

Land Ownership under the Malaysian Torrens System

Salleh Buang
Former Federal Counsel
Attorney General's Chambers
Malaysia

Introduction

Conveyancing lawyers in this country do not, as a rule, pay attention to or cite criminal cases when asked to explain a point involving land law. In the 1998 case of **Public Prosecutor vs. Tan Sri Muhammad Taib [1999] 2 MLJ 305**, they had to make an exception. It is an important case that spanned across the judicial divide, where substantive rules of land law become relevant for the trial court to consider and hold whether a criminal offence has indeed been committed or otherwise.

This criminal case is important for conveyancing lawyers not because the accused was (at that point in time and still is) a political figure to be reckoned with, apart from being a former Menteri Besar (Chief Minister) and a senior member of the UMNO Supreme Council, but because the grounds upon which the learned trial Judge acquitted him was pure land law, and it is these rules of substantive land law which in the end effectively negate the *mens rea* necessary for his conviction.

The Charge

The accused was charged with failing to declare certain assets belonging to him, his wife and children, as required by the Public Prosecutor through a notice issued to him under Section 25(1)(a) of the Prevention of Corruption Act (Act 57). The notice was issued to the accused on April 10 1997. The accused was alleged to have committed the offence at the Anti-Corruption Agency headquarters in Persiaran Duta in Kuala Lumpur on May 26 1997. The accused pleaded not guilty.

The Acquittal

After hearing nine witnesses called by the prosecution, the court held that a *prima facie* case had been laid down against the accused, and his defence was called. The accused refuted the charge by calling seven witnesses in his defence. At the end of the trial, which lasted eleven days, the learned trial Judge gave him the benefit of the doubt, acquitted and discharged him.

Had he been convicted, the former Menteri Besar could be given a maximum sentence of one year imprisonment, a fine of RM2,000 or both. It would mean the end of his political career.

The trial Judge said it was not disputed that the properties mentioned in the proceedings were all registered in the names of the accused and his wife. The Judge, however, accepted the accused's explanation for his non-declaration - which was that he (the accused) believed that since the said properties had been disposed off, he did not have any more beneficial interest in them.

The Judge said that the evidence of the disposal of the accused's interest in the properties was corroborated; there was ample evidence of land transfers being executed. The Judge also observed that the accused's testimony in court had not been challenged or shaken in cross examination. The Judge reiterated that our land law recognises legal ownership as being distinct and separate from equitable ownership.

The Judge also said that as a Menteri Besar (at the relevant time), the accused could not possibly imagine that he could avoid

detection (i.e. that his ownership of the said properties would not have been known by the public). He remarked that “our laws and system of justice would have failed him (the accused) if he is not at least given the benefit of doubt.”

The Judge further held that under Section 182(a)(3) of the Criminal Procedure Code, the accused ought to be acquitted and discharged on the grounds that the prosecution had failed to prove their case beyond reasonable doubt. The accused was accordingly acquitted and discharged.

Meaning of “Ownership” Under the National Land Code

Ownership of land, as far as the National Land Code 1965 (NLC) is concerned, is very easy to prove. A quick search at the relevant registry will tell whether a person is indeed the land’s registered proprietor or not. Whilst the issue document of title (IDT) is good *prima facie* evidence of ownership, the register document of title maintained at the appropriate land registry provides conclusive evidence (Section 89 of the NLC).

If the person’s name appears on the register, his ownership of the land is thus recognised, protected and guaranteed by law. This is the combined effect of Sections 89 and 340 of the NLC.

That, however, is not the end of the story. Whilst the backbone of the Malaysian Torrens system is the NLC, the courts have always been receptive to the continuing role of equity under our land law. Consequently, alongside “legal ownership” of land under the NLC, the courts have also recognised “equitable ownership”.

Equitable Ownership

The issue of equitable ownership becomes important when the registered owner

(vendor) has sold the land to another (purchaser). There is a long line of judicial decisions which say that if a vendor has signed a sale and purchase agreement with a purchaser, and:

- (a) the purchaser has paid in full the purchase price to the vendor;
- (b) the purchaser has been given the Issue Document of Title (IDT) by the vendor;
- (c) the parties have both executed the relevant instrument of transfer (Form 14A); and
- (d) the purchaser has been allowed to enter onto (occupy) the land;

the vendor will, to all intents and purposes, be regarded by the courts as a bare trustee for the purchaser (even though his name is still on the register) whilst the purchaser is now regarded as the equitable owner (i.e. the true beneficial owner) of the land.

In Borneo Housing Mortgage Finance Berhad vs. Time Engineering Berhad [1996] 2 AMR 1537, a decision of the Federal Court, Edgar Joseph Jr. FCJ said that “it is too late now to question the applicability of the concept of the bare trustee in a vendor/purchaser situation in Malaysia”.

The learned Judge noted that the question when the vendor becomes a bare trustee for the purchaser in Malaysia “has not been uniformly answered” in the past. In the old case of **Temenggong Securities Ltd. vs. Registrar of Titles Johor [1974] 2 MLJ 45**, H. S. Ong FJ held that the vendor becomes a bare trustee when the full purchase price has been paid and the vendor has given possession of the land to the purchaser.

In Ong Chat Pang vs. Valiappa Chettiar [1971] 1 MLJ 224, Gill FJ held that the vendor becomes a bare trustee when “he has done all that is necessary to divest himself

of the legal estate” to the purchaser. In **Karuppiiah Chettiar vs. Subramaniam [1971] 1 MLJ 116**, however, the court held that a vendor is said to have divested himself of all his interest in the land when he has received the purchase price in full and has executed the memorandum of transfer in favour of the purchaser.

Having considered all these earlier decisions, Edgar Joseph Jr. FCJ consequently held that “the contractual events” which result in the vendor becoming a bare trustee for the purchaser is the “completion” of the sale, that is to say, when:

- (a) the full purchase price has been paid to the vendor;
- (b) the parties have executed a valid and registrable instrument of transfer of the land.

To sum up, the court will consider the vendor to have fully divested his interest in

the land after he has done all the above. From that moment on, although the vendor’s name is still on the register, his status is merely that of a bare trustee - legally, he does not have any more interest in the land.

It is in the light of this dichotomy between legal and equitable ownerships that the acquittal of the former Selangor Menteri Besar must be understood.

Conclusion

Whilst the Torrens purists may not like the idea of the ghost of equity continuously haunting the Torrens system (with its perennial claim that “the register is everything”), it is now too late to do anything about it. As Edgar Joseph Jr. FCJ candidly said in the Borneo Housing case, it is now too late to question the existence of equity on these shores.