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THE APPLICATION OF EQUITABLE PRINCIPLES IN MALAYSIAN LAND LAW

BY

WAN MARIAM BINTI WAN ABDULLAH

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In the absence of any express provision in the National Land Code, 1965 regarding the application of English rules of equity in Malaysian land law, it has been the cause of much contraversies. This is due in part to the uncertain reservation effected by section 6 of the Civil Law Act, 1956 and in part to the uncertainty whether equitable principles are applicable under the Torrens System as embodied in the National Land Code, 1965. Therefore, this dissertation discusses the extent to which equitable principles are considered to be applicable under the National Land Code through the light of judicial decissions.

The Second Chapter of the dissertation defines the meaning of equity and discusses the development of the rules of equity in land law. The discussion has been specifically focused in England as that was the place where the rules of equity has been first introduced.

In the Third Chapter, the writer tries to highlight the general concept of the Torrens System which was originated by Sir Robert Richard Torrens in Australia and the attitude of the Torrens System towards the rules of equity.

The Fourth Chapter is the most significant chapter in which it deals with the basic features of the National Land Code, 1965 and its different approach towards the rules of equity from the Torrens System in New Zealand and Australia.

Despite of introduction of registration of title through the Torrens System, the National Land Code does not abolish the customary land law. In fact, land held under customary tenure in Peninsular Malaysia, their continued recognition and preservation are provided for under paragraph (a) of sub-section (2) of section 4 of the National Land Code. The details have been discussed in Chapter Five. This chapter also explains that even though the customary land laws adopted the principle of registration under the Torrens System, some of them were however, subject to the application of English equitable principles especially in jual-janji transactions.

The Sixth Chapter lays down some judicial decissions which are in favour of the application of equitable principles in land dealings in Malaysia, such as ownership, leases, tenancies, charges, and liens.

The equitable reliefs in land dealings have been discussed in the last Chapter. Those remedies are provided in the Specific Relief Act, 1950 (Revised 1974).

The writer has attempted to state all the relevant judicial decisions from both views, those who are upholding that the National Land Code recognises the rules of equity and those who do not with their own arguments.

Deficiencies in this dissertation remain solely the writer's responsibility.

PRINCIPLES OF EQUITY IN MALAYSIAN LAND LAW

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CHAPTER I

CHAPTER 1

INTRODUCTION

By virtue of the Selangor Registration of Titles Regulations of 1891, Torrens System was introduced in the Malay States to replace the English deeds system in governing land matters. This was later became the model for the other states to follow. In 1965, a uniformity of the system for all states was introduced into one Code, National Land Code, 1965.

One of the reformative roles of the Torrens System is to do away with the dual ownership of land which is "one of the causes of the evils in the English System of conveyancing". The Torrens System further recognises that "the register is everything". An estate or interest in land can only be acquired by virtue of due conformity with the statutory procedure. As ***Arulanandom J.*** in ***Verama v. Amarugam***[1] said:

> "in interpreting land laws in this country, one should always bear in mind that land laws are governed by the National Land Code which does not allow the law to be tempered by equity".

However, to what extent this statement stands? It seems that some judges, despite of the "the register is everything" recognise equitable estates or equitable interests.

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1 [1982] 1 M.L.J. 107.

Raja Azlan J. concluded in ***Mercantile Bank v. The Official Assignee***[2]:

> "It has not been shown that there are express words in the Statute which preclude me from enforcing the equitable rights of the applicants".

These two contradict views become the primary statement of problem in the writer's study.

1.1. *Objective of the study*

The main objective of this study is to look into the grounds and basis formulated by the judges leading to their different views in applying the equitable principles in Malaysian land law.

1.2. *Scope and methodology*

The scope of the study will be focussed into four areas.

1. The early doctrine of equity in land law.
2. Equitable principles in the early Torrens System introduced in Australia.
3. Equitable principles in Malaysian Torrens System in the early period pre-National Land Code and after the codification of the National Land Code, 1965. Is there any different attitude of the judges in applying the equitable principles between the two periods?

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[2] (1969) 2 M.L.J. 169.

4. Examples of the judicial decisions which are in favour of the reception of equity in Malaysian land dealings and the equitable remedies granted by the judges to the persons who are entitled for equitable rights and interests.

This study is mainly based on library research, using the primary legal sources, via, statutes and judicial judgments. From this judicial judgment also, the problem statement was derived whereby the contradict views given by different judges on the same issue had inspired the writer to study and analyse the statutes and cases which have been relied on by those judges, and the interpretation given by them to cause their different conclusions.

The secondary legal materials like books, journals and articles were also referred to, to help in analysing a particular point of law from different perspectives.

The methodology of this study involves three stages;

1. Stating the facts of the problem which has been derived from the judicial decisions concerning the application of the equitable principles in Malaysian land law.

2. Analysing the facts of the problem and determining the legal issues involved.

3. Searching the relevant authorities to support the findings of the analysis.

1.3. *Hypothesis*

1. The registration and indefeasibility of title introduced by the Torrens System do not necessarily mean to remove the equitable principles in land matters.

2. Different interpretation of the statutes, especially the National Land Code, 1965 by the judges resulted to the different opinions in the application of equity in Malaysian land law.

CHAPTER II

CHAPTER II

THE NATURE AND DEVELOPMENT OF EQUITY

2.1 *Definition*

Early authorities refer equity as 'conscience', 'reason' and 'good faith' as the principles which guide the Court of Chancery, and the term of *'equity'* implies a system of law which is more consonant that the ordinary law with opinion current for the time being as to a just regulation of the mutual rights and duties of men living in a civilised society.[3]

Equity is a branch of law in the promotion of justice which has been enforced exclusively in the Court of Chancery prior to the coming into force of the Supreme Court of Judicature Acts 1873 and 1875.[4] A plaintiff asserting some equitable rights or remedy must show that his claim has "an ancestry founded in history and in the practice and precedents of the court administering equity jurisdiction. It is not sufficient that because we may think that *'justice'* of the present case requires it, we should invent such a jurisdiction for the first time".[5]

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[3] Words and Phrases Legally Defined, Vol. II, at p. 173

[4] Repealed and replaced by the Supreme Court of Judicature (Consolidation) Act 1925, which was in turn replaced by the Supreme Court Act 1981

[5] *Re Diplock* (1948) Ch. 465, at p. 481

Equity has been further referred to as a body of rules or principles which form an appendage to the rules of law, or a gloss upon them. This new body of rules is distinguishable from the general body of law, not because it seeks to achieve a different end (for both aim at justice), nor because it appears at a later stage of legal development.[6]

A classic eighteenth century statement by ***Lord Cowper*** in the case of ***Lord Dudley and Word v. Lady Dudley***[7] is that;

> "Equity is no part of law, but a moral virtue, which qualifies, moderates, and informs the rigour, hardness, and edge of the law, and is a universal truth; it does also assist the law where it is defective and weak in the constitution and defends the law from erafty evasions, delusions, and new subtitles, invented and contrived to evade and delude the common law, whereby such as have undoubted right are made remediless; and this is the office of equity, to support and protect the common law from shifts and crafty contrivances against the justice of the law. Equity therefore does not destroy the law, nor create it, but assist it".[8]

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6 Jill E. Martin, *Hanbury and Maudsley Modern Equity* (13th Edn), London,(1989), at p. 33

7 (1705) Prec. Ch. 241, at p. 244

8 In Malaysia, see ***Southeast Asia Fire Bricks Sdn. Bhd. v. Neo - Metallic Mineral Products Manufacturing Employees Union & Ors.*** (1975) 2 M.L.J. 250, at p. 252, *Abdul Hamid J.* said that "Equity...does not destroy the law, nor create it".

2.2 *Jurisdiction and Development of Equity*

The field of equity is delineated by a series of historical events, and not by a priori theory of plan. At the end of the thirteenth century, a residuum of justice resides in the King as "*fountain of justice*". These petitions were sometimes examined by the King and his council and the relief was granted or refused. Later due to the pressure of business in the council, the petitions were sent to the Lord Chancellor who, as Chief Secretary of the State and "***keeper of the King's conscience***" dealt with them alone. By the end of the fifteenth century, the Chancellor had set up his own court, i.e., the Court of Chancery and dealt with the petitions for relief. The Chancellor was not bound by the writ system or the technical and formal rules of the common law.[9]

Petitions were addressed to the Chancellor in situations in which the petitioner complained that his case was beyond the ordinary mechanism, and he sought another way. The Chancellor was commonly an acclesiastic, well versed in both the civil and canon law. He will dispense an extraordinary justice remedying the defects of the common law on grounds of conscience and natural justice.[10] The Chancellor would give or withhold relief, not according to any precedent, but according to the effect upon

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9 C.F. Padfield, ***Law Made Simple***, London, (1985), at p. 14.

10 Philip H. Pettit, ***Equity and the Law of Trust*** (6th Edn), London, (1969), at p. 4.

his own individual sense of right and wrong by the merits of the particular case before him. It has been said that;[11]

> "Equity is a roguish thing. For law we have a measure ... equity is according to the conscience of him that the Chancellor, and as that is longer or narrower, so is equity. 'Tis alone as if they should make the standard for the measure a Chancellor's foot".

In England, before the Judicature Act of 1873, all branches of equity were ordinarily classified into three headings:[12] the exclusive, concurrent and auxiliary jurisdictions. The exclusive jurisdiction was said to comprise matters in which a court of equity alone had jurisdiction to grant relief, e.g., the enforcement of trust.

The so-called concurrent jurisdiction comprised matters jurisdiction to deal with which was possessed both by the courts of equity and the courts of common law. Thus, a court of equity when granting a decree of specific performance was said to be exercising its concurrent jurisdiction, such as equity had the power to decree specific performance, and law to award damages.

The auxiliary jurisdiction comprised matters in which a court of equity entertained jurisdiction in order to enable parties claiming legal rights the more conveniently or effectively to establish those rights in a court of common law. This included not only cases where a court of equity granted

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11 Holdsworth, *History of English Law*, Vol. I, at p. 467 (n.d).

12 R.P Meagher and W.M.C Gummow, J.R.F Lehane, *Equity, Doctrines and Remedies*, Butterworth Pte. Ltd., London, (1984), at p. 9.