

OFF THE CODE CONVEYANCING - A QUESTION OF LOCUS STANDI

~ HENRY KANG ~

The primary objective of the Torrens system and our National Land Code (NLC) is to simplify and facilitate dealings with land. Perversely, conveyance of real properties "off the code" so to speak is necessary and admittedly widespread due to the delay and difficulties in issuing titles. There are important variation between the law as provided by the NLC and the law and rules applicable to such off the code conveyancing.

The first step on a journey to acquire real property invariably starts with a contract to purchase. The acquirer's contractual rights, which is purely a personal right, i.e. a right in personam, may then undergo a juristic metamorphosis emerging eventually as a full proprietary right to the land, i.e. a right in rem, upon registration in accordance with the provision of the NLC. Legal rights or proprietary rights (right in rem) is good against all the world; equitable rights (in personam) are good against all persons except a bona fide purchaser of the legal estate for value without notice, and those claiming under such a purchaser.

The contractual event, which result in the vendor becoming a bare trustee of the land for the acquirer is on completion, that is to say, upon receipt by the vendor of the full purchase price timeously paid and when the vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form in favour of the acquirer for it is then that the vendor divest himself of his interest in the land. Bare trustee notwithstanding, the legal title continue to vest in the vendor. Title vest upon registration of the transfer in accordance with the NLC. This is a typical situation of trust; where the legal title remains with one party, i.e. management and administration, but the beneficial interest, i.e. enjoyment, is with another.

When does equity clothe the purchaser of strata properties yet to be issued with titles with such beneficial interest remains undecided by our courts. Nevertheless, the importance of such a transformation cannot be over estimated. Generally, such equitable rights are good against the world except a bona fide purchaser for value of the legal title without notice. The vendor's trustee in bankruptcy and any volunteers obtaining the property from the vendor will not be able

to successfully resist the purchaser's equitable interest. The limitation period for the enforcement of contract and that of trust is quite different. As enunciated in *William v Greatrex* [1957] 1 WLR 31 and applied by our Federal Court in *Tengku Mariah bte Sultan Sulaiman v Halimah bte Abdullah* [1980] 2 MLJ 234, time does not run against an equitable owner in occupation of the land. Perhaps, the vendor should be made to make a declaration of trust in favour of the acquirer upon receipt of full payment of the purchase price, pending the issuance and transfer of the strata title.

The aforesaid contractual rights are legal chose in action and the equitable interests are equitable chose in action. 'Choses in action' is a known legal expression used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession, *Torkington v Magee* [1902] 2 K.S. 427 at 430, per Channell J. Choses in action are conveyed from one party to another by a process called 'assignment'. The old common law rule does not recognise assignment. Thus equity gave effect to assignments not only of equitable things in action but also of legal things in action. A legal assignment is first created by the Court of Judicature Act 1873 and subsequently amended by the Law of Property Act 1925. Here in our jurisdiction the transfer of a chose of action may be effected by a legal assignment (statutory assignment) in accordance with S4(3) Civil Law Act 1956, or by an equitable assignment, which in this respect is derived from the rules of equity in force in England on 7th April 1956, as provided by S 3 (1) of the civil Law Act.

The Supreme Court of Judicature Act of 1873 also established that the rules of law and equity should be administered by all Courts of the land, so that remedy obtained should no longer depend on the precise court in which the plaintiff brought his action. Furthermore, in cases of conflict between law and equity, it was enacted that the rules of equity shall prevail. The changes brought about a fusion merely of administration in respect of law and equity. The two stream of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters. Although all courts may now grant legal

and equitable remedies, the principle which those remedies are granted remain distinct. Accordingly, the dichotomy between a legal and equitable chose in action and also the dichotomy between legal (statutory) assignment and equitable assignments remains important.

Equitable assignments do not require any particular form of words; only the intention that the right's and benefits shall become the property of the assignee because equity has always looked at the intent rather than the form. Equity is effective to pass on an equitable, though not a legal right to the chose in action, ex hypothesi the original creditor still owns the chose at law. A legal assignment on the other hand, must be in writing under the hand of the assignor, it must be absolute and not be by way of charge and that express notice in writing must be given to the person liable to the assignor under the assigned chose in action, see *UMW Industries Sdn. Bhd. v Ah Fook* [1996] 1 MLJ 365 at p. 371 A-B; S4 (3) Civil Law Act 1956.

In the enforcement of a chose in action, all interested parties must be before the court so that there may be a final adjudication binding on them all. It is an exception that when the chose is equitable and the whole interest in it has been vested in the assignee, equity permits him to sue in his own name without joining the original creditor; for Equity looks on that as done which ought to be done. Similarly the assignee of a statutory assignment, which is necessary of the whole chose, is allowed to sue in his own name. The rule is otherwise if the assignment leaves some interest outstanding. This occurs where there is an equitable assignment of part of the chose, or an equitable assignment of a legal chose; for in the later case, even if the whole chose is assigned, the original creditor still owns the chose in law, holding it in trust for the assignee.

In such cases, neither the assignee nor the original creditor can sue for the chose without joining the other, as plaintiff if he consents and as defendant if he does not. To reiterate, the court must have before it all parties interested in the chose so that there may be a final adjudication binding on them all.

An absolute assignment is an assignment which purports to pass the whole interest of the assignor in the chose in action, notwithstanding that the assignor may have a right of redemption or reassignment of the chose in actions. It has been held more than 100

years earlier that an assignment by way of a mortgage in the ordinary form whereby the whole debt is assigned to the mortgagee with a proviso for reassignment on repayment is absolute, *Tancred v Delagoa Bay and East Africa Railway* [1889] 23 QBD 239.

By contrast, where the right is assigned "until the money with added interest be repaid to you" is a conditional assignment and made by way of charge, *Hughes v Pump House Hotel Co*, [1902] 2 KB 190. Chitty LJ, delivering the judgment of the Court of Appeal said:

The assignment before us complies with all the terms of the enactment (*Section 25 ss 6 of the Judicature Act, 1873*) save one, which is essential: it is not absolute but a conditional assignment. The repayment of the money advanced is an uncertain event, and makes the assignment conditional. Where the Act applies it does not leave the original debtor in uncertainty as to the person to whom the legal right is transferred; it does not involve him in any question as to the state of the accounts between the mortgagor and mortgagee. The legal right is transferred and is vested in the assignee. There is no machinery provided by the Act for the reversion of the legal right to the assignor dependent on the performance of a condition; the only method within the provisions of the Act for reversioning in the assignor the legal right is by a retransfer to the assignor followed by a notice in writing to the debtor, as in the case of the first transfer of the right. The question is not of mere technicality or of form; it is one of substance, relating to the protection of the original debtor and placing him in an assured position.

As we have seen, the inability of the assignee to sue is much mitigated by equity and statutory assignment. Closer to home, our problem is in the reverse i.e. the inability of the assignor to sue in his own name. Such problems arise because of the mortgage of incomplete properties under construction. More problems, I believe, would arise in due course. Presently, the problem is for the purchaser/assignor to claim liquidated damages against vendor/developer whilst the rights, benefits and interests of the contract is assigned to the financier/assignee. Eyebrows were raised, when a large number of high court judgments held that an assignment by way of a mortgage is not

absolute assignment and therefore the assignor may sue in his own name. I have no doubts about the courts good intention. However, such 'quick fix equity' will give rise to uncertainty to the law and rules of equity that have guided practice for more than 100 years. Our apex court's judgements in *Nouvau Mont Dor*, *Hiparrion*, *Chuah Eng Kong* and *Bupinder Singh* have not been properly appreciated.

Quick fix equity aside, the Ministry of Housing has jumped onto the bandwagon whip cracking with it's 'quick fix legislation' in the form of a new s 22C, Housing Development (Control and Licensing) Act 2002, s 22c which reads

"Notwithstanding anything contained in any written law or rule of Law, a homebuyer ... shall be entitled on his own volition and in his own name to initiate, commence, institute and maintain in any court ...any action, suit or proceeding against a housing developer ...in respect of any matter arising out of the sale and purchase agreement entered into between the purchaser and that housing developer unless a contrary intention is expressed in any agreement, assignment or

charge between the homebuyer and his financier in which case the prior written consent of his financier must first be obtained before he exercises any of this rights under this section."

"Contrary intention" necessarily involves interpretation and determination of whether assignment is absolute or otherwise. If absolute will "consent" say by letter be sufficient to vest in the housebuyer the locus standi?

The law then went retrospective by stating that :

"Every agreement assignment or charge lawfully entered into between a purchaser and his financier before the appointed date shall be subject to , and the parties thereto shall be entitled to the benefit of, the new s 22 C of the principal Act ..."

While the intent is obvious, I believe that our draftsman in this instant has failed to appreciate that the issue here is the substantive law and not a matter of procedure.

Henry Kang



Quotable Quote

Independence of the Bar

...it is an independent Bar that can greatly contribute to the independence of the judiciary. And democracy cannot successfully function in any country if the Bench and Bar are subservient to the Executive. Both are responsible for protecting the Constitution. The lawyers have to perform the main function in this connection as, comparatively speaking, their area of activities is much wider than that of the Judges. A country without an active, diligent, strong and independent Bar can never hope to be great (speaking constitutionally). Consequently, the lawyers have a great burden to discharge; and every fresh entrant into the profession must also be prepared (in addition to doing his routine business) to perform this dignified role.

per Chaudri Nazir Ahmad Khan formerly Attorney-General for Pakistan in The Making of a Lawyer (Lahore 1976).

HOUSING DEVELOPERS (CONTROL AND LICENSING) (AMENDMENT) REGULATIONS 2002

Consent to Assignment – agreed administrative fee contrary to regulation 11A

Henry Kang Fang Hawe

The Housing Developers (Control and Licensing) (Amendment) Regulations 2002, which came into operation on 1 December 2002 ('the amendment date') brought with it extensive amendments, which have caused much debate. Questions were posed, whether developers are entitled to continue charging administrative fee for giving consent upon terms contrary to the new regulation 11A, where such terms were agreed upon in contracts made prior to the amendment date ('the agreed administrative fee').¹ It has been argued that developers retained their contractual right to impose the agreed administrative fee, for consent to assignment taking place after the amendment date, because regulation 11A is not express to have retrospective effect.

It would be impossible now to doubt that the court is required to approach questions of statutory interpretation with a disposition, and in some cases a very strong disposition, to assume that a statute is not intended to have retrospective effect.²

'In my judgment the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transaction in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree – the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.'³

Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case. Thus, the degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the statute affects, or the extent to which that value is diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely

affecting the rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the question whether the consequence of reading the statute with the suggested degree of retrospectivity is so unfair that the words used by parliament cannot have been intended to mean what they might appear to say.⁴

'A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regards to events already past.'⁵

The question to ask is whether the developer had, prior to the amendment date, acquired a vested right to collect the agreed administrative fee for assignment taking place in the future? My short answer is no! The reason is simply that the developers do not have a right to impose the agreed administrative fee until an assignment arises. Any assignment that arises after the amendment date is a prospective event. Thus, regulation 11A forbids the developer from imposing any administrative fee, which is inconsistent with the amendment, and which arises in the future. If regulation 11A is made to have retrospective effect, any administrative fee previously collected, which is now contrary to regulation 11A, would now be made unlawful by the amendment retrospectively.

Statutes, though they may relate to acts or events which are past, are not retrospective in the sense in which the word is used for the purpose of the rule under consideration.⁶ On this point there is the case of *Re A Solicitor Clerk*.⁷ The clerk was convicted in 1953 on four charges of larceny but the charge did not relate to money or property of his employer or

employer's client, and so an order prohibiting solicitors from employing him could not be made under the provision of section 16 of the Solicitors Act 1941. The Solicitors (Amendment) Act 1956, s. 11, amended section 16 to include conviction of larceny irrespective of ownership. The Divisional Court held that the amendment is not a true retrospective provision. "It enables an order to be made," said Lord Goddard C.J. (at pg. 1222, 1223), "disqualifying a person from acting as a solicitor's clerk in the future and what happen in the past is the cause or reason for the making of the order, but

the order has no retrospective effect. It would be retrospective if the Act provided that anything done before the Act came into force or before the order was made should be void or voidable or if a penalty were inflicted for having acted in this way or any other capacity before. ... This Act simply enables a disqualification to be imposed for the future which in no way affects anything done by the appellant in the past."⁸

The author's opinion is as at 22nd. January, 2003 and based on the several cases and material quoted..

- 1 The question whether developers are entitled to charge administrative fee in the first place, is reserved for future discussion.
- 2 Cited from Lord Mustill's judgment in 'The Boucraa' [1994] 1 All ER 20 at pg 29-30, also cited in the case of Lim Phin Kian v. Kho Su Ming [1996] 1 MLJ 1, per Gopal Sri Ram JCA.
- 3 Staughton LJ IN *Secretary of State for Social Security v Turncliffe* [1991] 2 All ER 712 at p 724
- 4 'The Boucraa' [1994] 1 All ER 20 at pg 29-30
- 5 per Lord Brightman, *Yew Bon Tew v Kenderaan Bas Mara* (1982) 4 PCC at page 101, line c-d.
- 6 For further reading, please refer to Maxwell on the Interpretation of Statutes, 12th Edition at pages 216 - 218.
- 7 [1957] 1 W.L.R. 1219
- 8 see Maxwell on the Interpretation of Statutes, at pages 217-218.

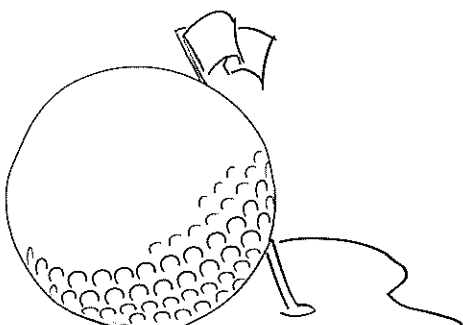


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