *Registrar of Titles, Johore v Temenggong Securities Ltd.*⁶⁷

Thus, in *Takako Sakao v Ng Pek Yuan*,⁶⁸ the Court of Appeal held that the appellant could recover her contributions to the purchase price of land on the basis of a resulting trust.⁶⁹ The appellant, a non-citizen, had acquired an interest in the land concerned without getting the prior written approval of the State Authority, thus contravening the National Land Code 1965. There was no evidence that she was aware of any legal impediment. Neither was there evidence of any illegal intent on her part when she agreed to the commercial arrangement proposed by the first respondent.

Similarly, in *Brett Andrew Macnamara v Kam Lee Kuan*,⁷⁰ there was a trust deed which declared that the defendant spouse held the property registered solely in her name in trust for her plaintiff husband, a non-citizen who contributed the whole of the purchase price pending the approval of the relevant authorities. The High Court held that the trust deed was valid and did not contravene the then Foreign Investment Committee's guidelines. The High Court took the opportunity to comment on the application of equity in the Malaysian Torrens system:⁷¹

... to introduce equity into the Torrens System and [National Land Code 1965] entail uncertainties — whether it be uncertainties as to the type of conduct deplored, or uncertainties as to the status of one's title — but to demand too great a certainty in the law is to cry for the moon. The existing approach provides the system with a degree of flexibility necessary to meet the demands of a property-owning community. There is sufficient latitude within existing authorities to cater for this development ...

65 *Lian Keow Sdn Bhd (in liquidation) v Overseas Credit Finance (M) Sdn Bhd* [1988] 2 MLJ 449.

66 At 463.

67 *Registrar of Titles, Johore v Temenggong Securities Ltd*, above n 28, at 45.

68 *Takako Sakao v Ng Pek Yuan* [2009] 4 MLJ 66.

69 A resulting trust was also held to have arisen in the recent Court of Appeal case of *Zainab bte Ibrahim v Limah bte Che Mat* [2014] 6 MLJ 419. However, no resulting trust was found in the following recent cases: the Court of Appeal case of *Pathma d/o Naganather v Nivedita d/o Naganather* [2006] 1 MLJ 132 and *Tan Sri William Cheng Heng Jem (suing as the President and Deputy President of the Associated Chinese Chambers of Commerce and Industry of Malaysia, and for and on its behalf) v Tan Sri Ngan Ching Wen* [2013] 8 MLJ 417.

70 *Brett Andrew Macnamara v Kam Lee Kuan* [2008] 2 MLJ 450.

71 At [31].

IV. MALAYSIAN TORRENS SYSTEM DOES NOT OUST JURISDICTION OF EQUITY

The discussion of the cases on the creation of beneficial interests in land as well as on the doctrine of proprietary estoppel aptly reflects what the Privy Council had perceptively observed on the role of equity in the Malaysian Torrens system in *Oh Hiam v Tham Kong*,⁷² a case on appeal from Malaysia:⁷³

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.

In *Oh Hiam*, the vendor and purchaser had entered into a contract for the sale of rubber lands. However, neither the vendor nor the purchaser knew when the contract was signed that a lot which was not rubber land was included in the sale. The purchaser was duly registered as proprietor of the said lot. In proceedings brought by the vendor, the Privy Council, in exercising its jurisdiction in the enforcement of a claim *in personam*, restored the order of the trial judge to rectify the register on the ground that the particular lot of land had been included by mistake in the contract of sale. The Privy Council was of the view that the principle of indefeasibility of title enshrined in the Malaysian Torrens system, while operating effectively and indeed necessarily for its effectiveness as between independent rival claimants to a property, “in no way interfered with the ability of the court, exercising its jurisdiction *in personam*, to insist upon proper conduct in accordance with the conscience which all men should obey.”⁷⁴

The Privy Council also gave the following instances of equity acting *in personam* which do not go against the principle of indefeasibility of title, 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 latter cannot, on grounds of equity or conscience, set up the principle of indefeasibility of title to defeat such claims.⁷⁵

72 *Oh Hiam v Tham Kong* [1980] 2 MLJ 159.

73 At 164.

74 At 165. For the position in Australia which is similar, see Heydon and others (eds) *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (5th ed, LexisNexis Butterworths, Australia, 2015) at 134-135: “With the introduction of the [Torrens system], which fundamentally differs from the common law system, it was clear that there would be some question as to the continued role of equity. However, none of the Torrens system legislation was interpreted by the courts as entirely removing Torrens land from the operation of equitable claims and interests.” In New Zealand, see *Frazer v Walker* [1967] AC 569 at 585 where the position is identical.

75 *Oh Hiam v Tham Kong*, above n 72, at 164.

The Court of Appeal in the later case of *Takako Sakao*, noted above, had similarly observed that:⁷⁶

... [the Malaysian Torrens system] does not exclude the court's jurisdiction to grant judicial relief in a claim in *personam* founded in law or in equity [and that] the court will certainly be at hand to render assistance to the appellant, as equity will not suffer a wrong to be without remedy.

In *Takako Sakao*, a resulting trust was found in favour of the appellant to enable her to recover her contributions to the purchase price of a property in respect of which she had acquired an interest in contravention of the National Land Code 1965.⁷⁷

As can be seen, the Malaysian 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.⁷⁸ In this way, the court is entitled to exercise jurisdiction *in personam* to insist upon proper conduct in accordance with equitable principles and norms not incompatible with the Malaysian Torrens system.

However, as a general rule, there is no room for the application of equity where third party rights have intervened. In regard to a transaction involving only the immediate parties thereto, the High Court in *Bhagwan Singh & Co Sdn Bhd v Hock Hin Bros Sdn Bhd*⁷⁹ correctly observed that:⁸⁰

... the Torrens system does not prevent the Court from doing equity where the rights of third parties have not intervened:
Loke Yew v Port Swettenham Rubber Co [1913] AC 491.

In *Holee Holdings (M) Sdn Bhd v Chai Him*,⁸¹ the High Court cautioned that the application of equity to bind a successor in title must be qualified by, *inter alia*, the indefeasibility of title provisions⁸² in the National Land Code 1965. In that case, the plaintiff, which was the successful bidder at a judicial sale, was registered as the proprietor of the land. The plaintiff served notices to quit on the defendants, some of whom claimed that they were tenants with equitable interests in the premises and that the plaintiff was bound by their equity. The High Court held that the plaintiff as registered proprietor had indefeasible title unless the exceptions to indefeasibility could be proved. In

76 *Takako Sakao v Ng Pek Yuan*, above n 68, at [24] and [27].

77 On appeal, the Federal Court ([2009] 6 MLJ 751) held that a constructive trust arose instead. Nevertheless, the significance of the Court of Appeal decision (which aspect was not disapproved of by the Federal Court) lies in reiterating the important role played by equity, in appropriate cases, in granting relief in the face of the strict provisions of the National Land Code 1965.

78 *Wilkins v Kannammal* [1951] MLJ 99 at 100.

79 *Bhagwan Singh & Co Sdn Bhd v Hock Hin Bros Sdn Bhd*, above n 64.

80 At 327.

81 *Holee Holdings (M) Sdn Bhd v Chai Him*, above n 17, at 653.

82 That is, section 340.

addition, as the defendants did not caveat their interests, the plaintiff had no notice of their interests so as to be bound by them. Given the circumstances, the position of the plaintiff was unassailable.

It would be different, however, if the successor in title was a mere volunteer. In *Siew Soon Wah v Yong Tong Hong*,⁸³ the person to whom the land was transferred was the son of the original landlord and the judgment of the court did not show that any consideration was paid for the transfer. In the result, the equity of the tenant was held to be binding on the successor in title of the original landlord given that equity would not assist a volunteer.⁸⁴

This would also be the position even if consideration was paid for the transfer by the successor in title, but the circumstances are such that it would be inequitable for the interest of, say, the tenant, to be defeated.⁸⁵ The successor in title may have paid for the transfer at a discount on the undertaking that he will recognise the interest of the tenant. It would then be inequitable for him to subsequently have the tenant evicted on becoming the registered proprietor. In the result, the undertaking will be made binding on the successor in title as registered proprietor in the way equity sees fit. This will be an instance of equity exercising its jurisdiction *in personam* on grounds of conscience as propounded in *Oh Hiam* and which does not unduly offend the principle of indefeasibility of title provided in the National Land Code 1965.

V. SECTION 206(3) OF THE NATIONAL LAND CODE 1965

Section 206(3) of the National Land Code 1965 provides that non-compliance with the provisions of the Code requiring dealings to be effected in the statutorily prescribed manner shall not “affect the contractual operation of any transaction relating to alienated land or any interest therein”.

In *Templeton v Low Yat Holdings Sdn Bhd*,⁸⁶ noted above, the High Court was of the view that “[section 206(3)] provides statutory authority for the liberal application of equity whenever there is a basis for that ...”⁸⁷

Accordingly, this provision provided statutory authority for the High Court to order the defendants to specifically perform their part of the contract by executing and presenting the relevant form for the registration of an easement.⁸⁸

Thus, in appropriate circumstances, s 206(3) may be relied upon to hold that an equitable interest has been created by the particular agreement in

⁸³ *Siew Soon Wah v Yong Tong Hong*, above n 48.

⁸⁴ See also the Federal Court decision in *Yong Tong Hong v Siew Soon Wah*, above n 55, at 108.

⁸⁵ See, for example, the fact situation in *Devi v Francis*, above n 52.

⁸⁶ *Templeton v Low Yat Holdings Sdn Bhd*, above n 33.

⁸⁷ At 459.

⁸⁸ See also *Qiristar Bricks Contractor Sdn Bhd v Loo Ngan Keong*, above n 36. For a recent case where a claim for an equitable easement failed, see the Court of Appeal case of *Cottage Home Sdn Bhd v Wong Kau @ Wong Kon Lin*, above n 38.

question such that it confers a right in equity to have the agreement specifically enforced by the grant of the appropriate legal interest in question. The High Court had earlier opined, in *Mercantile Bank Ltd v The Official Assignee of the Property of How Han Teh* that:⁸⁹

... independent of our land legislation our courts have always recognised equitable and contractual interests in land. See *Loke Yew v Port Swettenham Rubber Co* [1913] AC 491; Innes 202 SC. See also s 206(3) of the National Land Code.

Similarly, the Federal Court in *Inter-Continental Mining Co Sdn Bhd v Societe Des Etains De Bayas Tudjuh*⁹⁰ held that, even though the agreement between the parties was in substance a sublease of mining land though not in statutory form, it was effective as an agreement to enter into a sublease to which s 206(3) of the National Land Code 1965 applied, and equity would specifically enforce it.⁹¹ In the latest Federal Court case of *S & M Jewellery Trading Sdn Bhd v Fui Lian-Kwong Hing Sdn Bhd*,⁹² the respondent, as the registered lessee, sublet certain floors of a building to the first appellant for a term of 25 years. The latter subsequently discovered that the respondent had not registered the sublease. One of the issues for consideration was whether the unregistered sublease was an equitable sublease. Given that the first appellant had expended substantial sums towards renovation of the demised premises and sublet the demised premises, all with the consent of the respondent, the Federal Court was of the view that the unregistered sublease could be treated as a sublease in equity which was enforceable by a decree of specific performance.⁹³

The National Land Code 1965 only regulates the rights and obligations of the parties concerned from the stage of registration onwards. In the absence of any provisions therein, expressly or impliedly, prohibiting the application of equitable principles, recourse may also be had to s 206(3) to govern the relationship of the parties in respect of the dealings between them in appropriate circumstances.

89 *Mercantile Bank Ltd v The Official Assignee of the Property of How Han Teh* [1969] 2 MLJ 196. at 198. See also *Margaret Chua v Ho Swee Kiew* [1961] MLJ 173 at 175 and *Yong Tong Hong v Siew Soon Wah* [1971] 2 MLJ 105 at 108.

90 *Inter-Continental Mining Co Sdn Bhd v Societe Des Etains De Bayas Tudjuh* [1974] 1 MLJ 145.

91 At 148.

92 *S & M Jewellery Trading Sdn Bhd v Fui Lian-Kwong Hing Sdn Bhd* [2015] 5 MLJ 717. See also the Court of Appeal case of *Pembinaan Eastern Aluminium Sdn Bhd v Narita Shipping and Transport Sdn Bhd* [2014] 4 MLJ 534.

93 At [31] and [51].

VI. CONCLUSION

As a general rule, English land law and equitable principles relating thereto have no application in the Malaysian Torrens system in light of s 6 of the Civil Law Act 1956 and the relevant Torrens statutes in Malaysia. Examples of such non-application include a common law mortgage, the equitable doctrine of notice, and equitable relief against forfeiture, all of which are part of English land law. As for the concept of a bare trust which was ruled a peculiarity of English land law by the Privy Council in *Chin Choy*, its continued application in the Malaysian Torrens system, although an anomaly, may be explained on the basis that it was not definitively dealt with by the Privy Council which merely expressed reservation as to its application by way of *obiter*. Accordingly, it is plausible to argue that *Chin Choy* is not authority for the proposition that the bare trust concept is not applicable under the Malaysian Torrens system.

However, it is clear that certain aspects of English land law do continue to apply to fill the gaps where, for instance, the essential elements of an interest in land recognised in the Malaysian Torrens system, such as an easement or a lease, have not been comprehensively provided for under the relevant Torrens statute. In these instances, recourse to English case law is necessary.

As for equitable principles of general application, s 3 of the Civil Law Act 1956 provides for their continued application in appropriate circumstances. In addition, s 206(3) of the National Land Code 1965 provides statutory authority for the liberal application of equity in appropriate circumstances. However, their application must not offend the principle of indefeasibility of title and the system of caveats provided for in the Malaysian Torrens system.

Notwithstanding that the Malaysian Torrens statutes are a complete and comprehensive code of law governing the tenure of land in Malaysia and its incidents, equitable principles of general application and relevant aspects of English land law may continue to apply provided they are not in conflict with and do not offend the policy objectives of the Malaysian Torrens system. To contend otherwise is to take an extreme view.