

THIS LAND OF OURS – PROTECTING OWNERSHIP, INTEREST AND DEALINGS IN LAND

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ABSTRACT

This article highlights the contribution of Almarhum Tan Sri Harun M. Hashim in laws relating to land and trusts. The research methodology employed for this study is legal doctrinal, through analysing Tan Sri's judicial decisions on land law and the law of trusts. This study reveals that Almarhum Tan Sri Harun M. Hashim had contributed to a vast spectrum of knowledge revolving around land and trusts which is in line with Islam, culture, and values. Tan Sri had addressed and contributed to the development of legal principles in land law including charge, caveat, prohibitory orders, as well as equity and trust principles. Careful consideration of the findings of the review discloses the personal attachment and devotion of the work of Almarhum Tan Sri Harun M. Hashim to the legal development in upholding justice universally as well as to the litigants. As such, the late Tan Sri did not confine his career only as a judge but was also actively involved in and served as a committee member in justice related organisations. The end of his career as a judge saw him continue as an academic, providing a wider platform for him to propagate justice in the preparation of future lawyers and judges.

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TANAH (AIR) MILIK KITA: PENJAGAAN HAKMILIK, KEPENTINGAN DAN URUSNIAGA TANAH

ABSTRAK

Artikel ini mengetengahkan sumbangan Almarhum Tan Sri Harun M. Hashim dalam undang-undang berkaitan tanah dan amanah. Metodologi kajian yang digunakan untuk kajian ini adalah doktrin perundangan, melalui analisis keputusan kehakiman Tan Sri mengenai undang-undang tanah dan undang-undang amanah. Kajian ini mendedahkan bahawa Almarhum Tan Sri Harun M. Hashim telah menyumbang kepada spektrum ilmu yang luas berkisar tentang tanah dan amanah yang selaras dengan Islam, budaya dan nilai. Tan Sri telah menangani dan menyumbang kepada pembangunan prinsip undang-undang dalam undang-undang tanah termasuk pertuduhan, kaveat, perintah larangan, serta prinsip ekuiti dan amanah. Pertimbangan teliti terhadap dapatan semakan mendedahkan keterikatan peribadi dan pengabdian kerja Almarhum Tan Sri Harun M. Hashim terhadap pembangunan undang-undang dalam menegakkan keadilan secara universal dan juga kepada pihak litigasi. Oleh yang demikian, Allahyarham Tan Sri tidak hanya membataskan kerjayanya sebagai hakim tetapi juga terlibat secara aktif dan berkhidmat sebagai ahli jawatankuasa dalam organisasi berkaitan keadilan. Berakhirnya kerjayanya sebagai hakim menyaksikan beliau meneruskan kerjayanya sebagai seorang ahli akademik, menyediakan platform yang lebih luas untuknya menyebarkan keadilan dalam penyediaan bakal peguam dan hakim.

Kata Kunci: Harun M. Hashim, Undang-Undang, Keadilan, Undang-Undang Tanah, Undang-Undang Amanah.

INTRODUCTION

In this chapter, we extrapolate Tan Sri Harun M. Hashim's judgements in cases relating to the law of property, particularly, under the land law and the law of trusts. When Tan Sri Harun M. Hashim sat in the Supreme Court between 1986 to 1994, he had the opportunity to hear and decide - with a panel of two other judges- several appeals relating to rights and interests in land as well as the law of trusts. Cases relating

to land law involved land acquisition, creation, and enforcement of interests in land (charges and caveats), unlawful occupation of state land as well as the creation of a public right of way. Under the law of trust the well-settled rule of equity on the concept of beneficial ownership of the land together with the maxim that equity will not assist a volunteer was further elaborated in determining the existence of an incompletely constituted trust. Tan Sri Harun M. Hashim, together with a panel of fellow judges, set and defined the principles involving the position of bare trustee especially in determining the right of parties who retain their names in the issue document of title but having no interest in the property. The position of this person seems crucial. In Malaysia, a country that holds to the Torrens system, propagating “registration” is everything. The gist is, sometimes justice is not tied up to any system or foundation. It works on the needs and circumstances of the parties.

RESEARCH METHODOLOGY

This study seeks to employ the legal doctrinal analysis method where the research is library and internet based whereby primary sources namely, judicial decisions by the late Tan Sri Harun M. Hashim were reviewed and analysed. In carrying out the works, the scope of the review was narrowed down to decisions on land and trusts. In the analysis, a benchmark on Islamic principles was employed to highlight the late Tan Sri Harun M. Hashim’s interest and contribution to the jurisprudence.

Land Acquisition

Compulsory acquisition of private land is a delicate issue for the court as in deciding upon an appeal, it strives to balance between the government’s substantial right to acquire such land, usually for public purposes, and private land rights. Issues that have gone up to the courts range from challenging the acquisition itself to objecting to the amount of compensation. Under the Land Acquisition Act 1960, persons interested in the award of compensation may object against the amount of compensation awarded by the Land Administrator and such objection is then referred to the High Court for decision. Such cases are referred to as a ‘land reference matter.’ Tan Sri Harun M. Hashim heard

and decided several appeals in land reference matters while he was in the Supreme Court. Such cases are complex in nature as they involved the need to scrutinise both, the award made by the Land Administrator as well as the award made by the High Court judge especially on the method of valuation to arrive at a reasonable compensation for the proprietor whose land is affected.

A particularly challenging case came up for appeal from the Penang High Court in *Pemungut Hasil Tanah, Seberang Perai Utara, Butterworth v Bertam Consolidated Rubber Co. Ltd.*¹ In this case, the Penang state government acquired about thirty-two acres of land from a rubber and oil palm estate called Bertam Estate to construct a public road through the estate. The proprietor of the estate objected to the amount of compensation awarded for being ‘manifestly lower than the market value.’ The High Court increased the amount of compensation by 20%, increased the rate of interest and awarded compensation for various heads including the cost of new drains, reimbursement of all fees paid by the respondent to its valuers and engineer and costs. The High Court also issued a declaration for the government to maintain the drains and to reimburse the respondent in the event of flooding. The Collector in this case appealed against the High Court decision, particularly the heads aforementioned. The respondent cross-appealed against the amount of compensation for being lower than market value and the failure to award compensation for the loss of crops to make way for new drains under the head of severance and injurious affection. Supreme Court Judge Harun M. Hashim delivered the judgement in this case, sitting with Chief Justice Hashim Yeop Sani and Supreme Court Judge, Gunn Chit Tuan. It was held that the method used by the High Court judge to assess compensation was correct and equitable, namely, using the average value as the base figure and then increasing it for development potential. It was also held that the respondent (proprietor) was entitled to a higher rate of interest. The court allowed the appeal relating to reimbursement of surveyor’s fees. The declaration about maintenance of the drains and reimbursement in case of flooding was found to be superfluous and was set aside.

¹ [1990] 1 MLJ 268.

In *Draman bin Kassim v Land Administrator, District of Hulu Terengganu*², Tan Sri Harun M. Hashim sat with Chief Justice Hashim Yeop Sani and Justice Jermuri Serjan to decide an appeal by a registered proprietor against compensation awarded for his land in the Mukim of Kuala Berang. The land, seven acres in area and planted with rubber was acquired for a store site for the Public Works Department, Hulu Terengganu and the government had paid compensation of RM4,800 per acre. The High Court increased the compensation to RM7,000 per acre. The appellant was still unsatisfied as the High Court had rejected the comparison with two lots of land within the same district which had been sold for a higher value. The appellant also contended that the High Court judge had failed to use his discretion to award interest and the appellant was not satisfied with being asked to pay the cost of the assessors. The Supreme Court in this case still concurred with the High Court in rejecting the comparison with the two lots of land in the district as the sale of those lots was not a normal purchase but a special purchase for a specific purpose. Nevertheless, the Supreme Court in this case agreed that the High Court judge had failed to exercise his discretion to order the payment of interest and so allowed the second ground of appeal and ordered interest to be paid to the appellant accordingly. The appeal objecting to paying the cost of assessors was dismissed. From this case, the judges have been able to give justice to the registered proprietor about his claim for interest while properly setting aside the appeal on the method of valuation by scrutinising the nature of the sale of lands sought to be compared.

It was not always the land proprietor who appealed to the Supreme Court against land acquisition proceedings. Sometimes the appellant was the land office. This was the case in *Land Administrator, District of Gombak v Huat Heng (Lim Low & Sons) Sdn Bhd*³ where the land measuring 0.417 acres in Mukim Batu of Gombak was acquired for the project to widen the Kepong-Selayang Pandang Highway. The land administrator in this case appealed against the High Court's decision to pay compensation in a case where the land acquired had been subjected to a condition for surrender to the State Authority as a reserved road upon approval of an application for conversion of the land from agriculture to building. The Supreme Court allowed the

² [1990] 3 MLJ 465.

³ [1990] 3 MLJ 464.

appeal and held that the proprietor should not be allowed to deny the condition he had agreed to, that is to surrender the land indicated in the plan for a public purpose, and he thus cannot claim the market value for the land. It is observed that this judgement was able to stop the proprietor from claiming compensation in a case where he had already agreed to surrender such land earlier to the government.

From these cases on land acquisition decided by Tan Sri Harun M. Hashim, it can be deduced that he was able to (with the panel of other judges) give justice, both to the registered proprietor as well as the government. This approach is in accordance with the Islamic approach to justice (*al-adalah*) to prevent harm and to place something in its rightful place.

Charge

In Malaysia, a charge is a dealing that is most often created on land to secure repayment of a loan. A registered charge obtains indefeasibility of interest in the land for the registered chargee. Litigation concerning charges is abundant in the enforcement of a charge. A chargee, upon default of a chargor has two statutory remedies under the National Land Code 1965 namely, to apply for an order for sale of the charged land through a public auction or to take possession of the charged land.

The position of a registered chargee vis-à-vis purchasers under a sale and purchase agreement is settled law in Malaysia where a registered chargee has a legal interest by virtue of registration of the charge (which is indefeasible in nature) as opposed to a subsequent purchaser that has yet to be registered. Although such purchaser has paid the purchase price in full to the chargor (usually the developer), the courts will still uphold the priority of the registered chargee as a secured creditor.⁴ In August 1992, Tan Sri Harun M. Hashim heard the case of *Buxton & Anor. v. Supreme Finance (M) Bhd.*⁵ together with Supreme Court judges, Justice Mohamed Yusoff, and Justice Gunn

⁴ See *Tai Lee Finance Co. Sdn Bhd v Official Assignee & Ors.* [1983] 1 MLJ 81, *Perwira Habib Bank (M) Bhd. v Bank Bumiputra (M) Bhd.* [1988] 3 MLJ 84, *Perwira Habib Bank (M) Bhd v Oon Seng Development Sdn Bhd* [1990] 1 MLJ 447.

⁵ [1992] 2 MLJ 481.

Chit Tuan. The chargor in this case was a housing developer that had charged the land in Kuala Lumpur to the respondent, Supreme Finance (M) Sdn Bhd as a security for a loan. The chargor then sold the apartments built on the land to several purchasers including the Appellant who had paid the purchase price in full. Upon default of the chargor in repaying the loan, the respondent chargee applied for and obtained an order for sale of the land. The appellant-purchaser applied to set aside the order for sale alleging that the creation of the charge with notice of the appellant's right as a purchaser and 'beneficial owner' of the apartment constituted 'cause to the contrary' under s 256(3) of the NLC. It was held that a purchaser who had paid the purchase price with knowledge of the existence of the charge cannot claim priority based on *bona fide purchaser* for value. The interest of a registered chargee gains priority over a purchaser who entered into the sale and purchase agreement with notice of the charge. The court observed that the purchasers should have protected their rights with a caveat or tripartite agreement with the chargor and chargee.⁶

At the outset, the decision in this case may seem to have been unfair to the purchaser, however, in ruling that the interest of a bona fide purchaser for value cannot prevail over that of a registered chargee, the judges were merely upholding the rule of law under the Torrens system that registration is everything. Furthermore, the purchasers had executed the sale and purchase agreement with an express clause acknowledging prior creation of the charge, hence, they are bound by their contract. Nevertheless, the suggestion by Almarhum Tan Sri Harun M. Hashim when laying down the decision in this case, in regard to a possible means for the purchasers to protect their contractual rights through entering a private caveat or through a tripartite agreement can be further looked into by future conveyancing lawyers and judges to fortify the position of purchasers in this context.

Another case where Tan Sri Harun M. Hashim presided in regard to enforcement of a charge was the case of *MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener)*.⁷ In this case, the dispute was between a purchaser who had bought the charged land by private treaty before the land was sold by public auction and the chargee bank.

⁶ At p. 487, last paragraph of the case report.

⁷ [1992] 2 MLJ 642.

The respondent, the registered proprietor was the chargor who had defaulted in repaying the loan to the appellant resulting in the appellant enforcing the charge and obtaining an order for sale on 29th August 1988. The public auction however was aborted several times and the sale was finally concluded in an auction held on 24th March 1990 upon which the court issued the certificate of sale to the purchaser, Ng Choon Meng on 14th June 1990. It appeared that before conclusion of the sale in the public auction, the respondent had sold the land by private treaty to the intervener with the consent of the appellant with some conditions attached. On June 22nd 1990, the intervener applied to the court to intervene and the court allowed and subsequently set aside the public auction. The appellant appealed to the Supreme Court which allowed the appeal. Tan Sri Harun M. Hashim sat with two fellow judges, namely, Jemuri Serjan, SCJ and Wan Yahya, J, whereupon Tan Sri Harun M. Hashim delivered the judgement of the court. It was held that although under the NLC there is nothing to prevent the chargor with the consent of the chargee to sell the charged property by private treaty, to give full effect to this business arrangement, the chargee should discharge the charge. However, this was not done in this case and the sale by public auction was subsequently concluded with another party. Due to this, and the intervener only intervening after conclusion of the sale by public auction. The court held that the prior sale by private treaty did not confer any superior interest in the land to the intervener against the indefeasible interest of the bank. This judgement is an authority for the proposition that a chargor may still sell the charged land by private treaty subject to consent of the chargee bank. Nevertheless, to avoid the sale from being frustrated, it is pertinent for the chargee bank after consenting to the sale by private treaty, to take timeous steps to ensure that the public auction does not proceed. The obvious way to do this according to the court, is to discharge the charge. Hence, in laying down this judgement, Tan Sri Harun M. Hashim and his fellow judges have created a pathway for a chargor to pursue an alternative option rather than allowing the charged land to be auctioned off.

THE APPLICATION OF THE BARE TRUST CONCEPT UNDER THE MALAYSIAN LAND LAW

The bare trust concept is a creature of English equity which has found a comfortable place in Malaysian land law. This theory is based on the

scheme that the moment a valid contract of sale is entered into, the vendor becomes in equity, a trustee for the purchaser who has paid the full purchase price for the property. Tan Sri Harun M. Hashim had the opportunity to develop this concept in *Chua Hee Hung & Ors v QBE Supreme Insurance*.⁸ In this case, the Supreme Court made a decision involving the position of a prohibitory order entered over a property in which the owner had sold and released all his interests over the property. In this case, the respondents had obtained a judgement against one Chu Yun for the sum of \$120,266.35 with interest. Part of this sum was paid but the balance sum of \$32,550.25 remained unsatisfied. The respondents also obtained a prohibitory order against shares in two leases. It was later notified that the appellants had no more interest in the properties concerned. The three appellants claimed to have bought the flats from Chu Yun and to have paid the full purchase price for the flats. Although Chu Yun was the registered owner of the shares in the leases, he had sold his interests in them to the appellants, had received a full payment of the purchase moneys, and had allowed the appellants to enter into possession of the two units of flats. The appellants applied for the prohibitory order to be set aside. The learned trial judge dismissed the application and the appellants appealed on the ground that being in possession of the properties and the vendors having received the full purchase price indicated that the vendor has no more interest over the property though his name remained as the owner in the land title. The vendor is just a bare trustee.

The three Lordships in *Chua Hee Hung's* case have upheld the principle of equity in order to give justice to the purchaser who had paid the full purchase price. Jessel MR said in *Lysaght v Edwards*⁹ that “it is the moment you have a valid contract for sale, the vendor becomes in equity a trustee for the purchaser of the estate sold.” Furthermore, the House of Lords in *Shaw v Foster*¹⁰ made several remarks pertaining to the bare trust concept. Lord O’Hagan¹¹ observed that:

“By the contract of sale the vendor in the view of a court of equity disposes of his right over the estate, and on the execution of the

⁸ [1990] 1 MLJ 480.

⁹ (1876) 2 CH D 499, at p 506.

¹⁰ (1872) LR 5 HL 321

¹¹ Ibid, p 349

contract he becomes constructively a trustee for the vendee, who is thereupon on the other side bound by a trust for the payment of the purchase money.”

A wealth of local authorities were found applying the concept of bare trust to the Malaysian land law but they differ as to at which stage the bare trust may arise. Among the judgements is the Supreme Court’s decision in the case of *Yeong Ah Chee v Lee Chong Hai & Anor*.¹² Peh Swee Chin SCJ observed that:

“It is an old and well-settled rule of equity that under a valid contract for the sale of land, the beneficial ownership of the land passes to the purchaser who becomes the equitable owner, the vendor having a right to the purchase money for which he has a lien on the land.”

In most cases¹³ the Malaysian courts follow the decision of *Lysaght v Edwards*¹⁴ but prefer to apply the bare trust concept in a restrictive situation. For example, the vendor must have received the full purchase price from the vendor,¹⁵ and is able to show that he has done his part of the contract or the contract should be at a stage where specific performance is enforceable.

Lee Hun Hoe, Harun M. Hashim and Mohamed Yusoff SCJJ. have concluded their judgement after reviewing many local cases and agreed with Jacob, J. in *Chang v Registrar of Titles*,¹⁶ in which Jacob, J said:

“It is true that a vendor at the stage of contract where the contract is enforceable by specific performance has at times been described as

¹² [1994] 2 MLJ 614 at p 624A-D

¹³ See, *Ahmad bin Salleh & Ors. v Rawang Hills Resort Sdn. Bhd.* [1995] 3 MLJ 211; *Peninsular Land Development Sdn. Bhd. v K Ahmad*, [1970] 1 MLJ 149

¹⁴ (1876) 2 Ch D 266; The cases which cited *Lysaght* with approval are *Intercontinental Mining Co Sdn v Societe des Etains de Bayas Tudjuh* [1974] 1 MLJ 145 and *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45.

¹⁵ See *Punca Klasik Sdn. Bhd. v Foh Chong & Sons Sdn Bhd. & Ors* [1998] 1 CLJ 601; *Borneo Housing Mortgage Finance Berhad v. Time Engineering Berhad* [1996] 2 CLJ 561.

¹⁶ [1976] 50 ALJR 404.

a trustee¹⁷ and if by that no more is meant than that the purchaser is regarded by equity as the beneficial owner of the estate of which the vendor is the legal owner then there is no difficulty in describing the vendor as a trustee.”

Chua Hee Hung’s case emphasised two main principles: firstly, the bare trustee concept, although being an English creature of equity, has been upheld in many courts in Malaysia on the ground of doing equity to the parties. Secondly, the scope of the interest of parties in land contracts that have failed to register their rights has been narrowed down to an interest that can be enforced *via* specific performance. Given that the parties have paid the purchase price in full where this right is enforceable *via* specific performance, the vendor who has received it can be recognised as a bare trustee, holding property without having an interest in it. Thus, in this case, a judgement for a debt armed with a prohibitory order cannot be enforced against a property of a person who is just a bare trustee since he has relinquished all his interests over the property. It is seen therefore that the decision in this case has upheld the position of a purchaser who has paid the full balance purchase price vis-à-vis a judgement creditor who has obtained a prohibitory order. By using the concept of bare trust, Tan Sri Harun M. Hashim in the Supreme Court has developed the jurisprudence to protect the interest of the purchaser and this approach is in line with the Islamic notions of justice to give due rights to the parties.

BALANCING PUBLIC RIGHTS AND PRIVATE RIGHTS IN PUBLIC RIGHT OF WAY

The land law in Malaysia through the main statute i.e., the National Land Code (revised) 2020 (hereinafter referred to as ‘the NLC’) promotes justice through the registration of all rights and interest in land. Nevertheless, the State has the right to acquire alienated land (private land) for some public purposes. This can also be done under the Land Acquisition Act 1960 as discussed earlier. One of the justifications to take back private land is to protect public rights and interests.

¹⁷ See for example, *Shaw v Foster* (1872) LR 5 HL 321; *Lysaght v Edwards* (1876) 2 Ch D 499

In the case of *Lye Thean Soo & Ors v. Syarikat Warsaw*¹⁸ the respondents (plaintiffs) in this case were sand mining and sand contractors. They had entered into agreements with various landowners to mine, work and take away sand from their holdings. Entry to their holdings was by way of an access road on a lot which for many years had been reserved for a road and set aside as such and used by the public. Although the lot of land had been surrendered to the government it had not been taken over by the government. The National Land Code 1965 has dedicated a long and clear provision for the creation of Land Administrator Public Right of Way. Section 389

(1) of the NLC provides for Land Administrator's Right of Way where the benefit is for the public. Nonetheless, this case marks a different but common situation in which the right of way may be created prior to the birth of the NLC itself. The issue was whether the lot was a public highway? The judges, including the late Tan Sri Harun M. Hashim concluded that apart from having the legislation, the right of way may be created through dedication. In this case, the path has been used by the public, particularly those living in the vicinity for many years, even before the third appellant acquired ownership of the land, without interruption. The owner of the lot had taken no steps to ensure that a public right of way was not so created. The path had been used and enjoyed by the public as a right for so many years openly and without interruption and must be known to the owner of the land. The High Court judge had approved the common law method of establishing a public right of way by proof of dedication in his judgement which was subsequently approved by the three judges sitting at the Supreme Court. They confirmed the decision of the learned High Court judge and found no reason to interfere with his decision.

This case also shows that a strict interpretation of law should not be advocated in achieving and doing justice.

PRIORITIES OF CAVEAT AGAINST OTHER REGISTERED INTERESTS AND REMOVAL OF CAVEAT

Priorities of Caveat Against Other Registered Interests

¹⁸ [1990] 3 MLJ 369.

Tan Sri Harun M. Hashim and two other Lordships had deliberated on issues of competing claims and priorities in *KSM Insurance Bhd v Amanah Chase Merchant Bank Bhd*¹⁹. Apart from the issues relating to charges, this court also addressed the issue relating to competing claims between the right of the registered chargee and the interest of the caveator which has been secured through the entry of private caveat. The court has referred to many earlier cases in which it was upheld that the right of the registered chargee prevails against the right of the caveator protecting their interest via private caveat. In this case, the caveat was entered later in time than the registered charge, and the caveatee had failed to prove two main duties as prescribed in *Eng Mee Yong & Ors v Letchumanan*²⁰ that:

“The onus that lies upon the caveator in an application by the caveatee under s 327 for removal of a caveat (is that) he must satisfy the court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried; and, having done so, he must go on to show that on the balance of convenience it would be better to maintain the status quo until the trial of the action, by preventing the caveatee from disposing of his land to some third party.”

In the case of *Rajinder Kaur v Jeswant Singh*²¹ Syed Agil Barakbah HCJ explained another burden to prove as:

... (The) duty of the trial judge is to ascertain whether there is a serious question to be tried...

The appellant’ right as the purchaser of the properties under dispute shall not be denied but postponed to a later stage after the interest of the registered charge is determined.

Issues on priorities of caveat also appeared in the case of *J Raju v. Kwong Yik Bank Bhd & Anor*²². The appellant was the registered proprietor of a property which was charged to Perwira Habib Bank Bhd and Kwong Yik Bank Bhd (‘the respondents’). Foreclosure proceedings were taken out by the respondents and an order for sale was issued.

¹⁹ [1992] 1 MLJ 649.

²⁰ [1979] 2 MLJ 212.

²¹ [1987] 1 MLJ 214.

²² [1994] 2 MLJ 408.

After three unsuccessful auctions, a fourth auction was held in which the respondents were the highest bidders at the sale. They, however, did not comply with the conditions for sale, which required that they pay a 10% deposit to the senior assistant registrar ('the SAR') before the auction. Nevertheless, the Registrar declared them to be successful bidders, for the reason that they were entitled to set off the 10% against the sum due on the charge. The appellant claimed that he was not notified of the date of the auction sale and was aggrieved by the breaches of its conditions, and therefore entered a private caveat against the land which was duly registered. Later, the respondents entered into an agreement to sell the property to Mitsubishi Corp.

The respondents made an application for the removal of the caveat and the High Court allowed the application, holding that the appellant had divested his interest in the land. The appellant made an appeal. The court allowed the appeal on the grounds that the vendor of land is only regarded as having divested himself of the beneficial interest in his land and vested it in the purchaser at the time when the purchase money has been paid in full. The court was of the view that in an application under s 327 of the NLC by a caveatee for the removal of a caveat, the onus lies upon the caveator to satisfy the court that he has a caveatable interest in the land. The appellant in this case would have a caveatable interest if he could satisfy the court that his claim to the interest in the property would raise a serious question to be tried.

Addressing this case on the premise of the theme of this article, i.e the land is ours, protecting ownership, discussion on this case was deliberated on how the Supreme Court with a quorum of three judges had beautifully shown detailed concern in upholding justice. In this case, where it involved complaints by the chargor that as he was unaware about the date of the auction, he was deprived from exercising his right to redeem the property which is a right available to him until the fall of the hammer.²³ Under the law, the requirement to serve a copy of the order of the court on the chargor is provided initially by s

²³ See s.266(1) NLC on the right of the chargor to tender amounts before conclusion of sale. As regards the fall of the hammer being the point in time that sale in public auction is concluded, see the Supreme Court's decision in *M&J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor*. [1994] 1 MLJ 294.

258(1)(a) of the NLC. The provision in s 259(2)(c) as regards subsequent sale however was silent on this requirement although there is a specific requirement for the sale to be publicly advertised in the same manner as previously directed. Hence, the mere omission by the legislature to mention a specific procedure will not detract from the principle that such direction by an officer of the court must be exercised judiciously after giving the parties the opportunity of being heard.

Moreover, the order made by the SAR specifically provided that in the event of the sale being abortive, the matter should be adjourned, and a date fixed for further directions. On this, the Supreme Court felt that there was a strong indication of an obligation to hear both parties, and the chargor, before the SAR proceeded to issue any directions involving any change in the conditions or value of the property.

Another allegation raised by the chargor in his memorandum of appeal was about the failure of the SAR to ensure the requisite payment of the deposit was in compliance with the conditions of sale before any rights of set-off against the sums due could be exercised. Thus, there was a case of non-compliance with the conditions of sale.

Paragraph 2 of the conditions of sale in the fourth auction sale, as reproduced in the earlier paragraph of this judgment, allows the chargees merely to set off the purchase price against the amount due on the charge 'in the event of him becoming a purchaser'. The panel of judges were of the view that these words can be taken to mean that the right to set off could only arise at that stage when the chargees were declared the successful bidders or purchasers and certainly not before then. This interpretation is further reinforced by the terms of para four of the conditions of sale which requires 'all intending bidders' to deposit 10% of the reserve price with the SAR. The term 'all intending bidders' must necessarily include the chargees who had not at that moment even made a bid, let alone become a purchaser. The court was of the opinion that such construction is consistent with the concept of an impartial need to put every bidder on the same footing and on equal terms in a public auction.

From the affidavits and documents exhibited in the appeal records, it appeared that the Registrar did not deposit the conditional sum of RM250,000 being the 10% of the reserve price before the

auction sale held on 25 November 1988. Instead, a sum of RM2,000 being the mandatory cost payable under the order made on 22 January 1987 was paid before the sale and a further RM250,000 was only paid three days after (and not before) the sale. Under the circumstances, the Court agreed that there is, yet another serious triable issue raised by the chargor. The affidavit evidence indicates that the auction sale was held on 25 November 1988 and the caveat by the chargor was entered on 5 June 1989. The entry regarding the sale was then entered in sequence after the entry of the chargor's caveat. These events which could lead to the question of indefeasibility and notice are again matters to be dealt with at a proper trial.

Considering all the issues raised by the chargor and the reply deposed to by the chargees, the court was satisfied that there exists a conflict of evidence, where on the face of it was not to be inherently improbable. Such conflict cannot be disposed of based on affidavit evidence alone and that such conflict should be determined at a proper trial. The chargor's counsel was correct in his submission that the evidence before the judge left serious questions to be tried and that he should have maintained the status quo between the parties until the determination of these disputes.

The learned Lordships had allowed the appeal, set aside the order of the High Court and directed the caveat to remain until the final disposal of the suit. The respondent shall pay the costs here and, in the court, below. The deposit is to be returned to the appellant/chargor. The authors after reading the case for a few times felt edified with the details and the sensitivity of the members of the court in their journey to do justice to the parties.

A similar issue raised and heard by the late Tan Sri Harun M. Hashim with a different quorum within the same year. In *Gondola Motor Credit Sdn Bhd v. Almurisi Holdings Sdn Bhd*,²⁴ the quorum was Harun M. Hashim, Jemuri Serjan SCJJ. and Wan Yahya J. The case was heard and deliberated on 3rd September 1992. It was about a chargee who applied for an order for sale of land for non-payment of the principal sum and interest under s 256 of the National Land Code 1965. The court made an order for sale in May 1987 and the property

²⁴ [1992] 2 MLJ 650.

was sold in a public auction in July 1989 to the appellant. The appellant then received a certificate of sale from the court under s 259 of the NLC. The certificate of sale, however, could not be registered as there was a caveat entered by the respondent over the land. The appellant later applied for the removal of the caveat and sought for the registration of the certificate of sale. The application was dismissed and the appellant appealed. It was held by the Supreme Court that at all material times the option to purchase, and the agreement were subject to the registered charge. The respondent as a director of the company involved was aware of the existence of the charge on the land. Any dealing after the charge and with notice of the charge, as here, cannot defeat the indefeasible interest of the registered chargee and through him, the purchaser at a judicial sale. With the default judgement obtained in that suit, there is in fact and in law, no longer any justification for the caveat to remain on the register.

PROHIBITORY ORDER

In *Hon Ho Wah & Anor v. United Malayan Banking Corp Bhd*,²⁵ the late Tan Sri Harun M. Hashim delivered the judgement of the Supreme Court together with the other two judges. This case involved a competing claim between an equitable interest and an interest protected *via* a prohibitory order. The appellants were purchasers of two apartment units in an apartment block which was built under a joint venture between the developer and a church. The church, as the registered owner of the land on which the property was to be built, executed third party charges to the respondent's bank to finance the developer. Upon default, the bank applied for an order for the sale of the property, but the issue was settled outside court.

The appellants bought two units of the apartment built by the developer and paid the full purchase price. Later the bank entered a prohibitory order against the apartments pending their sale to realise another judgment debt of RM763,409.21 owed by the developer. The prohibitory order was registered in the Registry of Titles, Pulau Pinang on 21 August 1991. On 23 August 1991, the discharge of the charges was presented for registration.

²⁵ [1994] 2 MLJ 393.

The appellants filed an application to intervene in the proceedings and to set aside the prohibitory order on the ground that as equitable owners of the apartments, they had priority against the prohibitory order. The trial judge dismissed the application and the appellants appealed. The Supreme Court allowed the appeal on several grounds. Since the outstanding sums under the charge on 29 July 1991 had been paid in full to the chargee, the chargee therefore ceased to have any legal interest in the land on that date. The beneficial interest in the land had passed to the developer who then executed the sale and purchase agreements with the appellants. Once the appellants had paid the full purchase price, the developer held the interest in the apartments as a bare trustee of the appellants.

In the present case, the appellants had entered possession of the two apartments before the purchase. Although under the Torrens system, the register is everything, this is only *prima facie*. The appellants were aware of the charge but were shown proof of payment of the sums owed to the bank before executing the sale and purchase agreements. The delay in presenting the discharge of charge for registration on 23 August 1991 did not therefore affect the equitable rights of the appellants.

The prohibitory order should not have been granted as the requirements of s 334 of the National Land Code 1965 had not been complied with. The developer did not hold any interest in land in respect of the apartments when the prohibitory order was obtained and therefore, the appellants had every right to intervene in the proceedings.

It is important to emphasis that a prohibitory order is ineffective unless the debtor is the registered owner at the time the order is entered. Thus, in the case involving bare trustee as above, the court has ruled in *Ong Chat Pang v Valiappa Chettiar*²⁶ and *Munah v Fatimah*²⁷ and in *Dr Micheal Atun Wee v Malaysia Credit Finance Bhd*

²⁶ [1971] 1 MLJ 224.

²⁷ [1968] 1 MLJ 54.

²⁸ that if the debtor is holding it as a bare trustee, the order cannot affect his interest.

TRUST AND ITS CREATION.

The concept of trust is a unique concept in Malaysia. It originated from the English concept which basically refers to the existence of legal and beneficial ownership in an institution. Trust is an obligation enforceable in equity, which rests on a person as the owner of some property, for the benefit of another or for the advancement of certain purposes.²⁹ Historically, the concept of equity was introduced as a mechanism to uphold justice by the Court of Chancery. Presently the same concept is used to compel the trustee to administer in accordance with his conscience, with even a possible sanction of imprisonment until the trustee cover whatever loss.

Despite being originally from the English principles, there is an abundant list of local cases that have elaborated on this concept thoroughly. In 1994, Almarhum Tan Sri Harun M. Hashim sat together with three other Supreme Court Judges, namely Peh Swee Chin and Eusoff Chin to hear 14 appeals in a single case which was made against the order of the High Court on 8th October 1991. In this case, the appellants who were purchasers of land brought an action to be the surviving trustee out of two trustees (the Lee brothers). Both had executed seven trust deeds in respect of seven pieces of land in favour of the plaintiff. These undivided lands were earlier subject to sale and purchase transaction whereby the purchaser had appointed the Lee brother to sign sale and purchase agreement with the vendor.

The purchaser had applied for sub-division of the said land in accordance with the portion chosen by them and a separate sale agreement with the Lee brothers to buy the respective lots and this was made in 1969, a year before the Lee brothers executed trust deed in favour of the plaintiff. Although the sale and purchase were entered before the trust was executed, the trial judge gave his judgment in

²⁸ [1994] 3 MLJ 594.

²⁹ *Datuk M Kayveas v. See Hong Chen & Sons Sdn Bhd* [2014] 4 MLJ 64.

favour of the plaintiff since there was no evidence that the full purchase price had been paid. The trial judge held that there was interest passed under the sale agreement and the purchaser only obtained a caveatable interest on the property and above all the defendants purchaser elected not to give evidence. The defendants appealed and the appeals were allowed and the followings topic relating to the rules of equity and trust were thoroughly discussed in the appeal.

Rules of Equity

The fundamental application of the rules of equity touches on any matters which is not judicially enforceable in the courts of common law. The common law rules which were known to be so rigid and formal had created injustice to certain decisions made by the courts. Equity being an independent system of legal rules acted as a supplement to the existing rules of common law the two systems of law, *i.e* common law and equity, were complementary to each other.³⁰

Equity has always been referred to as fair and justice, moral and ethical developed system of law has ever been assisted by the introduction of a discretionary power to do justice in particular cases where the strict rules of law cause hardship. It consists of a body of rules that evolved to mitigate the severity of the rules of common law.³¹ Principles of justice and conscience are the basis of equity jurisdiction, but it must not be thought that the contrast between law and equity is one between a system of strict rules and one of broad discretion. Equity has no monopoly on the pursuit of justice.³²

In the case of *Yeong Ah Chee v Lee Chong Hai & Anor*,³³ the emphasis is on the rules of equity applicable in Malaysia by virtue of the Civil Law Act 1956. In so far as Peninsular Malaysia is concerned, s 3 of the Civil Law Act 1956 provides that:

³⁰ Ramjohn, M. (2019) *Unlocking Equity & Trusts*, 7th ed., London New York: Routledge Taylor & Francis Group, at 2.

³¹ Matin, Jill E. and Hanbury H. G (1993), *Hanbury & Martin: Modern Equity*, 14th ed., London: Sweet & Maxwell, at 3.

³² *Manju Bhatia v New Delhi Municipal Council* 1997 SOL Case No. 639.

³³ [1994] 2 MLJ 614.

(1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall

(a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April, 1956.

(b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 1st day of December 1951;

(c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered and enforced in England on 12th day of December 1949.

Provided always that the said common law, rules of equity and statutes of general application shall be applied 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.

(2) Subject to the express provisions of this Act or any other written law in force in Malaysia or any part thereof, in the event of conflict or variance between the common law and the rules of equity with reference to the same matter, the rules of equity shall prevail.

Section 3 of the Civil Law Act 1956 is a fundamental provision that decides the date and to what extent English common law and equity is referred to and applied by the Malaysian court. The application is based on three different dates and jurisdictions. There are a lot of arguments on this issue but what is important is that such applications shall be allowed so far as the circumstances of the states of Malaysia and their respective inhabitants permit and subject to such qualification.³⁴

³⁴ Ali, Z. et al., (2016) *A Student Guide to Equity and Equitable Remedies in Malaysia*. Malaysia: Lexis Nexis, 26.

In the appeal, the late Tan Sri Harun M. Hashim and other members of the Supreme Court judges had reiterated that based on s3 of the Civil Law Act 1956, the old and settled law on bare trustee can be applied. This is where under a valid contract for sale of land, the beneficial ownership of the land passes to the purchaser who becomes the equitable owner while the vendor has a right to the purchase money for which he has a lien on the land. The vendor becomes a bare trustee for the purchase once the full purchase price is paid.³⁵

Creation of Private Trust

The issue on creation of trust was highlighted in this case. The Supreme Court judges stated that there was no evidence to support the finding that the transfers to the purchasers or their assignees were void because of the trust deeds. Most of the trust deed (except for the trust deed in Appeal No 5), were found to have lacked certainty of subject, i.e., the trust property, because the beneficial ownership of the lands had already passed to the purchasers when the sale agreements were executed.

There are three essential elements to determine whether the trust had been validly created or not. The court has formulated a test to determine this question based on the three certainties principles laid down by Lord Langdale in *Knight v Knight*³⁶ for a trust to be created. The three certainties are first certainty of intention; secondly certainty of subject; and lastly certainty of object. Certainty of intention is where the words used to create such trust must be clear and imperative. The use of precatory words will not be taken as to create a trust as it will indicate expressions of hope or desire, The court must look at all words

³⁵ *Yong Ah Chee v Lee Chong Hai & Anor and Other Appeals* [1994] 2 MLJ 614.

³⁶ [1984] 3 Beav 148. Lord Langdale MR said, 'First, if words were so used that upon the whole, they ought to be construed as imperative; secondly, if the subject of the recommendation or wish be certain; and thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain.'

used by the testator or settlor to see if, on their true construction in the context of a particular gift, a trust was intended.³⁷

Certainty of subject matter refers to property or subject matter of the trust which must be certain. The law needs to know the exact property that was intended to be left on trust³⁸ and the shares in the trust property to be taken by each beneficiary must also be certain. The last test will be referring to certainty of object whereby the objects or person intended to have benefit from the trust, or the disposition must also be certain. The requirement for certainty of object will not be applicable in cases relating to charitable trust.

Consideration of the seven trust deeds is observable in *Yeong Ah Chee's* case (except for that in Civil Appeal No 5). In this case, the court found that there was certainty of words and also the object, i.e. the names of beneficiaries. Nonetheless, there was no certainty of subject, i.e. trust property, viz the lands, because the beneficial ownership of the lands passed to the purchasers of those subsidiary agreements of sale and purchase in 1969 when the sale of these lands took place, i.e. before the trust deeds were executed. The Lee brothers, named as the trustees of these trust deeds, were also the settlors of the trusts created by those trust deeds could not vest the lands in themselves as trustees when, at the time of signing the trust deeds, they were not owners of the lands both in law and equity.

Nonetheless as for Appeal No 5, there was no sale agreement between the Lee brothers and the predecessor-in-title of the present landowners of Lot 2042. There was no evidence to show that the purchaser of Lot 2042 had sold the lot to the two present owners before the date of the trust deed. Thus, in the absence of such evidence, the Lee brothers, at the time of the signing of the trust deed in Appeal No 5, were the owners of Lot 2040, both at law and in equity and the trust created did not fail for uncertainty of subject or trust property and hence it was a valid trust.

Completion of Trust

³⁷ *Re Hamilton* (1895) 2 Ch 370. Per Lindley LJ.

³⁸ *Palmer v Simmonds* (1854) 61 ER 704.

It is a rule under the law of trust that a settlor must vest the trust property (subject matter of the trust) in the hand of the trustee completely. The fact that a settlor or testator may have fulfilled the requirements for a valid trust³⁹ may not let to the completion of it. A settlor who wishes to create an express trust is required to adopt either of the following methods for the trust to be completely constituted in. First, a transfer of property to the trustees, subject to a direction to hold upon trust for the beneficiaries and secondly, a self-declaration.⁴⁰ This general law is found in the words of Turner LJ in *Milroy and Lord*.⁴¹ whereby the Lordship stressed on the above are two methods involved in constituting the trust property in the hands of the trustee. Once a trust has been completely constituted in the hand of the trustee, the beneficiaries are in the position to enforce a trust and it binds the whole world except a *bona fide* purchaser for value without notice. The settlor is not allowed to claim back the property as the property is now a trust property.

There are a few reasons why the rule of constitution is important and relevant. It provides an important test of the seriousness of a donor's or settlor's intent to make an irrevocable disposition of his beneficial interest in the subject matter of the gift or trust.⁴² In the case involving transfer of property to trustee, the transferor is required to establish that he has done everything according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property.⁴³ A self-declaration on the other hand is a simplest mode whereby the settlor or the original owner of the property needs to make a declaration that he is now holding the property that he owned legally as a trustee. The court will require very clear evidence that the owner had constituted himself as a trustee of his own property.⁴⁴

³⁹ The element of a valid trust is by fulfilling the element of three certainties, namely certainty of intention, certainty of subject matter and certainty of object.

⁴⁰ Ramjohn M, *Unlocking Equity & Trusts*, at 78.

⁴¹ (1862) 4 De GF & J 264 at 274-5

⁴² Watt, G. (2010), *Trust and Equity*, 4th ed., United Kingdom: Oxford University Press, at 119.

⁴³ Re Rose [1952] Ch 499

⁴⁴ Watt, G. (2010) *Trust and Equity*, 4th ed., United Kingdom: Oxford

In the case where none of these two components were available, the trust cannot be enforced and is considered an incompletely constituted trust. Unless and until the expected beneficiary in an incompletely constituted trust can prove the existence of the element of consideration in the transaction, equity will not be able to enforce it as the general rule here is equity will not assist a volunteer and perfect an imperfect gift. A volunteer is a beneficiary who has not given any valuable consideration (in the usual sense of an ordinary law of contract) for the creation of a settlement or trust.

The issue that was raised in the case of *Yeong Ah Chee* was how could the settlors (the Lee brothers), vest the lands in themselves as trustees when, at the time of signing the trust deeds, they were not owners of the lands both, in law and equity? The plaintiffs, who claimed to be the beneficiaries in this case were all volunteers who had not given any valuable consideration for the creation of the trust, and it is a settled rule of equity that a court of equity would not render assistance to a volunteer in the case of an incompletely constituted trust where the trust property has not been finally and completely vested in the trustee. The appeal case that was brought before the late Tan Sri Harun M. Hashim and two other Supreme Court judges showed that the Malaysia court is very pertinent and detailed in ensuring the fundamental principles governing the creation of trust in Malaysia are properly observed.

CONCLUSION

The impact made by Tan Sri Harun M. Hashim's judgements in developing laws relating to land and equity is undeniable. From the concept of indefeasibility of title that emphasises more on the legal right to the recognition of other equitable land dealings, the continuity in ensuring the proper legal concept is adhered to, can be seen in most of the judgements. Similarly in elaborating the concept of trust, the English concept of trusts has blended well with the situation in Malaysia. The importance of ensuring that the legal ownership stays in the hands of the trustee is fundamental to fulfill the real intention of the person creating the trust and at the same time, to protect the right of the beneficiaries.