

# A Review of the Judicial Approaches to the Recognition of Customary Security Transactions in the Peninsular Malaysian Land Law

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## I. Introduction

From the inception of the modern statutory system of land dealings based on the Australian's Torrens model in the last quarter of the 19th century,<sup>2</sup> the Malaysian judiciary has had to, up until to date, concern itself with the hard question whether the statutory system has provided for an exhaustive system of land dealings and land interests. The modern system has, after a succession of land statutes, continued today in Peninsular Malaysia under the National Land Code 1965. After almost 12 decades of implementing the modern statutory system, the issue has yet to be resolved satisfactorily. Although there is now high authority on judicial reception of extra-statutory land dealings and interests, there are still found judicial voices to the contrary. This legal area is also shrouded by high level of uncertainty as regards the exact types of land dealings and land interests permitted legal recognition outside the statutory system; and where a type of extra-statutory dealing or interest is recognized, its nature and incidents are not always clear.

This paper explores one aspect of this big issue.<sup>3</sup> It focuses on the judicial treatment of a type of customary security land dealing known in the Malay language as *jual-janji* (translated as 'conditional sale'). This customary dealing, which was already widely practised amongst the native community before the intervention of the modern statutory land system, has continued to be resorted to by the locals, even until today. The paper aims to review key judicial decisions in which the courts have been called upon to adjudicate on the rights of the parties to the *jual-janji* transactions, in order to decipher the legal concept and nature of *jual-janji*, and to evaluate the legal position assigned to it in the Malaysian land law by the courts.

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<sup>2</sup> The first Torrens land statute was the Selangor Registration of Title Regulation 1891 (Order in Council No IV of 1891).

<sup>3</sup> This writer has explored other aspects in several earlier publications – see Yong Chiu Mei, 'A Review of the Nature of Security Transactions over Properties Without Individual Title in Peninsular Malaysian Land Law' [2006] The Law Review 84-113; 'Yong Chiu Mei, 'Equity and Indefeasibility of Title and Interests in Land under the Peninsular Malaysian National Land Code 1965 (Part I)' [2006] 2 MLJ xlix-lxxiii; Yong Chiu Mei, 'Equity and Indefeasibility of Title and Interests in Land under the Peninsular Malaysian National Land Code 1965 (Part II)' [2006] 3 MLJ lxxvi-civ; Yong Chiu Mei, 'The Role of English Equity in the Peninsular Malaysian Torrens System of Land Law: A Review of Salient Statutory Provisions (Part I)' [2005] 1 MLJ lxxviii-lxxxvii; Yong Chiu Mei, 'The Role of English Equity in the Peninsular Malaysian Torrens System of Land Law: A Review of Salient Statutory Provisions (Part II)' [2005] 2 MLJ cvii-cxxvii; Yong Chiu Mei, 'Trusts and the Peninsular Malaysian Torrens System The Implications of the Provisions on Trusts of the National Land Code 1965' [2004] 4 MLJ cxli-clx.



## The legal nature of '*jual janji*' transactions

### a. The Conceptual Framework – What is a *jual janji* Transaction?

*Jual janji* is a term in the Malay language. It is usually translated as conditional sale. Literally 'jual' means 'sale', and 'janji' means 'promise'. It is a kind of customary security dealing in land widely practised amongst the Malay peasant community before the introduction of the modern Torrens type land dealings system in the late 1880s. The form of this dealing was influenced by the rule against usury in Islam; Islam being the religion of the Malays. In its form, a *jual janji* resembles the common law mortgage. The resemblance is no coincidence since the form of the common law mortgage was also a product of the influence of the medieval Church law against usury. However, leaving aside this common feature in the origin of the two types of security dealing, there is no evidence to suggest that the conceptual genesis and the early development of *jual janji* were in any way influenced by the rules of the common law mortgage. Maxwell<sup>4</sup> did not offer, in any of his writings, any explanation for the non-inclusion of *jual janji* in the first Torrens statute, the Selangor Registration of Titles Regulation 1891. The resemblance in form between *jual janji* and the common law mortgage might provide the answer, since the borrowed system, *i.e.* the Australian Torrens system, had intended to substitute hypothecation (charge) for the common law mortgage. However, despite the non-inclusion, *jual janji* dealing continued to be resorted to by the *kampong* (traditional Malay village) community as a security dealing.

There is no one single authoritative description of the form of a *jual janji* transaction. Nevertheless, Maxwell's work on the Malay customary land tenure published in 1884 may well provide the most apt description of such customary practice.<sup>5</sup> The practice is described in the following words:

The Malay who raises money on his holding by the transaction called *jual janji*, sells his proprietary right<sup>6</sup> for a sum then and there advanced to him, and surrenders the land to the vendee, coupling; however, the transfer with the condition that if, at any time, or within a certain time, he shall repay to the vendee the sum so advanced, he (the vendor) shall be entitled to take back his land. This transaction differs from our mortgage<sup>7</sup> in the facts: - (1) that no property in the soil passes, but merely proprietary right;<sup>8</sup> (2) that possession is actually given to the person who advances the money.

It frequently happens that the conditional vendor (the debtor) wishes to retain the possession of the land during the period of his indebtedness, and, if so, this is arranged by his becoming the tenant of the conditional vendee (the creditor). The rent in money or kind which he pays, or which some other tenant pays if the land is not let to the conditional vendor, or the profit which the conditional vendee derives from cultivating the land himself if he does not let it, takes the place of interest, which is not charged, usury being condemned by Muhammadan law.

<sup>4</sup> WE Maxwell. Maxwell was instrumental in introducing the Torrens system into the Malay Peninsula in the late 1800s when he was the British Resident of the State of Selangor. He drafted and put into force the first local Torrens statute, the Selangor Registration of Titles Regulation 1891.

<sup>5</sup> Maxwell, 'The Law and Customs of the Malays with reference to the Tenure of Land' (1884) 13 Journal of the Royal Asiatic Society (Straits Branch) 75.

<sup>6</sup> See the explanation in the following paragraph.

<sup>7</sup> *I.e.* an English common law mortgage.

<sup>8</sup> See the explanation in the following paragraph.



If a term is mentioned within which the money must be repaid, and the condition of repayment is not fulfilled within the appointed period, the sale becomes absolute (*putus*) and the vendee takes the full rights of proprietorship. But even then, the payment of the money at some later time would, in most cases, be sufficient to enable the conditional vendor to regain his land from a stranger under purely native rule. If no term is fixed, the money may be paid at any time, but until it is paid, the conditional vendee is entitled to retain possession of the land and to cultivate it, or let it, at his pleasure. A short document is generally drawn up in evidence of the transaction, but these are often so loosely or informally worded that the proof of the existence of the condition rests principally upon the good faith of the parties. Sometimes there is no written agreement at all.<sup>9</sup>

To understand the above extract in the correct perspective, it is to be noted that Maxwell's term 'proprietary right' meant 'usufructuary' right, *i.e.* a right of a peasant in a community of subsistence agriculture to occupy and cultivate an area of land. This right was acquired 'by the clearing of the land followed by continuous occupation'.<sup>10</sup> It was Maxwell's theory that in the Malay customary tenure the soil of a Malay State was vested in the Malay King (Sultan or Raja). The subjects of the King had merely a right to use the land: they did not have 'property' or ownership in the land.

One may extract from the above passage that, at the time of Maxwell, in a *jual janji* transaction, as security for a loan, the borrower would 'sell' his land to the lender. In order to make the lending profitable, but at the same time to avoid usury, the lender was let into possession of the land to take profits as an owner. A time might or might not be specified for the borrower to regain possession (hence use) of the land by repaying the capital sum of the loan. The parties might also agree that the borrower could remain in possession as a tenant of the lender by paying rent in kind (normally part of the produce of the land) or in money. Where a time was specified for the borrower to repay the capital sum, the sale would become *putus* *i.e.* 'absolute' if the loan was not paid on the due date. The lender could then remain in possession or the borrower would remain as the tenant of the lender.

*Jual janji* dealings are still carried out today. Decided cases show that after the modern Torrens system of registration of dealing was introduced, the 'sale' element of a *jual janji* transaction started to take the form of a formal transfer; even though, it was 'conditional', by the registration of the title in the name of the lender, subject to a collateral agreement that the title was to be retransferred by registration to the borrower upon repayment of the loan. It would; therefore, appear that the availability of registration has made a *jual janji* transaction very similar to an English common law mortgage. There have also been cases where a lender took possession without first being registered as the proprietor, the borrower being under an obligation to make the 'sale' 'absolute' by executing an instrument of transfer in the lender's favour upon the expiry of the repayment period.<sup>11</sup>

In a classic customary setting of a Malay rural peasant community, it would appear that the 'sale' of the land is more for the purpose of facilitating the taking of profits, in lieu of interest, from the land by the lender, rather than enabling the lender to 'hold' the land as security for

<sup>9</sup> *Supra* n. 4, pp. 123-124.

<sup>10</sup> *Supra* n. 4, pp. 77-78.

<sup>11</sup> See, for example, *Halijah v. Morad* [1972] 2 MLJ 166 and *Nawab Din v. Mohamed Shariff* (1953) 19 MLJ 12.



repayment<sup>12</sup>. It is not a qualifying feature that a period of time must be specified for repayment. Of course, there is a compelling reason for the borrower to pay the capital sum since without repayment he would not be able to regain the use of the land or cease to be a tenant. With the advent of the concept of title by registration, the lender is also enabled, in a more proper sense, to 'hold' the land as security, without taking possession of the land, or making the borrower the tenant of the land.<sup>13</sup> As such, the practice has also been resorted to among the non-Malays.<sup>14</sup> Avoidance of 'usury' has apparently become less important. In at least one reported case interest was charged on the loan even though the parties were Malays (therefore Muslims), yet the transaction was judicially recognized as a '*jual janji*' dealing.<sup>15</sup>

## **b. The Issue of Recognising *jual janji* As a Form of Security Dealing Outside the Statutory System**

### **i. The Judicially Perceived Uneasy Association between Common Law Mortgages and *jual janji* Transactions**

A survey of the cases shows that judges tend to perceive that a *jual janji* transaction as only 'security' in nature if the borrower is entitled to 'redeem' the land after the contractually agreed period.<sup>16</sup> This view equates the recognition of the 'security' nature of the transfer with

<sup>12</sup> In *Mohamed Isa v. Haji Ibrahim* [1968] 1 MLJ 186, Azmi CJ said at page 187 of the report: The transaction comprised in the transfer of the land ... between the plaintiff and the defendant is what is generally known among the Malays in Kedah as a "*jual janji*" or conditional transfer with a right to repurchase and so made in order to enable the lender to benefit from the transaction lawfully according to Muslim law. The rent of the land would then belong to the lender.

<sup>13</sup> In *Yaacob Lebai Jusoh v. Hamisah Saud* (1950) 16 MLJ 255 and *Mohamed Isa v. Haji Ibrahim* [1968] 1 MLJ 186, the borrower remained in possession, but the facts did not suggest that he was paying rent; in *Ismail Haji Embong v. Lau Kong Han* [1970] 2 MLJ 213, the borrower paid interest on the loan instead of rent; in *Abdul Hamid Saad v. Aliyasak Ismail* [1998] 4 CLJ 429, the facts stated that the borrower in possession was not obliged to make any payment to the lender. In other cases, whether rent was paid by the borrower in possession was not regarded as important.

<sup>14</sup> For example, the parties in *Wong See Leng v. C Saraswathy Ammal* (1954) 20 MLJ 141 were ethnically Chinese and Indian.

<sup>15</sup> *Ismail Haji Embong v. Lau Kong Han* [1970] 2 MLJ 213. There is only one reported case where the judge applied the traditional idea - *Tengku Zahara v. Che Yusof* (1951) 17 MLJ 1. In this case, Briggs J, refusing to recognize a transaction as *jual janji* because interest was charged on the loan, said (at page 3): The whole purpose of *jual janji* transaction is to provide a procedure for securing loans and giving the lender adequate recompense therefor without infringing the prohibition of usury which is binding on the conscience of all good Muslims. In its proper form the transaction involves an actual transfer of possession and the enjoyment by the transferee of the rents and profits of the land during the period before the retransfer. An agreement that the transferee will let the transferor remain in possession in consideration of a rent is not offensive to Muslim views, but such an agreement, even if made, would not justify the capitalisation of the rent or its inclusion with the sum intended to be lent.

<sup>16</sup> See, for instance, the account of this judicial view in Teo & Khaw, *Land Law in Malaysia – Cases and Commentary* (Malaysia: Butterworths Asia) (2<sup>nd</sup> ed., 1995) at p. 410: The issue which has confronted the courts, as early as 1917, was whether such a transaction, in particular the collateral agreement for a re-transfer, had effect only as a pure contract of sale or whether effect could be given to it as a customary security transaction. In the case of the former, time would be of essence in regard to the period stipulated for repayment in the collateral agreement for a re-transfer. In the case of the latter, time would not be of essence as the security is represented by the land which is in the name of the lender. Provided the borrower repays the sum borrowed, the land would be re-



the right of the borrower to a retransfer unrestrained by the contractually agreed period. With respect, it is submitted that non-recognition of a right to a retransfer after the contractually agreed period would not make a security dealing by transfer any less 'security' in nature. In England, equity intervened to grant the right to redeem in equity to a mortgagor only from the seventeenth century onwards, but there was no suggestion that a common law mortgage before the intervention was any less a form of security.<sup>17</sup> It is further submitted that the recognition of such a right of retransfer after the contractual period does not necessarily mean that the equitable rules in relation to English common law mortgages have been applied to reach that result. The local courts have inherent jurisdiction to do equity between the parties to a transaction so that a judicial grant of the right to a retransfer after the contractual period may be the result of the exercise of local judicial equitable jurisdiction not amounting to the importation of an common law mortgage rules. Viewed in this way, the prohibitive section 6 of the Civil Law Act 1956 would not be an issue.<sup>18</sup> It would appear to be a policy decision for the courts to make as to whether the recognition of the right to retransfer after the contractual period is appropriate in the local codified system of statutory dealing by registration; and, if so, what would be the nature of the right and interest of the lender and the borrower in the land and the possible impact on the statutory principle of indefeasibility. The courts did not approach the issue in this manner. Cases decided so far show that the judges have been troubled by the 'imagined' or 'feared' association between *jual janji* transactions and common law mortgages. The Privy Council opinion in *Haji Abdul Rahman v. Mahomed Hassan*<sup>19</sup> has also apparently asserted a far-reaching influence on the subsequent judicial thinking in this field.

## **ii. The Privy Council Opinion in *Haji Abdul Rahman v. Mahomed Hassan*<sup>20</sup>**

Some academic writings suggest that the Privy Council opinion in *Haji Abdul Rahman* is unduly harsh on a borrower in a *jual janji* transaction.<sup>21</sup> By confining the right of the borrower to repurchase the land within strict contractual principles, the Privy Council refused to intervene by way of equity to allow a retransfer after the termination of the contractual right to repurchase. It is suggested that such an approach is a total disregard of the reality of traditional Malay rural life where *jual janji* transactions are undertaken more in the spirit of *gotong royong* (community mutual help) than for profit making, where the amount of the loan is mostly small in proportion to the actual market value of the land and where the borrower usually depends upon the very land under the transaction to earn a living. It is, therefore, urged that equity should intervene by granting a right to redeem in equity after the contractual

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transferred to him. Note that by '1917', the authors are referring to the Privy Council case of *Haji Abdul Rahman v. Mahomed Hassan* [1917] AC 209.

<sup>17</sup> Sykes terms the common law mortgage before equitable intervention 'mortgage *stricto sensu*' - Sykes & Walker, *The Law of Securities* (Australia: LBC) (5<sup>th</sup> ed., 1993), Chapter 1.

<sup>18</sup> In essence, this section provides that the Civil Law Act 1956 is not to be read as having brought into the states of Malaysia any part of the law of England relating to land.

<sup>19</sup> [1917] AC 209.

<sup>20</sup> *Ibid.*

<sup>21</sup> See Wong, *Tenure and Land Dealings in the Malay States* (Singapore: Singapore University Press) (1975), pp. 282-293; Wong, 'Jual Janji Transactions - A Question of Recognition and Equitable Intervention' (1973) 15 *Malaya Law Review* 27. Teo & Khaw, apparently influenced by Wong's view, also suggest equitable intervention in favour of a borrower in a *jual janji* transaction - *Land Law in Malaysia - Cases and Commentary* (Malaysia: Butterworths Asia) (2<sup>nd</sup> ed., 1995), p. 410. See also Allan & Hiscock, 'Jual Janji' in Ahmad Ibrahim & Sihombing (eds.), *The Centenary of the Torrens System in Malaysia* (Kuala Lumpur: Malayan Law Journal) (1989), p. 80.



period of redemption. However, in view of the present spread of the use of the *jual janji* transactions beyond the traditional Malay peasant community setting to the business community and to non-Malays, and the continued urbanisation of society, an argument for the recognition of a borrower's rights after the contractually agreed period can no longer be based solely on the narrow traditional setting. Further, it is also submitted that Lord Dunedin's opinion in *Haji Abdul Rahman* was in fact relatively favourable to a borrower in a *jual janji* transaction, bearing in mind the timing of the decision and the strict legislation under which the case was decided. It was made in the early 1900s when the Court of Appeal of the Malay States still largely held a strict attitude against dealings in land outside the statutory system. The Court of Appeal in *Haji Abdul Rahman*, which seems to have recognized the principle 'once a mortgage always a mortgage', was an exception. In comparison with the strict attitude of the local judges prior to *Haji Abdul Rahman*, the Privy Council took a softer stance by not striking down the *jual janji* transaction as null and void as an attempt to deal in land. Lord Dunedin declined to pronounce on whether the transaction was an outright sale with an option for a resale, or a security transaction. In this manner his Lordship avoided having to strike down the whole transaction as null and void. The decision at least preserved the contractual right of a borrower to repurchase the land. What Lord Dunedin could not do was to disregard the clear and strict words of section 4 of the Selangor Registration of Titles Regulation 1891 which declared a dealing transacted not in conformance with the Regulation as 'null and void and of none effect', although his Lordship's opinion also appears to have been based on the overall spirit of a codified system of registration of titles. Having said that, it is reiterated here that, even though Lord Dunedin's effort to preserve a borrower's contractual right to redeem land is to be admired, the grant of equitable relief to a borrower to repurchase the land after the contractual period should not be narrowly equated with the application of the rules of common law mortgages. It is submitted that the local courts cannot be prevented from developing a particular principle of law solely because the English legal system had developed a similar principle earlier.

If *Haji Abdul Rahman* is to be adhered to, the recognition or non-recognition of *jual janji* as a security transaction is a non-issue. The agreement for resale would be given full contractual effect. If a borrower can establish that the original sale and transfer have been undertaken in the traditional understanding of *jual janji*, this is merely evidence to prove the existence of an agreement for resale. Whether a *jual janji* transaction should be regarded as a security dealing in land seems to be of significance only where the court is asked to rule in favour of the borrower after the contractual period to repurchase. In saying so, it is not suggested that a necessary feature of a security transaction is the presence of the borrower's equitable right to redeem land outside contractual principles. It is; however, suggested that, if a borrower has an equitable right to repurchase the land after the contractually agreed period, there would be judicial recognition that the initial sale and the collateral agreement for resale do constitute a security transaction. Certainly, such a recourse has to be taken either in direct confrontation of, or by distinguishing the authority of, the Privy Council opinion in *Haji Abdul Rahman*.

### **iii. Judicial Approach Subsequent to *Haji Abdul Rahman***

*Haji Abdul Rahman* was decided under the stringent Selangor Registration of Title Regulations 1891. Subsequent relevant cases have been decided under the apparently less stringent provisions of the Federated Malay States Land Code (hereafter referred to as the 'FMS land Code') and the currently enforced National Land Code 1965, which did not retain the strict words of 'null and void and of none effect' as regards the consequence of attempted transactions not in conformance with the statutory scheme of dealings.



(1) The Misunderstanding of *Haji Abdul Rahman* in Two Cases

In view of the clear opinion of Lord Dunedin that the common law mortgage is not recognized in the local codified system of land dealings, it is indeed surprising that the Court of Appeal in *Yaacob Lebai Jusoh v. Hamisah Saad*<sup>22</sup> and the High Court in *Nawab Din v. Mohamed Shariff*<sup>23</sup> construed *Haji Abdul Rahman* as having promulgated the opinion that a *jual janji* transaction was to be likened to and treated in substance as a common law mortgage, with the consequence that the borrower had a right of redemption after the contractual period of redemption. Both cases involved a sale of land to a lender and a collateral agreement for resale at the same price to take place within a specified period of time. The borrowers failed to repurchase on time. The facts of the two cases were not identical. In *Yaacob Lebai Jusoh* the land was registered in the name of the lender, subject to a collateral agreement for retransfer to the borrower upon repayment, with the borrower remaining in possession at all times; in *Nawab Din*, the lender took possession of the land, but was only to be registered as the owner if the borrower failed to repurchase within the agreed time. In *Yaacob Lebai Jusoh*, the borrower asked for a court order to direct the lender to retransfer the land; in *Nawab Din*, the lender sued for specific performance of the sale and transfer. In both cases, the court considered the agreement for sale and resale as having constituted a transaction which was 'in essence a mortgage of land'<sup>24</sup> to secure the repayment of a loan equivalent to the price of the sale and resale. The court, therefore, concluded that the agreement for resale was 'in effect a redemption' with the consequence that the borrower was 'entitled to redeem what was given as security'<sup>25</sup> unaffected by the contractual resale period. What was most surprising was the reference to *Haji Abdul Rahman* as the authority for the decision. In *Yaacob Lebai*, Jobling J said:

For the defence it was submitted that in any case the agreement of 30<sup>th</sup> January, 1945, was void as the [borrower] had not repurchased the land within the stipulated period of three years. But in *Haji Abdul Rahman v. Mahomed Hassan*, the Privy Council laid down that where an agreement is in the nature of a mortgage the right to redeem remains irrespective of whether or not the period within which it is specified the loan shall be repaid has expired. The stipulation that the land shall be re-purchased within three years does not therefore affect the [borrower's] right to redeem.<sup>26</sup>

And Briggs J said:

... the transfer was made by way of security only ... I am satisfied that the transaction was the familiar one of *jual janji*. The wording of the agreement and the amount of the consideration for re-transfer (in a rapidly depreciating currency) tend to support this view. Once that is established, it matters not whether the agreement was in the form an agreement of purchase and sale or an option. The case of *Haji Abdul Rahman v. Mahomed Hassan* shows that in either event time is not of the essence of the contract, since the later transaction will be in effect a redemption.<sup>27</sup>

<sup>22</sup> *Supra* n. 12.

<sup>23</sup> *Supra* n. 10.

<sup>24</sup> *Per* Jobling J in *Yaacob Lebai Jusoh*, *supra* n. 12, p. 257 and Thomson J in *Nawab Din*, *supra* n. 10, p. 14.

<sup>25</sup> *Per* Thomson J in *Nawab Din*, *ibid*.

<sup>26</sup> *Supra* n. 2, p. 257.

<sup>27</sup> *Ibid*.



The third judge Pretheroe Ag CJ gave unreserved concurrence with the other judges.

In *Nawab Din v. Mohamed Shariff*, Thomson J said:

Having come to that conclusion, it clearly follows from the [opinion] of the Privy Council in *Haji Abdul Rahman v. Mahomed Hassan* and of the local Court of Appeal in the case of *Yaacob bin Lebai Jusoh v. Hamisah binti Saad* that the [borrowers] are entitled to redeem what was given as security and that that right is not affected by the stipulation that the land can only be re-purchased within two months after the lapse of a period of three years.<sup>28</sup>

Wong suggested that, leaving aside the apparent misreading of *Haji Abdul Rahman*, the courts in the two cases were in fact acting in the spirit of setting the policy of recognising a *jual janji* transaction as a security transaction outside the statutory system. He also suggested that such a course should have been carried out by distinguishing *Haji Abdul Rahman* from the revised less stringent version of the statutory system under the FMS Land Code.<sup>29</sup>

## (2) The Return to *Haji Abdul Rahman*

Four years after *Yaacob Lebai Jusoh* and one year after *Nawab Din*, in *Wong See Leng v. C Saraswathy Ammal*,<sup>30</sup> the Court of Appeal was again urged to give a judgement according to the principle of 'once a mortgage always a mortgage' in favour of a borrower in a *jual janji* transaction who failed to repurchase within time. This time the Court of Appeal rejected the contention of the borrower. The blatant error of authority in *Yaacob Lebai Jusoh* was pointed out and rectified. Murray-Aynsley CJ(S), with whose judgment Pretheroe Ag CJ<sup>31</sup> concurred, said:

The contention of the [borrower] was that on the basis of these facts the transaction was an informal mortgage and that the English doctrines concerning mortgages, in particular those dealing with clogs on an equity of redemption, should be applied. In my opinion, since the case of *Haji Abdul Rahman v. Mahomed Hassan* it is an impossible position. That case decided as clearly as any case can decide anything that a transaction of this kind can in territories subject to the Land Code amount only to a contract between the parties and nothing more. If it is a contract it is subject to the Contract Ordinance and there is nothing there or anywhere else that gives the Courts power to substitute something else for what was agreed between the parties. The contract alleged was an option with time the essence of the contract. That is a contract which parties are free to make if they choose, and people very frequently do make contracts of this kind. Courts have no power to extend time for exercising the option.<sup>32</sup>

<sup>28</sup> *Supra* n. 10, p. 14. In *Bachan Singh v. Mahinder Kaur* (1956) 22 MLJ 97, the same judge advocated a different juridical analysis of the nature of the pre-registration rights of purchasers.

<sup>29</sup> Wong, *Tenure and Land Dealings in the Malay States* (Singapore: Singapore University Press) (1975), pp. 283-284; Wong, 'Jual Janji Transactions – A Question of Recognition and Equitable Intervention' (1973) 15 Malaya Law Review 27, 31-32.

<sup>30</sup> *Supra* n. 13.

<sup>31</sup> Pretheroe Ag CJ changed his earlier approach in *Yaacob Lebai Jusoh*.

<sup>32</sup> *Supra* n. 13, pp. 141-142.



Buhagiar J replied:

With regard to the appeal on the point of substantive law the question is whether on the facts ... the [borrower] is entitled to a retransfer of the lands ... It was argued on behalf of the [borrower] that the transfer of the lands in question was by way of security and that being so the right to redeem remained, irrespective of whether or not the period during which the option to repurchase was to be exercised had expired. Counsel for the [borrower] relied on the decision of this Court in [*Yaacob Lebai Jusoh v. Hamisah Saad*] and submitted that this Court was bound by this decision ... In my opinion, that case was decided against the authority of the [opinion] of the Privy Council in *Haji Abdul Rahman* ... In that case their Lordships held that the agreement in question was valueless as a transfer or burdening instrument but it was good as a contract. The whole ratio of the [opinion] delivered by Lord Dunedin is based on the registration statute itself in force in the former Federated Malay States and not on any peculiarities of the local law. That judgement is binding ...

The option given to the [borrower] to repurchase the land did not confer on the [borrower] any interest in the land; she only acquired a contractual right.<sup>33</sup>

Thus, again, the relationship between the parties to a *jual janji* transaction was cast within the framework of strict contractual principles devoid of any equity intervention. Whether the transfer to the lender was by way of security or an outright transfer did not seem to be of significance.

The Privy Council opinion in *Haji Abdul Rahman* and the Court of Appeal decision in *Wong See Leng* were again referred to with approval by the Federal Court in *A Kanapathi Pillay v. Joseph Chong*<sup>34</sup> in 1980. In this case P, who was in need of money to pay off a loan secured by a registered charge over his land, agreed to sell the land to D. There was an option for P to repurchase the land at an enhanced price. The option was not exercised within the time provided. D then agreed to sell the land to a third party. P brought an action against D for 'the recovery of the land'. P contended that the transfer of the land to D was by way of security. In the Federal Court, Salleh Abbas FJ, delivering the judgement of the court, held that the contention was not supported on the evidence. It was found that there was a sale of land, with an option for repurchase by the vendor, but that the sale and agreement for repurchase were purely contractual arrangements of sale and resale unrelated to any loan. The finding was said to be based on the contents of the agreement of sale between the parties and the conduct of the parties pursuant to the agreement. In the light of such a factual finding, the case could have been disposed of easily on the ground of failure to exercise the option of repurchase within time. However, the judge also expressed the view that, according to the authority of *Haji Abdul Rahman* and *Wong See Leng*, the option to repurchase given to P had only conferred a contractual right, which did not create any equitable interest in the land for P; and that such contractual right could be defeated by the effluxion of time or the statute of limitation.

Thus, even though on the facts *A Kanapathi Pillay* did not involve a *jual janji* transaction, the Federal Court took the opportunity to approve the principle in *Haji Abdul Rahman* in relation to such a transaction.

<sup>33</sup> *Supra* n. 13, p. 143.

<sup>34</sup> [1981] 2 MLJ 117.



(3) Time Not the Essence of the Collateral Contract for Repurchase - a 'Through the Back Door' way of Equitable Intervention?

*Ismail Haji Embong v. Lau Kong Han*<sup>35</sup> involved a *jual janji* transaction in which a rate of interest was charged on the loan granted. After the expiry of the contractual period for repayment of the capital sum, the lender promised that 'it was all right as long as' the borrower paid the interest monthly. Eventually, when the borrower was in a position to repay the capital, the lender refused to accept payment. When the borrower sued for retransfer, the lender counter-claimed for possession of the land. Ibrahim J acknowledged the agreement of sale and resale between the parties as a *jual janji* transaction but stated that, pursuant to *Wong See Leng, Haji Abdul Rahman and Ponnusamy v. Nathu Ram*<sup>36</sup>, such a transaction could not be considered as anything other than an absolute sale of the land with an option to repurchase, which conferred only a contractual right on the borrower. However, on the facts the borrower had not lost his contractual right to repurchase because by their conduct the parties had shown that they did not consider time to be of the essence of the contract.

Wong suggested that Ibrahim J was in fact making a 'renewed effort' 'to do equity in favour of the borrower', after the unsuccessful attempts of *Yaacob Lebai Jusoh* and *Nawab Din*.<sup>37</sup> Wong thought that, although the facts supported the finding that time was not of the essence of the agreement for resale, Ibrahim J was in fact 'basically inclined towards regarding time not to be of the essence' in a collateral agreement for resale in a *jual janji* transaction. He, therefore, suggested that such an approach might open up a question:

whether or not, once such an agreement is established as being in fact part of a security transaction, a judge who would favour protecting the borrower may readily go a step further to infer that the intention of the parties in the light of the security nature of their dealing must have been not to regard time as of the essence.<sup>38</sup>

He suggested that, to avoid direct opposition to *Haji Abdul Rahman*, such an approach could be a 'technical device' to allow a borrower to 'get back his land' after the expiry of the contractual period of repayment. Wong was an advocate of equitable intervention in favour of a borrower in a *jual janji* transaction and perhaps could have erred on the side of reading too much into Ibrahim J's judgment. A plain reading of the judgment does not suggest any such 'inclination'; but Wong's suggestion received positive judicial support in *Ahmad Omar v. Haji Salleh Sheik Osman*.<sup>39</sup>

*Ahmad Omar* concerned a typical *jual janji* transaction. For reasons undisclosed in the judgment, the lender refused to accept repayment within the contractual repayment period and asked for more time to resell the land. After several further refusals, the borrower brought an action for specific performance of the agreement for retransfer. The lender contended that the sale was an outright sale. In the High Court, Mohamed Dzaiddin J was satisfied on the evidence that 'the said property was transferred by the plaintiff to the defendant as a *Jual Janji*

<sup>35</sup> *Supra* n. 14.

<sup>36</sup> (1959) 25 MLJ 86. This was a decision of Justice Thomson, following the principle in *Bachan Singh v. Mahinder Kaur* (1956) 22 MLJ 97.

<sup>37</sup> Wong, *Tenure and Land Dealings in the Malay States* (Singapore: Singapore University Press) (1975), pp. 287-288; Wong, 'Jual Janji Transactions - A Question of Recognition and Equitable Intervention' (1973) 15 Malaya Law Review 27, 34.

<sup>38</sup> Wong, *Tenure and Land Dealings in the Malay States* (Singapore: Singapore University Press) (1975), p. 288.

<sup>39</sup> [1987] 1 MLJ 338.



transaction'.<sup>40</sup> His Lordship then proceeded to consider whether time was the essence of the contract. It was held that the conduct of the lender had rendered time not the essence of the contract. On the facts, it would appear that whether time was the essence of the contract was a non-issue because the borrower had indeed offered to repay within the contractually agreed time. The decision; however, was taken on the basis that, as time was not the essence of the contract in view of the conduct of the lender, the borrower was not late in demanding a retransfer by payment. The authority cited and followed was Ibrahim J's decision in *Ismail Haji Embong*. The judge reached this conclusion after noting that, although *Haji Abdul Rahman* was the authority that a *jual janji* transaction could not in law be recognized as a security dealing, there had been equitable intervention 'after' *Haji Abdul Rahman* in 'several cases'. The 'several cases' were not listed, but the judgment referred to a 'fuller discussion on the subject' at pages 280-293 of Wong's *Tenure and Land Dealings in the Malay States*.<sup>41</sup>

*Ahmad Omar* shows the judicial willingness, evidently influenced by Wong, to accept that in a *jual janji* transaction, although the relationship between the parties is, according to *Haji Abdul Rahman*, based in contract, time is not, however, to be regarded as the essence of the contract of resale and repurchase. Thus, unless the borrower is guilty of inordinate delay in 'redeeming' the land, his right to demand a retransfer by payment is not lost by reason only of the passing of the contractual time to repay. However on the facts, the case still falls short of an actual adoption of such an approach.

#### (4) Moving Away from *Haji Abdul Rahman* Conceptually – but yet a Full Voyage

Treating time as not of the essence of the agreement for resale is only necessary if the purpose is to avoid direct confrontation with the ruling in *Haji Abdul Rahman*. There is another option, albeit a more radical one. A court might confine *Haji Abdul Rahman* to the strict provision in the old registration of titles legislation, so as not to restrict equitable intervention in cases falling under the less stringent provisions of the FMS Land Code and the National Land Code. As we have seen, such an approach took place in the development of the judicial recognition of 'equitable charges' in relation to imperfect charges. The first indication of such an approach insofar as a *jual janji* transaction is concerned is seen in the High Court decision of Mohamed Dzaiddin J in *Ahmad Omar v. Haji Salleh Sheik Osman*.<sup>42</sup> Besides referring to the 'fuller discussion' in Wong's book on equitable intervention in *jual janji* transactions, the judge also referred to the 'trend towards equitable intervention [which] was clearly reflected in the recent Federal Court decision in *Mahadevan & Anor v. Manila & Sons (M) Sdn Bhd*'.<sup>43</sup>

The Federal Court decision in *Mahadevan*,<sup>44</sup> concerned the legal effect of an agreement to create a statutory charge, and is not directly in point on *jual janji* transaction. The judge in *Mahadevan*, Salleh Abas CJ, was also the judge in *A Kanapathi Pillay v. Joseph Chong*.<sup>45</sup> In *A Kanapathi Pillay*, the judge showed unreserved adherence to the authority of *Haji Abdul Rahman* on the legal nature of a *jual janji* transaction; in *Mahadevan*, the judge opted to restrict *Haji Abdul Rahman* to the strict provision of the old registration of titles legislation, but *jual janji* was not in issue in the case and nothing with reference to *jual janji* was raised.

<sup>40</sup> *Ibid.*, p. 341.

<sup>41</sup> *Ibid.* For the citation of Wong's book, see n. 36 *supra*.

<sup>42</sup> *Supra* n. 38.

<sup>43</sup> *Supra* n. 38, p. 341.

<sup>44</sup> [1984] 1 MLJ 266.

<sup>45</sup> *Supra* n. 33.



In *Ahmad Omar*, there was lengthy quotation from Salleh Abbas CJ's opinion on how *Haji Abdul Rahman* should be distinguished, and why there should be no hindrance to the recognition of equitable charges outside the current statutory system. The quotation was obviously intended to strengthen the very decision in the case as regards *jual janji* transactions. However, no explanation was offered on the relevance of the concept of equitable charges to a *jual janji* transaction. Certainly on the facts and decision, *Mahadevan* could not be applied without legal conceptual adjustment appropriate to *jual janji* transactions. If the judge intended to show that, given the subsequent changes in the statutory provisions, *Haji Abdul Rahman* was no longer a sound authority insofar as *jual janji* transactions were concerned, it was most unfortunate that the point was not clearly expressed and followed by an exposition as regards the scope for equitable intervention and the effect of such intervention.

*Mahadevan* was again purportedly applied to a *jual janji* transaction in the more recent High Court decision in *Abdul Hamid Saad v. Aliyasak Ismail*<sup>46</sup>. In this case, the borrower had offered to repay within the extended contractual period. His action against the lender for a retransfer was also brought within the limitation period for an action based on contract. Again, this case could have been decided in accordance with contractual principles. The judgment; however, was based on the premise that the relationship between the parties was not merely contractual, the judge apparently being under the impression that *Mahadevan* had overtaken *Haji Abdul Rahman* as the authority on the legal nature of a *jual janji* transaction. But again, unfortunately, the case failed to expound clearly the legal nature of a *jual janji* transaction. One issue considered was whether the borrower's action for retransfer was time barred. Alauddin Sherrif J held that the borrower's action to demand a retransfer was in substance an action for the 'recovery of land' so that the limitation period was governed by section 9(1) of the Limitation Act 1953, which set a 12-year limitation period from the date of accrual of the right of action, rather than section 6(1), which set a six-year limitation period for an action based on contract and tort. The borrower brought the action within five years. By referring to the action as one for the recovery of land, the judge apparently found that the borrower's right to the land was more than a contractual right to repurchase. No comment was made indicating either adherence to or rejection of *Haji Abdul Rahman*. There was, however, a rather baffling purported application of *Mahadevan* to explain the nature of the right of the lender *vis-à-vis* the land. Having made a factual finding that the parties had entered into a *jual janji* transaction and that the lender had acted contrary to the agreement for retransfer, the judge stated:

Of course the position would have been altogether different if the [borrower] has chosen not to exercise his rights to repurchase the said land in which case the [lender] would have an equitable right to secure the said loan by being registered as owner of the said land (See *Mahadevan & Anor v. Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266).<sup>47</sup>

There was no further explanation as to how *Mahadevan* was applicable to the *jual janji* transaction in issue. The lender in the case was already a registered proprietor pursuant to the initial conditional sale. His right to retain the ownership was described as an equitable right, which seems to have arisen only when the borrower chose not to exercise his right to repurchase. If the judge meant that the lender's security was an 'equitable charge' over the land which was registered in his name, this appears to be a species of equitable charge totally

<sup>46</sup> [1998] 4 CLJ 429.

<sup>47</sup> *Ibid.*, p. 433.



different in form and concept from the equitable charge in *Mahadevan*, and in fact not known in English law either.

(5) More Recent Expression of Judicial Doubt as to the Propriety of Recognising *jual janji* Transactions outside the Statutory System

More recently, in *Yeap Joo Kim v. Ong Choo Ean*<sup>48</sup>, *bdul Hamid Mohamad J* in the High Court, commenting on the difficulty of finding a trust created by an oral declaration on the evidence, made the following observation:

The Torrens System was not introduced for no reason. It was to avoid the uncertainties such as this from haunting land administration. But unfortunately, after decades of its introduction, we still have such dealing as this “oral declaration of trust”, “*jual janji*”, “assignment”, “bare trustee” and other principles of the English land law being applied, not only diluting the effect of the Torrens System but also complicating an otherwise simple system.<sup>49</sup>

It is curious that in two earlier cases the same judge had made an observation that *jual janji* was ‘recognized’ in the local land law. In 1996, in *Bencon Development Sdn Bhd v. Yeop Cheng Cheng*<sup>50</sup>, which in fact concerned the application of the principles of proprietary estoppel, he observed that the local courts should not be too much clouded by the way equity is applied in England so as to lose sight of the local circumstances:

I am of the view that in considering how the equity [arising from the principles of equitable estoppel] is to be satisfied the Court should not only look at what is fair to the tenant ... The Court should also consider what is fair to the landowner, the effects of the award to others *e.g.* purchasers of the houses to be built, general effects on the community, and even past and prevailing practice[s] in the country.

Let me begin with the practice among the rural people in this country. I think I am entitled to take judicial notice of such practice. Otherwise, how are we going to develop our own common law? After all, “*jual janji*”; for example, which is now recognized, by our law, was not an invention of some law professors or learned Counsel or Judges. It was a kind of transaction practised by those humble folks which was later recognized as a legal principle by the Courts ... If a judge has personal knowledge of such practice, why should he not take judicial notice of it?<sup>51</sup>

In 1998, in *Mastiara Sdn Bhd v. Motorcycle Industries (M) Sdn Bhd & Sons*<sup>52</sup>, he made the following remark as regards the recognition of dealings and interests in land outside the National Land Code:

<sup>48</sup> [2000] 1 CLJ 333.

<sup>49</sup> *Ibid.*, p. 339.

<sup>50</sup> [1996] 4 CLJ 25.

<sup>51</sup> *Ibid.*, p. 30.

<sup>52</sup> [1998] 3 CLJ 874.



... it is now well – established that “*jual janji*” and bare trustee concept, to name only two, are recognized by our courts, even though they are clearly not provided by the Code.<sup>53</sup>

## II. The Present State of *jual janji* and Concluding Remarks

From the above discussion it may be said that, on balance, the development of cases on the legal nature of a *jual janji* transaction, in particular after the Federal Court case of *A Kanapathi Pillay v. Joseph Chong*, has reflected an increasing judicial preference for equitable intervention to afford more than contractual effect to such a transaction. This is as much as can be gleaned from the cases. Beyond this, the court has yet to clarify the legal nature of a *jual janji* transaction as a recognized security dealing outside the statutory system.

In comparison with the more readiness of courts in recognizing the extra-statutory land interests of equitable charges, equitable liens and equitable mortgages, the relative ‘tardiness’ of the court with the case of *jual janji* seems to have been spurred solely by the similarity of the form of *jual janji* with common law legal mortgages. It is, however, difficult to see the coherency and legal logic in, on the one hand, recognizing that an absolute assignment by way of security of the ‘equitable interest of a contractual nature’ of a purchaser of a housing accommodation without separate or strata title as having created an extra-statutory system security called the equitable mortgage,<sup>54</sup> and on the other hand, refusing to recognize the security effect of a *jual janji* transaction that involves a formal transfer of title by way of security. It is not suggested here that *jual janji* should be recognized as a extra-statutory security dealing. With respect, it is, however, to note here that the courts have failed to, as in cases of recognition of other extra-statutory land dealings, assess the issue of *jual janji* within the larger issue of whether the statutory system has provided for an exclusive and exhaustive system of land dealings and land interests. Until this larger issue is in sight, we are far from overall coherency in juridical reasoning, whatever the approach taken.

With respect, it is, however, to note here that the court has failed to, as in the cases of recognition of other extra-statutory land dealings, assess the issue of *jual janji* within the larger issue of whether the statutory system has provided for an exhaustive system of land dealings and land interests.

<sup>53</sup> *Ibid.*, p. 879.

<sup>54</sup> The leading case is the recent Federal Court decision in *PhileoAllied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh* [2002] 2 MLJ 51 (FC). See Yong Chiu Mei, ‘A Review of the Nature of Security Transactions over Properties Without Individual Title in Peninsular Malaysian Land Law’ [2006] The Law Review 84-113



