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Research paper

The Importance of Attestation Prior to the Registration of Instruments under the National Land Code 1965

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Abstract

Recent events had put the question of security of land transactions at the forefront of not only the political and economic agenda worldwide, but also posed some key questions for law and the future regulation of property rights. The Torrens System of land registration which is practiced in Malaysia can be traced back to Sir Robert Torrens in South Australia during the late eighteenth century. The land registration system should be made flexible enough to adapt to the changing of technologies but also secure enough to ensure that the registered proprietors have good title to their lands. This article is intended to explore the rigorous and somewhat tedious process that is provided under the National Land Code 1965 relating to the attestation of instruments before the presentation for registration.

Keywords: *Torrens, Registrar of Titles, section 211 of the National Land Code 1965, attestation*.

1. Introduction

The increase of fraud cases in the recent years is indeed a cause of concern to the government in its journey to become a developed nation by the year 2020. It is a well-known fact that an efficient land registration contributes significantly to the country's development.

2. Registration under the National Land Code 1965

Section 5 of the National Land Code 1965 defined the Registrar as a Registrar of Titles or Deputy Registrar of Titles appointed under section 12 in relation to land held or to be held under Registry title, or under the form of qualified title corresponding to Registry title, or under subsidiary title dependent on a Registry title.
The Registrar also referred to the Land Administrator in relation to land held or to be held under Land Office title, or under the form of qualified title corresponding thereto, or under subsidiary title dependent on a Land Office title. Since under the Torrens system, the register is considered as of utmost importance and a registered title confers on its owner an undeniable right or indefeasibility of title, the Registrar of titles as the person behind the application and implementation of such system is considered as the backbone of the land registration system.
As the administrator of the land registration system, the Registrar's main duty is administering the functions provided under the NLC 1965 which is focusing on the process of registering of instruments. One of the powers conferred upon the Registrar by the National Land Code 1965 (hereafter referred to as the Code) is to conduct an attestation according to section 211. Although the attestation procedures laid out under the Code is considered stringent and too tedious [1] for many law practitioners dealing with conveyancing matters, it is important to adhere to the requirements as to ensure the instruments are fit to be registered as provided under section 297 of the Code. The Registrar can reject or suspend such instrument for a period not exceeding 14 days if the unfitness is solely due to a formal defect or clerical error, according to section 298 and 299 of the Code.
Under section 298(3) of the National Land Code 1965; if an instrument of dealing is suspended, the Registrar shall give notice thereof to the person or body by whom the instrument was presented, specifying the period of the suspension and the reasons for it.
Where an instrument is considered as fit for registration but is not accompanied by the appropriate documents, the Registrar must make the necessary enquiries with respect to the missing document and takes such action for securing its production and to register the instrument upon the production of that document; otherwise the instrument must be rejected. When rejecting an instrument, the Registrar shall mark the said instrument with the word 'Rejected' and return it to the person or body by whom it was presented attached with a note of the reasons and cause a note of the rejection to be made in the Presentation Book.

3. Significance of Attestation Procedures

Prior to the presentation of any instrument, it must first be attested in a manner prescribed in the Code. The execution of an instrument of dealing by a natural person must be attested by one of the officers listed in the Fifth Schedule of the Code, which also includes the Registrar. In attesting an instrument, the Registrar should note the provisions in the Tenth Schedule which extensively explained the procedures and forms to be applied. It is to be noted that the Registrar is duly required to use permanent black or blue-black ink only and any errors or mistakes must be cancelled and later initialled by the Registrar. Erasing or the uses of liquid to cover mistakes are not allowed.

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Where attestation is required, the person should be physically present at the time execution. In an attempt to reduce forgery and fraud cases, it is good practice for the Registrar to keep a log book detailing the particulars of the persons or parties when doing the attestation as such records would prove to be useful when disputes arise as to the genuineness of any attestation.

S.K. Das has highlighted the importance of attestation and stated that the process of attestation is the hinge on which hangs the success of any scheme of transfer, charge or lease by registration and that the attestating witness not only must state that the signatory signed in his presence but must also add that he verily believes that such signature is of the proper handwriting of the person described therein [2].

The Court of Appeal in *Ong Lian v Tan Eng Jin* [3] highlighted the importance of the attestation process by stating that the attestation is the hinge on which hangs the success of any scheme of transfer of land by registration and in jurisdictions where there is no assurance scheme it is even more than ordinarily important.

Brooking J in *Ex parte Charles Windsor* also stated that [4]:

Attestation was material, not because it went to validity, but because of its practical or commercial significance as affording both a safeguard against forgery and a means of proof in the event of litigation.

In the Indian cases of *Abinash v Dasarath* [5] and *Shamu Patter v Abdul Kadir* [6] it was found that attestation should be of execution and not merely of admission of execution; the executants and the attestating witness must sign the instrument in the present of each other.

Young J in *Ellison v Vukicevic* [7} discussed the principle that attestation requires the witness to be present at the time of execution for the purpose of witnessing execution, and that he sign the attestation clause as evidence of that. A witness is considered as someone who attests a signature by a party to a transaction as a person who is present at the signing and who sees what passes and who shall, when required, bear witness to the facts [8]. Jessel MR in *Ford v Kettle* [9] also proclaimed that it must be done in the presence of the man who in the future will be able to testify that it was done. This is also apparent in *Messer v Gibbs* [10] when Webb J proclaimed that the principal reason for requiring the transferee's signature is to show his assent.

While Foster J in *Broadlands International Finance Limited v Sly* [11] accepted that where a witness did not sign the document as witness in the presence of the person executing the document, there was a clear breach of the requirement that the document be witnessed. In *Brott v R*, [12] Brennan J said that 'a witness who attests a signature by a party to transaction is a person who is present at the signing'.

In the Malaysian context, Abdul Hamid J in *Re Joseph De Cruz James & Anor; Margaret Rose v Manomani Kandiah* [13] stated that:

The practice of signing blank form has left much to be desired and to say the least it was quite irregular but I fail to see how it would render the transfer invalid. Section 211 of the National Land Code 1965 which deals with the attestation of the instruments of dealing primarily provides matters relating to persons qualified to attest, type of attestation clause to be used and the signature of the person attesting. Failure, if any, to comply with the section of the nature revealed from the circumstances of this particular case is, I think, something that affects the form and not the substance. I would regard it as a mere irregularity and not an illegality.

Chang Min Tat J in *Che Dah v Commissioner of Land Titles* [14] also observed that:

In the presence of such provision (section 340), it becomes of the utmost importance that any instrument transferring the proprietorship of or interest in the land should show, on the face of it, the validity of the execution by the registered proprietor as transferor or the person with a registered interest in the land.

Low Hop Bing J in *Wong Fook Seng v Mrs Fredericks Nee Kho Swee Cho* [15] held that section 211 of the Code regulate the attestation of instruments of dealing and provides that the attestation clause shall be that shown in Form 13B. The error in inserting the defendant's name as the person executing Form 19B was a fundamental error going to the roots of the caveat. Therefore, the plaintiff's Form 19B was null and void and consequently the caveat entered thereby was also null and void. On this ground alone, the caveat should be removed forthwith.

In *Albert Chew v. Hong Leong Finance Bhd*, [16] the advocate and solicitor had attested the signature of the bank's attorney on a discharge of charge, and the solicitor admitted that the bank's attorney did not sign in his presence or before him. The bank's attorney signature was forged. It was held that the advocate and solicitor had falsified the attestation and therefore had breached a Code so fundamental to the legal profession.

Indeed clear instruction and reminders are given by the Malaysian Bar Council for legal practitioners to actually be present at the time of the attestation and the Court even held in *Lau Teck San @ Lau Beng Cheng & 3 Ors v SK Song* [17] that an attesting solicitor would be liable for professional negligence and or breach of an implied warranty of an authority in the event the transferor turns out to be an impostor.

Zulkefli J in *Wee Huay Fong v Pentadbir Tanah, Klang & Anor* [18] in addressing the issue of whether a charge document is considered as void for the reasons of non-attestation and falsified attestation where the chargor alleged that the charge was not signed before the attesting solicitor stated that the purpose of section 211 of the Code with regard to attestation of instruments of dealing, is to prevent the forgery of the charge document and if the chargor does not deny signing the said charge document, the purpose of requiring the attestation has then been served.

The learned judge in interpreting the said provision look to the purpose of the statute that is the mischief that it intends to address and section 211 of the Code seeks to prevent forgery by ensuring that an attesting witness certifies that the person executing the charge is in fact the chargor. If the chargor does not dispute the fact that she is the person who executed the charge, then the mischief has been addressed and therefore the purpose of section 211 of the Code has been met. It was held that the said charge is not a void instrument and once registered become indefeasible. The Australian case of *Isaac Alexander Brott v The Queen* [19] was followed in this case where the principle that an inaccurate attestation does not alter the validity of the document.

4. Attestation for Malay Reserve Land

Where the land falls under the various Malay Reservations Enactments and Part VIII of the *Code (Penang and Malacca Titles) Act 1963*, the attestation has to be done only by the Land Administrator [20]. Under the *Director of Land and Mines Circular No. 2/1992*, it is provided that an application to enter a caveat on a Malay reserve land must be attested by a Land Administrator only. If the application was not attested by a Land Administrator then the application is considered as unfit for registration and therefore must be rejected under section 298 (1). It must be observed however that the definition of Malay is different according to the various Malay Reservations Enactments.

For example, in *Chuan Seng & Anor v Wan Abdul Hamid Wan Jaafar & Ors*,[21] the Court held that the transfer of a Malay Reserved land is void *ab initio* for having contravened section 6(1) of the *Kedah Reservations Enactment No. 63*. Puja (the transferee) is not a Malay defined in section 2 of the Enactment and neither has it been declared as one under section 19. The fact of it being 100% owned by Malays does not make it a Malay within the meaning of the Enactment. There is no equivalent provision as that found in *Malay Reservations Enactment (FMS Cap 142)* where a company with all members being Malay is deemed Malay. It is Enactment No. 63 which applies to Malay Reserved land in Kedah and not FMS Cap 142 as submitted by defendants' counsel.

However, para 4 of the Fifth Schedule exempts this requirement in respect of an execution by a person under a power of attorney on

behalf of a body corporate or company if that body or company is allowed to be a charge under the appropriate Malay Reservations Enactments and also in respect of an instrument of discharge of a charge.

Mohd Hishamuddin J in Sime *Bank Bhd v Projek Kota Langkawi Sdn Bhd* [22] held that the plaintiff in this case which is a company and therefore not a Malay as defined by the Enactment is allowed to be a chargee in respect of a Malay reservation land and therefore under para 1 of the Fifth Schedule of the Code the execution of the charge instrument by the attorney of the charge, may be attested by an advocate and solicitor.

In *Bank Pembangunan dan Infrastruktur Malaysia Bhd (formerly known as Bank Pembangunan Malaysia Bhd) v Omar bin Hj Ahmad* [23], the Court of Appeal held that the charge executed by the defendant as chargor and attested by an advocate and solicitor instead of by the Land Administrator was clearly not in accordance with section 211 read together with para 3(1) of the Fifth Schedule to the Code and thus it was not registrable under the Code as a legal charge. However the Court further held that the execution thereof by the chargor is cogent evidence of his express antecedent agreement to provide security for the loan which the bank had given to the borrower and that the wrong attestation by an advocate and solicitor, instead of a Land Administrator, in relation to the Malay Reserve land would not, in the absence of any fraud, misrepresentation or any other vitiating factor, invalidate the charge.

5. Other Attestation Procedures and Legal Requirements

It is important to note that the officer attesting any execution according to section 211 of the Code is required to sign the attestation clause and, if he has a seal of office, authenticate his signature with that seal.

There are several important points to be taken into consideration when conducting an attestation. First, the person must be an adult according to the *Age of Majority Act 1971* and *Contracts Act 1950* as minor is incapable to enter into a contract. According to the *Age of Majority Act 1971*, the age of majority is 18 years. Section 11 of the *Contracts Act 1950* provides:

Every person is competent to contract who is age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

Generally, where a minor enters into a contract, he is not bound by its terms and can avoid performance without being treated as having breached the contract. However, the contract is said to be unenforceable as against the minor. By contrast, the contract might be enforceable by the minor against the other party. There are however several exceptions to this general one. For one, contract for necessities is enforceable against a minor.

What can be considered as necessities? According to *Wharton v McKenzie* [24], where a minor purchases goods and services necessary to his actual requirements such as food, clothing, accommodation, medical services and education which are appropriate to his 'station in life' they are referred to as 'necessities'. Under section 9(2) of the *Sale of Goods Act 1957*, the minor is bound to pay a reasonable price for any such goods or services supplied making the contract enforceable and binding on the minor.

However one must bear in mind that the quality or quantity of the 'necessaries' for a particular minor relevant to his station in life will certainly differ from those necessary for another minor and that such distinction refers to the particular position of the minor in society such as decided in *Nash v Inman* [25].

Another exception for minors entering into contract is where the minor has received property 'of a permanent nature' under a purported contract. The minor has a choice then as to whether or not to be bound by it. He can ratify the contract during minority by accepting it as binding and agreeing to be bound by its terms; the right to ratify lasts for a reasonable time after he becomes as adult. In *Re Constantinople & Alexandria Hotel Co* [26] this type of contract is treated as being voidable. If the minor fails to ratify the contract, it is unenforceable against him and he is required to return that property to the other party.

As a general principle, a contract for the purchase of land or for an interest in land would not be considered as necessaries for a minor except where that contract is to provide for accommodation such as for a lease then it can be considered as a necessary in most cases.

The provisions of the Code have to be referred to in such situations because section 205(2) of the Code explicitly stated that:

The persons and bodies in whose favour.dealings are capable of being effected shall be those, and only those, to whom, under section 43, State land is capable of being alienated.

Section 43 of the Code provided that the powers of disposal on the State Authority by section 42 may be exercised only in favour of, and applications for their exercise may be accepted only from, the following persons and bodies which included natural persons other than minors. The provisions of the Code therefore would disentitle a minor from dealing with such land and that the trustee will hold the legal or statutory estate or tile, but the minor will have the equitable or beneficial estate or title.

The Registrar when executing and attestation must also verify that the parties involved is a citizen of Malaysia. Section 433B of the Code provides that non-citizens and foreign companies may acquire land through dealing but an application in writing must be made to the relevant State Authority beforehand. For example in *Jalaludeen a/l Abdul Aziz v Thrumalingam a/l S Rajadurai & Anor* [27], the plaintiff's failure to obtain a prior approval from the State Authority rendered the memorandum of transfer that he entered into as null and void as it contained an object or consideration that was forbidden by law specifically under the provisions of section 433B and section 433C of the Code. It was further held that the object or consideration was thus unlawful and the agreement was, therefore, void by reason of section 24 of the *Contracts Act 1950*.

Reasonable inquires as to the person voluntariness when executing the instrument and his understanding of the contents and effect thereof are also considered as the duties of the Registrar as the attestating witness [28]. In this context the person must be of sound mind and understand what he is undertaking.

According to the *Director of Land and Mines Circular No. 1/1995*, it is immaterial whether the transferees or the transferor sign the instruments first as there is no provision which specifically require that the transferor sign before the transferee in order for the instrument to be of effect. Therefore the Registrar cannot reject an instrument of dealings solely on these reasons.

In other countries which applied the Torrens system of registration but does not have the stringent requirements as provided under the Fifth Schedule of the Code, problems can arise especially when forgery is later discovered as to the process of attestation of documents.

For example in *Ratcliffe v Waters* [29], A was the registered proprietor of a lot of land. B, his daughter forged an authority to A's solicitor, S, requiring S to give B the title to the land. B then went to another solicitor, T and said that A wished to transfer the land to her and she wished to charge the land. B and C who masqueraded as A went to T to execute the transfer and the charge and T acted as witness. Street J referred to the attestation by the solicitor which described A 'who is personally known to me' which is required under the *Real Property Act 1900 (NSW)* and observed that:

There has, it seems, grown up in conveyancing practice an element of looseness in the identification of transferors in connection with the attestating of signatures to transfers under a note such as appears in this transfer. No evidence of such a practice has been tendered, but the suit has been conducted with recognition on both sides of some such practice. It seems necessary to remind solicitors, in view of the effect of a void instrument has when regis-

tered, of the significance of identifying transferors or mortgagors with the persons who represent themselves to be authorized to transfer or mortgage. The statutory forms of transfer and mortgage themselves recognize the importance of identification, and purport to prescribe the only persons authorized to attest the transferor's or mortgagor's signature – a prescription which is, I gather, commonly disregarded, as it was , in this case. Faithful compliance with the directions in this regard, on the statutory forms of transfer and mortgage will lessen the risk of loss through fraud or forgery.

6. Suggestion and Recommendation

6.1. Uniformity of Land Registration Practices

Since land matters falls under the individual States' powers, it can be seen that sometimes an instrument of dealing that may be deemed to be fit for registration at one land registry may be suspended or rejected at another land registry. This is particularly due to the issuance of different guidelines, rules and procedures introduced by the States themselves. Such practice was highly criticized by the legal practitioners but it is unavoidable unless the practices are found by the Court to be clearly in contravention with the provisions of the Code. It is highly suggested for the State Government to streamline their procedures in order to better serve the public thus ensuring the quality of the land administration.

6.2. Amendments to Attestation Procedures

Under the National Land Code (Amendment) Act 2016, the Fifth Schedule was amended where a diplomatic officer and consular officer was included as one of the officers or persons who can attest the execution of instruments under the Code. Such inclusion is important to accommodate land proprietor who might be residing outside Malaysia. However, it is to be noted that under the amendment, an advocate and solicitor, or an advocate, as the case maybe, in attesting any execution, shall indicate that he holds a practising certificate which is in force at the date of the attestation and shall also indicate the reference number to which it relates.
The fact that the government is serious in transforming the land administration by implementing e-Tanah and introducing electronic lodgement of instruments under the new provision 292A, should be lauded. Subsequently, the process of attestation through manual and detailed forms should also be simplified to cater such technological innovation.

7. Conclusion

It is imperative for the Registrar as an agent who maintains and operates the system, to take the necessary steps to reduce or deter the occurrence of fraud in land registration. Since the process of attestation is considered as vital in the execution of instruments then proper care must be exercised by all parties involved. It may appear that the methods are cumbersome to the unsuspecting layman but a minute detail makes all the difference which may result in the said dealing to be considered as void according to the law.

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