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Responding to Land Fraud: Should Torrens Compensation Scheme Be Introduced in Malaysia

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Abstract

In Malaysia, land fraud continues to be a risk to landowners. Unfortunately, current legal redresses are insufficient to protect the interests of the land fraud victims. This research explores the need to introduce a compensation scheme as part of the Torrens system in Malaysia to provide statutory monetary compensation to land fraud victims. This paper employs library-based doctrinal study and comparative legal analysis. This research resolves that a compensation scheme should be established as one of the risk mitigations measures in facing land fraud.

Keywords: Land Fraud, Indefeasibility of Title, Compensation Scheme, Torrens System

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1.0 Introduction

Land has social, economic, and political significance to every human being. The system in which a society allocates title and rights to land is an important indicator of the nature, character and organisation of that society, since rights to land can be held to reflect rights in other areas of public life (Payne & Durand-Lasserve, 2012). In this regard, a good land administration system is a vital element in ensuring secure land tenure and dealings are in place. It is unfortunate that fraudulent land dealings continue to be a threat to landowners in Malaysia. (Joseph, 2007; Husin, 2016). The worst part is that the legal remedies available to land fraud victims are insufficient to safeguard their interests because standard legal actions against the perpetrator rarely achieve favourable results. (Syed Abdul Kader 2008; Chai, 2008). Moreover, the law under the concept of indefeasibility of title is intertwined in between protecting the right of registered landowner and the *bona fide* purchaser (O'Connor, 2009; Wu & Chung, 2011).

In addressing this issue, this research aims to analyse the need to introduce a compensation scheme as part of the Torrens system in Malaysia and propose for its establishment as an effective settlement mechanism in land fraud dispute. This scheme provides statutory monetary compensation any person who has been wrongly deprived of their land. (Whalan, 1982). The objective of the compensation scheme is in line with the protection of the right to property guaranteed under the Federal Constitution.

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2.0 Literature Review

The land registration system as embodied in the National Land Code 2020 [Act 828] ('NLC') deviates from its original structure which comprises of three main principles namely 'curtain', 'mirror' and 'insurance' principles. The absence of the compensation scheme indicates that the 'insurance' principle was not adopted when the Torrens system was introduced in Peninsular Malaysia. Earlier writings by legal scholars (Wong, 1963; Sihombing, 2015) have cautioned the consequences of the non-availability of the compensation scheme in the Torrens system in Malaysia especially in land fraud cases. Several factors contribute to the occurrence of fraud in land dealings which include negligence on the part of land office (Maidin & Khadouf, 2010), poor security measures in implementation of computerized land administration system (Ismail et al, 2011; Zakariah et al; 2020), weaknesses in the conveyancing procedures (Abu Bakar, 2019, Zakariah et al; 2020) and corruption among civil servants (Zakariah et al, 2020; Harun et al; 2022). The need to provide a statutory remedy to land fraud victims was highlighted by various parties (Fook Hin, 2010; Buang, 2013; Zakaria & Hussein, 2013, Harun et al, 2017). A report prepared by the Department of the Director-General of Lands and Mines in 2009 suggests for the establishment of the compensation scheme as a mature approach in respond to the fraud issue. This suggestion was supported by further research on the need to establish a compensation scheme (Kaprawi et al, 2012, Zakaria, 2013, Ismail et al., 2013, Abdullah et al, 2017, Halid, S.A & Hassim, J.Z, 2022). Judicial pronouncements on its importance in a number of cases further strengthen the need for its establishment. While the existing studies highlight the issues and challenges of fraud in land registration system and agree on the need to establish a compensation scheme in the land registration, there is no specific analysis on the legal framework of the proposed compensation scheme. This research seeks to fill in the gap in the existing literatures by providing legal analysis on the issue concerned and proposed the model to be adopted if the scheme were to be introduced in the future. This research is significance because it highlights the importance of having the compensation scheme as a guaranteed remedy to land fraud victims.

3.0 Methodology

The research methodology applied in this paper is library-based doctrinal study and comparative legal analysis. For content analysis references are made to the primary data such as statutes, rules, guidelines and case laws and secondary data including books, journals, electronic materials and newspaper reports. Besides that, comparative approach is employed to gain insights on the implementation of the compensation scheme in other countries such as Australia, Canada and Singapore. These countries are selected based on their similar legal background with Peninsular Malaysia being common law countries and adopt Torrens land registration system. Comparative approach is useful to law reform to glean experience and to identify problems encountered and addressed by other jurisdictions. It is also served as a lesson learnt if a similar scheme were to be adopted in the future.

4.0 Findings

4.1 Land Fraud

Land fraud is a global issue. It hits every country irrespective of whether the country has efficient land registries established for over a century with trained staff and strong regulatory authorities or the transitional countries that adopted the land registration system within the last 40 to 50 years (Gunasekara, 2008). Similarly, land fraud occurs in manual or paper-based land administration or a combination of manual and paper-based administration or fully electronic land administration (Low, 2008). In Malaysia, the infamous land fraud case of *Adorna Properties Sdn. Bhd. v Boonsom Boonyanit @Sun Yok Eng* [2001], had triggered a cause for concern on the security of land tenure and dealings in the current land registration system. Similar incidents were reported from time to time which indicate that the land registration system is not fraud-proof.

The research found that the incidences of land fraud are contributed by the internal and external factors surrounding the working of the Torrens system. The internal factor revolves around the concept of indefeasibility of title which entangled between protecting the interests of the landowner and *bona fide* purchaser (O'Connor, 2009). The principle of indefeasibility of title was introduced to overcome the issue of uncertainty created under the old law of private conveyancing and deeds system which determined the legality of a title and interest based on the validity of the chain of instruments through which the grantor derived his title (Whalan, 1982; Stutt, 2008). The Torrens system seeks to eliminate these uncertainties by giving conclusiveness to the title or interest upon registration which means once a person is duly registered as an owner or interest holders, his title or interest over the land is unchallengeable and immune from attack by equitable or unregistered interests which do not appear in land title register. The concept of indefeasibility of title is incorporated in section 340 of the NLC.

Nevertheless, in a fraud case, the principle of indefeasibility of title may works against the innocent registered landowner who could be deprived of their land due to the fraudulent act of other parties. At this juncture, courts are facing difficulties in resolving the conflicting interests of two innocent parties of the registered owner and *bona fide* purchaser (O'Connor, 2003). This is despite the established principle of 'immediate' and 'deferred indefeasibility' which determined whether the property acquired could be safely secured by the immediate purchaser or subsequent purchaser.

In addition to unsettled issue of the indefeasibility principle, external variables that contribute to land fraud include operational flaws in the land registration system (Maidin & Kadouf, 2001; Harun et al, 2022) and conveyancing practices (Abu Bakar, 2019). For example, Identity theft is possible due to operational flaws in the identification and verification procedures at the land office or by attending solicitors. In addition, failure to follow procedures for replacing lost certificates of title or issuing new titles, as well as poor security measures in the

deployment of the computerised land administration system (Ismail et al,2011, Zakariah et al, 2020) are among the system's flaws. According to Kadouf (2008), the incident of land fraud has been encouraged by a lack of systemic updating of records and a lack of follow-up on the part of the registered proprietors of their property for long periods of time.

Aside from that, other prevalent conveyancing processes have been highlighted as having the potential for fraud (Abu Bakar 2019; Zakariah et al, 2020). For example, some law firms allow their employees to manage conveyancing procedures without close supervision by lawyers. The lawyer in charge is not always present when the conveyancing documents were signed. In the presence of sophisticated and organised crime syndicates that engage in identity theft, these practices are harmful. Fraudsters may use identity theft to induce lawyers into believing that they are genuine clients. This is done by producing genuine looking, but fake NRIC or if the fraudsters are foreigners, they will provide a fake passport. In the case of *Anthony Ting Chio Pang v Wong Bing Seng & Anor* (1997), it was held that the solicitors were negligent in failing to properly ascertain the true identity of the person who claimed to be the owner of the land and held the said solicitors to be negligent.

4.2 Legal Remedies

Emotional and financial problems face by the affected parties in land fraud lawsuit are tremendous. They are not only dispossessed of their precious assets, but the process of obtaining their remedies is also lengthy, costly, and emotionally draining. Even if they are successful in bringing the fraudster or any other party involved in the fraud to justice, there is no guarantee that the deprived party will be able to reclaim their property or be adequately compensated. Several factors contribute to the difficulty in proving land fraud in criminal cases, including lack of positive evidence of the suspect's identity, lack of proper records on the registration of documents produced to the land office, and the absence of essential documents from the land office (Chai,2008). Furthermore, the practice of exchanging passwords among staff members of the land register in the computerised land registration system, as well as simple access to the strong room, makes it difficult to prove fraud in criminal action. It is important to have strong evidences in criminal action since the burden of proof is beyond reasonable doubt.

Likewise, there are several limitations in bringing civil action against fraudsters. If the action is based on the Contract Act 1950, the difficulties to establish fraud arise from the restricted definition of fraud under section 17 of the Contract Act 1950. Furthermore, it is important to prove the existence of contract between the aggrieved party and the fraudster or his agent. In a civil claim based on section 340 of the NLC, the fraudster is usually cautious not to appear on the register as one of the registered proprietors after the fraud happens, thus the registered proprietor may not be able to claim compensation or damages directly from the fraudster himself. On top of that, if the land has been transferred to a *bona fide* purchaser, the defrauded landowner cannot claim back his/her land and to be reinstated as the landowner as the NLC protects the *bona fide* purchaser (Syed Abdul Kader, 2008).

It is also noted that the NLC's existing compensation provisions as provided in section 61, 386 and 393 do not apply to land fraud cases. Section 61 of the NLC is limited to the payment of compensation for any land, tree, or crop damaged as a result of the State Authority's exercise of power under the NLC. Whereas, compensation payments under section 386 of the NLC are confined to any purchaser of alienated land who suffers any loss as a result of a certificate of search error. Any use or damage of land as a Land Administrator's right of way is subject to compensation under section 393 of the NLC.

4.3 Limitations in Action Against Registering Authority

Besides the difficulty in initiating criminal or civil action against a fraudster, it is also difficult to bring a claim against the land registrar for negligence or breach of statutory duty. The registering authority's common defences in dismissing the claim is that they are fulfilling their duties in good faith under section 22 of the NLC which provides that no official can be sued in a civil court for anything he does in good faith and in the intended exercise of any authority or performance of any obligation bestowed or imposed on him by the NLC. Action caught by limitation period and action against a wrong tortfeasor are two others common defences employed by the registering authority.

Limitation period provided under the Public Authorities Protection Act 1948 requires any action against government servant must be made within thirty-six (36) months after the act, neglect or default complained of or the case of a continuance of injury or damage, within thirty-six (36) months next after the ceasing thereof. Failure to commence action within the thirty-six (36) months period, will make action against the public authority is statute-barred. Moreover, the registering authority usually dismisses the claim against them by referring to sections 5 and 6 of the Government Proceedings Act 1974 which make it essential to designate the tortfeasor in order for the government to be held accountable in tort for the carelessness or omission of a public officer,

Besides limitation imposed under Public Authorities Protection Act 1948 [Act 198], any court proceedings are subjects to limitation of time imposed by the Limitation Act 1953 [Act 254]. The Act provides different periods of limitation depending on different types of cause of action that arise. Contract and tort actions, as well as some other actions, may not be initiated after six (6) years have passed since the cause of action arose. When an action is brought because of the defendant's or his agent's fraud, or because any information material to the plaintiff's cause of action was purposefully concealed, or because of a mistake, the six-year period does not begin to run until the plaintiff discovers the fraud, concealment, or mistake. When an action is brought to reclaim land, the period of limitation is twelve (12) years.

The research found that the present legal remedies, which require land fraud victims to pursue criminal or civil lawsuits against the perpetrators, are time consuming, difficult, and expensive, and frequently fail to produce adequate results. Furthermore, proceedings against the registering authority for negligence and breach of statutory duty are subject to the Government Proceedings Act 1956 [Act 359] and the Public Authorities Protection Act 1948 [Act 198], making it difficult to succeed. In a summary, the current remedies are deemed insufficient to give adequate compensation when there is a deprivation of private property as required by Article 13 of the Federal Constitution. Since the state is the system's administrator, any claim for loss of title or interest as a result of the system's operation must

be guaranteed by the state. Victims of land fraud should not suffer as a result of another's crime or negligence. On the basis of fairness, the government should establish a statutory compensation scheme through which land fraud victims can seek redress.

Following the case of *Boonsom*, the public and legal community are increasingly concerned about the security of land tenure and dealings in Malaysia. Thus, besides working on fraud prevention and capacity building of land registry staff, it is timely for the government to initiate a legislative reform by establishing a statutory compensation scheme as a risk mitigation tool in the land registration system. This idea is also supported by the bench as observed in a number of cases. Richard Malanjum CJ in the case of *Pushpaleela R Selvarajah & Anor v Rajamani Meyappa Chettiar & Others Appeal* [2019] said:

"As the law now stands, our Code unfortunately, provides absolutely no remedy to innocent parties who are deprived of their lands due to fraud or forgery. It is high time for the relevant authorities to consider, as done in other jurisdiction, with the Torrens system of land registration, to establish a statutory assurance fund to mitigate the losses suffered by registered owners because of fraud or forgery. The Torrens system ought to be implemented fairly and the relevant authorities must seriously look into amending the code to cater for an effective assurance fund".

5. Discussions

5.1 Torrens Compensation Scheme

Torrens system works on three guiding principles known as 'mirror', 'curtain' and 'insurance principle'. Compensation scheme often known as the "assurance fund" or "insurance fund" is a mechanism that underpins the insurance principle in the Torrens system. The insurance concept expresses the idea that a title is guaranteed by the state provided it is properly registered. The state guarantee is backed up by a legislative compensation scheme designed to reimburse those who incur loss as a result of the Torren system's operation through no fault of their own. The State insures against deficiencies, inaccuracies or other mistakes in the register (Dixon, 2012). This method of guaranteeing immunity against loss distinguishes the Torrens system from other systems of land registration (Woodman & Grimes, 1974). The need to have the compensation scheme as part of the Torrens system was acknowledged by Sir Robert Torrens (1859) in the following words:

"...as we cannot give the land to one and the improvements to another, there is no way of avoiding injustice other than adopted in the South Australian Act, giving compensation in money to the rightful proprietor....indefeasibility of title is a necessary corollary to the [abolition of the respective investigation of titles], and from this again follows the necessity of providing a fund where compensation in money may be secured to the rightful heirs and others who through the operation of law may be barred from recovering the land itself..."

The objective of the scheme is to provide monetary compensation to the registered title/interest holder/*bona fide* purchaser who has been wrongfully deprived of their land in consequence of the operation of the land registration system. It must be provided by the state as the registering authority affecting the registration. In Torrens jurisdictions which implement the compensation scheme such as Australia, New Zealand, Canada, and Singapore, two compensation models are now in use: the "first resort" and "last resort" models (Caruthers & Skead, 2011). The deprived party must exhaust all other options before applying to the fund for compensation under the "last resort" model. As a result, the compensation action must be firstly brought against the person who is responsible for the deprivation ('the wrongdoer'). Whereas, the deprived party has the right to sue the registrar directly under the "first resort model." The registrar has the authority to determine whether or not the claimant is eligible for compensation. If the registrar finds that the claim is valid, the claimant may be awarded indemnity for his loss as well as reasonable fees incurred in initiating the claim. Consequently, the registrar is subrogated to any rights the claimant has against any wrongdoer and the registrar can pursue the wrongdoer to recover the amount, which was paid out as indemnification (Siebrasse, 2003). The source of the fund is derived from the state consolidated fund or from the levy imposed on the registration of land dealings. For example, in Singapore, pursuant to rule 59 of the Singapore Land Titles Rules, 5% of the fees collected by the Registrar under the Act shall be set aside to the compensation fund.

5.2 Non-Availability of a Compensation Scheme in Malaysia

Since the Torren system was implemented in Peninsular Malaysia during British administration, the compensation scheme has not been included into the system. There are several reasons for its absence. Firstly, the land title registration system in the Federated Malay States was modelled after the Fiji statute which did not incorporate the compensation scheme in its land registration system. Second, land transactions were still minimum at the period. As a result, many of the contributing factors that have resulted in increase in land registry work were absent, and the risk of memorial errors may be prevented by a small number of staffs (Dass, 1963). In addition, land dealings at that time were simple and there was easy access to regional land officials to assist in all dealings. Furthermore, all grants emanated directly from the State thus the need to bring the land under the new system became irrelevant (Sihombing, 2015). Furthermore, the compensation scheme was considered as unnecessary at that time because the British's priority was to make sure the working of the newly introduced system rather than focusing on a sophisticated measure such as setting up a compensation scheme. Since the system was still in the formative period, the staff was still being trained and the public was still ignorant of the new system. Thus, it would be impractical to guarantee titles since there was great possibility of administrative errors and irregular dealings (Wong, 1963).

Nonetheless, given Malaysia's rapid economic and social development, the justifications for the lack of a compensation scheme in the Malaysian Torrens system are no longer applicable. The following factors support the necessity to consider a compensation scheme under the Malaysian Torrens system:

- a. Due to recent economic developments and rising house demand, the number of land sales has continuously increased. According to the Valuation and Property Services Department of the National Property Information Centre (NAPIC), for the first half of 2021(H1 2021), a total of 139,754 transactions worth RM62.01 billion were recorded. While in 2020, the number of transactions recorded was 295,968 worth RM119.08 billion. With this development, the burden of the land registry and land office has increased as well, increasing the risk of fraud and negligence.
- b. Cases of land fraud are alarming and involve sophisticated scams. The losses incurred as a result of land fraud are substantial. Without a proper statutory compensation framework, landowners' rights and interests are compromised.
- c. Modernization of land administration system through the introduction of the Computerized Land Registration System (CLRS) has transformed the registration process from manual or paper-based registration to a combination of manual and electronic registration. The implementation of computerized system exposes the registration process to risks of potential errors and security issues because it depends on who has access and the nature of the review performed by the registry staff prior to and during the registration process (Low, 2008; Ismail et al, 2011 & Harun et al, 2022). As a result of this development, a statutory compensation scheme is expected to protect against the additional risks that may arise.
- d. Land dealings are becoming more complicated nowadays with the introduction of various concepts of housing schemes and use of underground land to maximize land use and development needs. In this context, possibility of errors and mistakes are not circumvented. As a result, having a statutory indemnity scheme in place to protect against these risks is essential.
- e. The need for a statutory compensation scheme to supplement the Torrens system's application of the principle of indefeasibility of title could also be considered in light of the courts' continued application of equitable principles in land matters despite the contention that the NLC being a complete and comprehensive code provides no room for the importation of equity. The controversy surrounding the application of the principles of equity in the NLC is derived from Section 206(3) of the NLC which is said to provide room for equitable principles to be applied in the NLC. Consequently, this creates uncertainty to the concept of conclusiveness of registration under the Torrens system (Sihombing, 2015).

The compensation scheme is important to the Torrens system for various purposes. Neave et al (1994) believe the scheme is vital to attain the objective the Torrens system which is to provide certainty and conclusiveness to a land transaction. In this regard, the state should compensate all person(s) who sustain loss by reliance on the register. Wong (1963) concludes that the compensation scheme is almost indispensable to the working of the system since innocent registered title or interest holders may suffer loss through the operation of the indefeasibility principle. On the other hand, Dixon (2002) considers the scheme is important in instilling confidence in those who use the system and encouraging their reliance on it. As such, any registration system that guarantees title effectively will need to provide a system of compensation for those persons who suffer loss by the reason of the application of the system due to the concept of indefeasibility of title. Stutt (2008) concurs that the compensation scheme would provide added commercial and consumer confidence to the system. In brief, the compensation scheme compliments the risks that comes with the concept of indefeasible title offered by the Torrens system.

There are several issues to be considered in establishing the compensation scheme. Firstly, the Federal Constitution mandates land matters under state's jurisdiction. Thus, the final decision to adopt compensation scheme lies with the state since it will financially affect the state revenue (Halid & Hassim, 2021). Secondly, the issue of floodgates of cases is forthcoming if security measures and capacity building of the land office staffs are not properly addressed. Besides, fraud and forgery cases need to be adequately policed by criminal justice system for the scheme to be effectively operated (Ismail, Ganason & Zakaria, 2013). Strategic co-operation and strong commitments between federal and state government are vital towards the introduction of the compensation scheme.

6.0 Conclusions and Recommendations

Preventive and protective measures are important in addressing the issue of land fraud. In this regard, government is expected to resolve the weaknesses in the land registration system and strengthen security aspects in the conveyancing practices. Besides the preventive measures, it is equally important to provide statutory compensation scheme should the incidence of fraud is inevitable. The scheme serves as an economic security to any person who has been deprived of his property through the application of the indefeasibility principle. At the same time, it helps the land registry to manage risks in the registration process, which is crucial to ensure the smooth and economic flow of business. As such, the compensation scheme is not only complementary to the principle of indefeasibility of title in the Torrens system but serves the economic aspects of the system, without which the system is defective. This research proposes that the 'last resort model' is to be adopted as an introductory model pending necessary measures taken by the government to address the weaknesses in the existing operation. This option is chosen to avoid floodgates of cases against the fund, besides preparing for administrative infrastructure such as training and staffing to be properly put in place. Additionally, adopting the 'last resort model' would enable the government to

assess the administrative and legal issues arising from the implementation of the compensation scheme. This will also allow the state, as the implementing body, to enhance their capacity building and business operation. Nevertheless, hopefully that once the system has reached a certain level of maturity and security, the 'first resort model' can be adopted to allow better access to the fund. It is the government's responsibility to provide reliable land registration system that guarantees security of land tenure and dealings as part of sustainable development goals.

The discussion in this research confines to the application of land law in Peninsular Malaysia as provided in the NLC and excludes the operation of land tenure system in Sarawak and Sabah which are governed by their respective land law. This research suggests further studies on the administrative and financial implication on the state if the scheme were to be implemented.

Paper Contribution to Related Field of Study

The authors hope that this research will contribute to academic discussion on upgrading Malaysia's land registration system and will offer policymakers with a general foundation on how the compensation scheme works if the scheme is adopted in the future.

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