

Security of Tenure in the Malaysian Computerized Land Registration: A Myth

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Abstract: Following the amendment to the national land code 1965 the registration of title or interest has undergone a transformation from a manual registration to an electronic registration. This was made possible by incorporating schedule 14 or more popularly known as the Computer Land Registration System (CLRS). A paradigm shift in the process of registration simultaneously may pose a risk of exposing both the land authority and stakeholders in conveyancing to a risk of fraud. The introduction of CLRS was made possible by virtue of Section 5A of the National Land Code 1965 where it states that the provisions relate to the forms of documents of title, the procedure for the preparation and registration of any document of title, any dealing or entry in land shall be read in accordance with the 14th schedule. Despite an assurance given by schedule 14 on the conclusiveness of the land data base, it is still far from satisfaction as to whether it is able to secure the land data base or merely creating a myth of security. An analysis of judicial decisions and the current legal provisions were carried out to evaluate the legal implication of inaccurate land data base. Whilst change to a far better system is fully appreciated, it is hope that in the interest of justice and fairness the paradigm shift will create a more secure and will continue to serve the nucleus of the Torrens system that is a convenient, secure and cost effective system. Eventually the land data base should be accurate, reliable and trustworthy to avoid any loss suffered. In a nutshell, security of tenure is not just an idea but should be realized.

Key words: Electronic registration, security of tenure, conveyancing, risk of fraud, conclusive land data base

INTRODUCTION

Under the federal constitution, land is a state matter. In West Malaysia the relevant statute that regulates land law and issues related therein is the National Land Code 1965. Since the National Land Code 1965 is based on the Torrens system, registration is the cardinal principle that divests interest and ownership in land. Registration of instrument of dealings is an important process that has evolved since 1965. Modernization of the process begins with the incorporation of a computerize system in managing the land data base. The Computerized Land Registration System (CLRS) was introduced in West Malaysia by the incorporation of schedule 14 into the National Land Code 1965. It provides that entry and endorsement of dealings and documents in the register document of title be made on the computer printed document of title by the registrar and whenever a new computer document of title is prepared the previous version shall be cancelled and destroyed. However, it is not a mere simple conversion from a paper-based built up over several decades to an electronic data base system that may be accessed through a computer (Rajasekhar, 2006). It is also vital to ensure that the electronic land transaction operates within a proper legal framework in order for it to be legally accepted (HMLR, 2003).

The procedure for the computerized registration of any document of title, any dealing or entry in land shall be read in accordance with schedule 14. The provisions relate to the forms of documents of title it is provided for under Section 5A of the National Land Code 1965. It begins with the conversion to computerize the register document of title as provided under Paragraph 8 of the 14th schedule, where the Registrar is responsible to convert the existing register document of titles either on his own initiative or upon application made by the registered proprietor to the computer printed register documents of title and shall sign and seal the same. The existing title is valid until the issuance of the computer printed issue document of title. The conversion may also be done by the land authority without an application made by the proprietor. Paragraph 11 of the 14th schedule guarantees that every folio of a computer printed document of title is conclusive evidence of the particulars recorded therein. This is also similar to the guarantee provided under Section 89 of the National Land Code 1965.

To ensure the smooth operation of the CLRS, the Director General of Lands and Mines (DGLM) is empowered to issue circulars relating to the administration of the provisions of the National Land Code 1965 with the concurrence of the State Director. This is provided by

Section 8(1) of the National Land Code 1965. A circular issued on 12th January 2012 as guidelines for the smooth administration and effective operation of the CLRS. The circular states the rights and obligations of the state authority as the owner of the land data base and its obligation to ensure the accuracy and reliability of the data base. In order to achieve this objective a security officer of the system is appointed. A bio metric system is used to tighten and ascertain that no unauthorized person can have access into the system whenever transactions are being recorded and endorsed on the register document of title. Every staff is required to log in by using their national registration card and thumbprint. At the same time, the practice of using passwords and security papers for title deeds is also regulated under this circular. The security officer of CLRS shall monitor the issuance of the security paper for the purpose of printing of new title deeds and must be properly recorded in the log book. For safe keeping of the security papers, the page and serial number must be recorded and for withdrawal, it must be recorded under the CLRS application. Although, it is only in the form of a circular, compliance by the state authority on all the guidelines may in many ways decrease the possibility of manipulation of the CLRS by any unauthorized personnel.

Online transactions or a computerized system there is always a possible risk in the issue of security because it depends on who has access and the nature of review performed by the registry staff prior to and during the registration process. In New Zealand, the computerized data base is electronically scanned and the copies are kept in image form. The data entry is done to capture the relevant details in an electronic format (Muir, 2009). The converted data must be accurate and to ensure it is reliable the captured information is subjected to monitoring at several stages throughout the conversion process and the extinguished interests were retained in the form of an electronic image of the original title (Muir, 2009). The conversion is legally permissible via the land transfer (Computer Registers and Electronic Lodgement) Amendment Act in 2002). It basically allows the storage of information electronically for land held under the Land Transfer Act 1952. Imaging of titles is permissible under Section 27(3) and (4) of the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002. This is taken as authorised copies of titles. In Queensland, Australia to convert the manual data base to a computerized data base, the use of imaging technology is adopted where image processing software is put in place for the purpose of scanning the titles (Christensen and Stickley, 1999). In brief, both the countries invested heavily on hardware and by doing so they managed to

smoothly transfer the data base to computerized data base and ensure accurate data base is kept by the land registry.

In West Malaysia, the recent case of *Low Poh Kim v Pengarah Tanah dan Galian Negeri Selangor* in 2015 (Christensen and Stickley, 1999) MLJ 287 where it was decided by the court that Section 5A of the National Land Code 1965 expressly provides the procedure for the conversion of manual title to a computerized title. The learned judge decided that the land registry does not have a system in place to ensure compliance with the conversion of the manual title to a new computerized title as provided under the National Land Code 1965 because the plaintiff is still in possession of the old title when the new computerized title was issued. In the circumstances the computerized title issued was insufficient and void document and therefore any transaction based on the same would be defeasible by virtue of Section 340(2)(b) of the National Land Code 1965. The court decision indicates that the impact of any conversion which does not conform to the National Land Code 1965 is regarded as a nullity and could not confer any rights or interest in land.

LEGAL EFFECT OF INACCURATE DATA BASE

The transfer from paper based to computerized data base is carried out by keying in the data into the system. This opens up a risk of potential errors. The human error has a disastrous effect and can cause legal implication. In the case of *uptown Properties Sdn Bhd v Pentadbir Tanah Wilayah Persekutuan and Or* (2012) 8 MLJ 713 the High Court cautions as follows at Paragraph 28 Page 731 on the legal implication of an inaccurate land data base:

“The maintenance of a land registry that is efficient and maintains accurate particulars is a duty that the first defendant owes to every member of the public who makes and relies on a search made at the land registry maintained by the first defendant. If this confidence is jeopardised that could have dire consequences for trade and economic activity in this country”

The court decided that the failure on the part of the state authority to provide an accurate data base affected the plaintiff's right to property as enshrined under Article 13 of the federal constitution. In brief it is ruled that it is the basic duty of the state authority to provide an accurate data base for the public. In *uptown properties SdnBhd*, due to inaccurate data base a more serious legal impact could arise because based on the torrens system registration will divest rights and interest in land. It could create uncertainty when there are errors on the record of

ownership during the process of conversion. Security of tenure is crucial to economic development of land and if land tenure is not secured, domestic or foreign investors will be hesitant to invest in land development. Security of tenure is the basic foundation of a market economy and a catalyst for a sustainable economic growth (Apiyo, 2010). It is important to determine whether the parties who enter into land dealings are adequately protected by the law and guaranteed the security of tenure as provided by UN-ECE (1996) where registration of titles or interest in land system should be aimed at delivering security of tenure.

In the case of *Poh Yang Hong v Ng Lai Yin and or* (2013) 8 CLJ 964. The plaintiffs sue for damages against the defendants including the land registry and contended that the registrar has breached his statutory duty in keeping accurate records of land data base. It was ruled by the court as follows:

“The second defendant (Pendaftar Hakmilik Wilayah Persekutuan) must take all reasonable steps to ensure that the register contained only correct and accurate information failing which the second defendant must be held to have breached his duty of care to the members of the public....”

Comparatively, another case decided by the Kuala Lumpur High Court indicated that anyone conducting a private search under Section 384 of the National Land Code 1965 should not solely rely on the outcome of the search to commence any land transaction. In the case of *Tirai Kristal SdnBhd v Pengarah Tanah dan Galian Wilayah Persekutuan* 6 CLJ 530 the Plaintiff has agreed to enter into a sale agreement with the so called vendor when the search result issued by the land registry made via Section 384 of the National Land Code 1965 stated that *Kunjung Raya Development SdnBhd* is the registered owner of the said land. When the Plaintiff filed a claim against the land registry for failure to provide an accurate data and therefore should be liable for the lost suffered by the plaintiff when the private caveat was rejected because *Kunjung Raya Development SdnBhd* is actually not the registered proprietor of the land in question. In this case the court rejected the Plaintiff's claim because there is no duty of care by the land registry, in favor of the Plaintiff since private search in Section 384 of the National Land Code 1965 has no confirmation or endorsement made by the registrar as to its accuracy of the result of the search unlike a certificate issued and signed by the registrar if official search is made under Section 385 of the National Land Code 1965. Using an isolated approach for the

extent of duty in providing a result of land search under Section 384 as compared to Section 385 of the National Land Code 1965 may not be in harmony with the mirror and curtain principle under Torrens system. Both cases were being decided by the High Court and in future, the same court may have the discretion to view the extent of duty of care against the public differently. Thus, the duty to provide an accurate data base is just a mere fallacy.

It is however observed that in the recent High Court decisions that it is still the basic duty of the land authority to ensure that its data base is accurate and a sole reference for the public. In the case of *Yew Foo Chun v Wong Nye Keong* (2014) 1 LNS 189 where without her knowledge her land was transferred to another person despite payment made for the annual quit rent. The manual issue document of title is still with her solicitor and is still in the process of discharging the property from a charge created in favour of Hock Hua Bank. The property was transferred by a forger to the defendants. In this case the conversion of manual to computerized land data base became an issue since the computerized title deed has been given to a wrong party. For the purpose of conversion it can either be applied by the registered proprietor or on the Registrar's own accord. Paragraph 8(9) of the 14th Schedule of the National Land Code 1965 provides the mandatory duties of the registrar upon conversion into computerized titles to endorse the face of the existing register document of title to the effect that the title has been converted to the computer printed register document of title and shall be deemed that the register document of title has been cancelled. It is also required to call upon the proprietor to take delivery of the computer printed issue document of title and plan of the land. If the conversion is done on his own accord, the registrar is not obliged to deliver to the proprietor unless the issue document of title is produced to him. In this case it is admitted by the registrar that the issuance of the computerized title deed has not complied with the provision of 14th schedule of the National Land Code 1965 there was no record indicates who had collected the computerized title deed and the manual title deed has not been obtained from the proprietor. It was decided in this case that the computerized title deed is valid since it has been issued and authenticated under the hand and seal of the registrar of titles. The court further decided that the land authority has breached its statutory duty to provide an accurate data base by not having a proper procedure in issuing the computerized title. It is humbly submitted that to give priority to the new proprietor who hold the computerized title deed as compared to the original proprietor who hold the manual title may give rise to injustice to the latter. This does not reflect the mirror and curtain principle of Torrens system.

CONCLUSION

Without a proper system in place, it will affect the reliability of the data base. Hence, any land transactions carried out thereafter based on the erroneous data base is null and void. Despite the shortcomings of the transfer process the courts however, imposed on the registrar the basic duty to provide an accurate data base over and above their statutory duty only to determine the fitness of documents prior to presentation as provided under the National Land Code 1965. The fundamental obligation of the registrar is to keep an accurate data base in the register.

By providing an accurate data base the object of the Torrens System on simplicity, cheap and reliability so the object of the register is to provide security of tenure or else will be achieved or it will just be a myth. To convert the bulk of the manual record into a computerized land data base requires a lot of effort. The land registry should be commended for taking such an effort to engage in technology in doing so. Nevertheless to do so requires a proper and reliable system to avoid or reduce any possible form of errors.

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