

CONTRACT & EQUITY v TORRENS SYSTEM

The Prologue

The decision of the Supreme Court in *Lee Yoke Chye v. Toh Theam Hock & Co (a firm)*¹ is the latest addition to the continued conflict and rivalry between the torrens system and the conveyancing practice. The torrens system cannot completely abrogate or replace the conveyancing practice which is ostensibly adopted and dressed as a contract between the parties. The courts have sought to harmonize the two: that the contracts and equitable rights are binding between the immediate parties and equitable relief is provided to complete or perfect them within the torrens system.² The inevitable practice is that in the torrens land transactions in this country a contract of sale and a loan agreement precede the transfer and a charge in the case of banks. The contracts govern the rights of the respective parties pending and after completion in respect of charges, and in some cases of, transfers.

The Facts

The facts leading to the present litigation can conveniently be dealt with in three stages.

The First Stage

The respondent-solicitors ("the solicitors") had acted for the appellant when the latter ("the owner") purchased a piece of land ("the land"). Upon registration of the transfer in favour of the owner the Land Office sent the title to the solicitors. At this stage the solicitors were clearly the agents of the owner. If the matters stood as at this stage the solicitors were bound to deliver, and would have had no answer to the owner's claim for the delivery of the title.

¹[1986] 2 C.L.J. 423; [1987] 1 M.L.J. 124 (SC).

²The conflicting views and cases are discussed in Sinnadurai, *Sale & Purchase of Real Property In Malaysia* 199-220 (Butterworths, Singapore 1984).

The Second Stage

The real problem arose with this stage. The owner had appointed her son as her attorney ("the attorney") and the power of attorney had been registered. The attorney was alleged to have sold portions of the land (not yet subdivided) to various buyers ("the subbuyers"). A clause ("the stakeholder's clause") in these sub-sale agreements provided that

[u]ntil such time when a proper representation is agreed to by all the other *co-owners* of the other various portions of the . . . land, the relevant title of the land shall be kept in the safe custody by [the solicitors] who shall be stakeholders thereof (emphasis added).

There is no mention in the judgment of the other terms of the sub-sale agreements. It is also not clear whether the solicitors had acted for the parties in these sub-sale agreements. They probably did. However, it is clear that transfers had not been effected under these agreements.

The Third Stage

The owner subsequently entered into an agreement to sell the whole land to another, *Kursani Sdn. Bhd* ("*Kursani*") through another firm of solicitors. The solicitors refused to hand over the title to the new solicitors to complete the sale to *Kursani*. The refusal was based on the stakeholder's clause.

The Proceedings

The owner applied to the High Court for an order against the solicitors for the delivery of the title. The solicitors took out an interpleader summons naming the owner and the sub-buyers. The High Court refused relief and gave effect to the stakeholder's clause. The Supreme Court allowed the owner's appeal and reversed the judge: the title was ordered to be delivered up.

Preliminary Matters

The owner did not dispute the appointment of her son as the attorney. It was revoked much later and it has no bearing on the

issues. The attorney denied that he had executed the sub-sale agreements. Such denial and the validity of the sub-sale agreements have to be resolved in subsequent (substantive) proceedings. For the present purpose it has to be assumed the sub-buyers were claimants having an interest adverse to the owner.

The Decision & Reasons

In summary the Supreme Court held that

- (a) the issue document of title is evidence of present registered ownership;
- (b) the solicitors were not and could not be stakeholders "as at present advised . . . [of] an 'issue document of title' . . . relating to a large parcel of land . . . yet to be subdivided into building lots."

The grounds of decision of the Court are far from satisfactory. The case does not appear to have been argued fully. It is a pity that our system of justice does not provide for judicial clerks who could provide the judges with the benefit of independent research. Though the law is said to be in the bosom of the judges they could hardly be expected to do their own research with a heavy backlog awaiting justice at their door.

A. Issue document of Title

The Court just referred to the definition of this phrase⁴ and concluded that it was only "evidence that the person named therein is presently the registered owner of the interest in the land." The definition nowhere sets out, describes or even indicates the conclusion of the Court.

The legal effect and purport of the phrase, "issue document of title", could only be declared after a consideration of the other

³*Supra* 427.

⁴S.5 N.L.C. ". . . means any document prepared for issue to the proprietor of any land . . . being a copy of, or an extract from, the register document of title relating thereto."

relevant provisions of the Code. Ss. 86 and 87 deal with the registry and land office titles and state that "the issue document of title shall consist of a copy of the register document of title." S.89 of the Code treats the register document of title as "conclusive evidence" subject to the provisions of the Code.⁵ The copy (issue document of title) must have the same legal effect as the original (register document of title).

There is a difference between the title being mere "evidence" and "conclusive evidence" of the ownership. The former is rebuttable whereas the latter is not. This is essential to give effect to the paramountcy of title by registration under the torrens system.

The reference to the issue document of title in this case was irrelevant. The wide and loose conclusion — that title is just evidence — was not only unnecessary but leads to confusion and uncertainty.

B. Stakeholder & Torrens System

The Supreme Court's decision on this raises two separate but connected questions:

- (a) what is meant by "stakeholder"? and
- (b) is "stakeholding" inconsistent with the Code in relation to land not yet subdivided?

No doubt in normal parlance the term "stakeholder" in a sale transaction refers to the holding of the deposit pending completion or some specified event. The stakeholder is a common agent; he cannot sacrifice the interests of one for the other. He cannot part with the funds without the consent of both or until the occurrence of the event. Stakeholding has been resorted to in the case of goods⁶, shares⁷ and title deeds⁸.

In this case the solicitors and the sub-buyers relied on the stakeholder's clause in the contract. The rights of the parties under the

⁵These refer to defeasibility provisions in s.340 (2) N L C and have no application in the present case.

⁶*Cousens v. McGee* (1867) 4 W W & A'B 29.

⁷*Vindin v. Wallis* (1864) 24 V.L.R. 9.

⁸*Roberts v. Bell* (1857) 7 E & B 323, 119 E R 1267.

contract is determined by construing its terms. It is the intention of the parties that must prevail.

Consequently the construction must be as near to the minds and apparent intention of the parties . . . as the law will permit.⁹

Intention need not be stated in express terms. The modern approach is the purposive approach. The courts always lean to validate a document rather than to invalidate it: *ut res magis valeat quam pereat*.

On that approach what did parties intend by the stakeholder's clause? The sub-buyers purchased portions of the land, the remainder remained with the owner, the registered proprietor. The owner could create registrable encumbrances behind the back of the sub-buyers. It is to prevent that possibility and to secure their own purchases the stakeholder's clause was inserted. The owner, *albeit* by her attorney, agreed to that clause.

When this occurred the solicitors ceased to hold the title as agents of the owner. A change had occurred in their status. From this point they held the title on behalf of both the owner and the sub-buyers.

Assuming for a moment, that the term "stakeholder" was confined to deposits in a sale/purchase transaction, could not the parties by contract invest the solicitors with similar powers and duties in relation to the title? Parties by contract can provide for the custody of common property or property in which they have a common interest, legal or equitable.

At common law the purchaser is entitled to the title. The existence of a valid contract of sale creates an equitable interest in the land. This would include the title to the land. According to Butt, *Contract Of Sale Of Land In NSW*¹⁰

The right to the title deed follows the land itself;¹¹ the title deeds are incident to the purchaser's right to possession under his freehold estate.¹²

⁹12 *Halsbury's Laws of England* (4th Edn) para 1459.

¹⁰(Law Book Co. Sydney, 1985) 269.

¹¹*Harrington v. Price* (1832) 3 B & Ad 170, 110 E R 63, *Buckhurst v. Fenner* (1598) 1 Co. Rep. 1a, 76 E.R. 1, *Re Knight's Question* [1959] Ch. 381.

¹²*Sirode v Blackburne* (1796) 3 Ves. Jun. 222, 225, 30 E R 979, 981, *Austin v. Groome* (1842) Car & M 653, 174 E R 675.

Position Under The Code

Common law principles, not inconsistent with the Code, are recognized.¹³ S. 206(3) of the Code expressly preserves contractual obligations of the parties. Even as between co-proprietors the Code makes express provision as to who should hold the title. S. 343(2) states that the title, in the absence of a contrary agreement between them, should be in the custody of the registrar. Did not the stakeholder's clause provide for the contrary?

The common law expression, "muniment" of title covers the torrens certificate of title.¹⁴ S. 57(1)(c) of the Conveyancing Act, 1919 (NSW) provided that in the absence of a contrary agreement the purchaser was entitled to the possession of the title. In *Braddock Pastoral Co Pty Ltd. v Stead*¹⁵ the vendor sold individual lots of a torrens land, the subdivision of which had been approved but the individual titles had not yet been issued. The purchaser refused to complete unless the individual title to his lot had been issued. The Court held that the vendor had sufficiently complied with his obligation by tendering the (undivided) mother title to the purchaser. This decision serves to illustrate the point that even in respect of torrens land a purchaser of a portion has rights to the mother title.

Apart from the law common sense also suggests that the stakeholder's clause was intended to provide interim protection to the sub-buyers. If the owner wanted to sell the remaining (unsold) portions there should be no difficulty in procuring the production of the title for that purpose.

Conclusion

The result of the decision was not as "interesting" as the point raised in the appeal. The sub-buyers lost the title to their portions. Once transferred to *Kursani* the sub-buyers could have no claim to the title. A caveat could not have been lodged against a part of a land.¹⁶

¹³*U M B C v. Pemungut Hasil Tanah* [1984] 2 M.L.J. 87 (PC).

¹⁴Butt, *op. cit.* 270 citing Baalman, *Torrens System in NSW* (2nd Ed.) 132.

¹⁵[1979] 1 N S W L R 148.

¹⁶S. 322 (1) NLC as amended.

This case raises a more serious and fundamental problem. Has not the time come for a National or standard conditions of sale of land in this country? It would promote certainty and uniformity and help avoid the kind of problem faced by the sub-buyers in this case.

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