INTRODUCTION

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1 At the close of the first decade of a new millennium it may not be inappropriate to take stock of where we are and to form some idea of where we may be going. This is no less true of the discipline that land lawyers study, write about and practise. Especially in land-scarce Singapore it has become all the more important to evaluate the way in which the precious resource of realty is organised, regulated and protected by the law. Hence the motivation for this special issue of the *Singapore Academy of Law Journal*.

2 Of course modern Singaporean land law, so superbly analysed in Prof Tan Sook Yee's ground-breaking text on the subject,[1] derives many of its foundational principles from English law. But the emergence of any truly rational exposition of the English law of realty occurred only 50 years ahead of Sir Stamford Raffles' first footfall in Singapore. It has been rightly said that, prior to the publication of Sir William Blackstone's *Commentaries on the Laws of England* ("*Commentaries*") in the late 1760s, land law remained, for want of an authoritative elucidation of its principles, an "incomprehensible mystery" for almost all observers.[2] More bluntly, the law of realty, still encrusted with its feudal anomalies, comprised an unmanageable heap of information unaccompanied by any effective index. It was Blackstone's epic achievement to fashion an ordered structure out of the chaos of pre-Blackstonian land law. Not, it seems, that this feat caused him any deep or lasting satisfaction. Towards the conclusion of the second volume of his *Commentaries* (which was devoted to the law of property), Blackstone gloomily recorded his fear that this volume "has afforded the student less amusement and pleasure in the pursuit, than the matters discussed in the preceding volume".[3] Blackstone was left to lament the means by which, over the centuries, "vast alterations" of land law doctrine and "infinite determinations" by the courts had been

1 See now Tan Sook Yee, Tang Hang Wu & Kelvin F K Low, *Tan Sook Yee's Principles of Singapore Land Law* (LexisNexis, 3rd Ed, 2009).

2 A W B Simpson, *A History of the Land Law* (Oxford University Press, 2nd Ed, 1986) at p 272.

3 William Blackstone, *Commentaries on the Laws of England, A Facsimile of the First Edition of 1765–1769* vol 2 (University of Chicago Press, 1979) at p 382.

"heaped one upon another … without any order or method" and had "made the study of this branch of our national jurisprudence a little perplexed and intricate".[4] Despite Blackstone's best efforts, his disobliging assessment of the intellectual attraction of land law has found an echo in the response of many successive generations of students of real property!

3 Here, however, is a special issue of the *Singapore Academy of Law Journal* which will surely counteract any suggestion that land law is lifeless or intellectually unrewarding. A number of authors have combined their efforts to provide an invigorating series of articles on today's law of realty. If any brief was given to our contributors, it was not merely to analyse current law, but also to project it into the future – to map out the direction in which certain key features of the land law of Singapore may or should be moving in the years to come. This forward-looking perspective is accompanied by an awareness of the comparative – indeed the universal – dimension of many of the topics covered. As Prof Simon Chesterman has aptly said elsewhere, "globalisation is now seeing the world as a web in more ways than one, with lawyers needing to be comfortable in multiple jurisdictions".[5]

4 Underlying the contributions contained in this special issue is one further recognition. At the centre of all land law discourse are the enduring conundra posed by the human institution of property. How can property be acquired and on what grounds can property be taken away? How absolute or sacrosanct are property entitlements? What place do considerations of fairness have in the allocation of property rights? What is the optimal relationship between justice, certainty and efficiency? Where is the correct balance between private and public interests in respect of the resources of this world? Should property be viewed from an individualist or collectivist perspective? How does environmental welfare impact upon our understanding of property? What is property anyway?

5 Such questions are profound; all raise thematic concerns which, in one way or another, are ventilated in the pages of this special issue. Small wonder that even Blackstone, in one of his more cheerful moments, recognised that there is "nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property".[6] It follows also that the articles contained in this land law issue are devoted to asking tough questions. So far as is possible, these

4 William Blackstone, *Commentaries on the Laws of England, A Facsimile of the First Edition of 1765–1769* vol 2 (University of Chicago Press, 1979) at pp 382–383.

5 Simon Chesterman, "The Globalisation of Legal Education" [2008] Sing JLS 58.

6 William Blackstone, *Commentaries on the Laws of England, A Facsimile of the First Edition of 1765–1769* vol 2 (University of Chicago Press, 1979) at p 2.

articles also afford robust answers. What, above all, is clear is that our contributors have brought both a topicality and a fresh vitality to the subject of realty.

6 The first contribution captures perfectly the spirit of the enterprise. In his article entitled "Whither Torrens Title in Singapore?", Assoc Prof Barry Crown takes a critical look at the past, the present and (more importantly) the future of Singapore's system of land title registration. Regimes of title registration are traditionally associated, possibly with some historical inaccuracy, with the name of Sir Robert Torrens ("Torrens"). It was Torrens who, as governor of South Australia, oversaw in 1858 the enactment of the first statute to orchestrate a comprehensive registration of land title information. Earlier schemes of registration, pioneered sporadically in England, had provided merely a means of recordation of certain deeds relating to land. The essence of the Torrens scheme lies, of course, in the isolation of specific estates in land which are registered under a unique numeric identifier and against which are then entered the various benefits and burdens that affect the title in question. The register generally guarantees the validity of a land title and serves as the essential reference point for any further dealing with that title. The register operates, moreover, as a mirror reflecting at any given time the overwhelming majority of the rights and liabilities pertaining to the title. In effect, as Assoc Prof Crown emphasises, certainty and finality in land dealings are vital policy objectives underpinning any Torrens regime.

7 Torrens legislation was introduced in Singapore half a century ago. Thanks largely to the expertise of the draftsman, John Baalman, Singapore enjoys the benefits of one of the better variants of the Torrens model to be found anywhere in the common law world. The streamlined scheme for title registration now enshrined in the Land Titles Act (Cap 157, 2004 Rev Ed) certainly marks a quantum advance. The old common law system of investigation of title necessitated a prolonged, repetitive and costly examination of the historic documents of title on each transactional occasion. But Singapore's registration regime has yet to reach a zenith of perfection. As Assoc Prof Crown points out, it is not insignificant that the last decade has brought a number of critical problems before the Court of Appeal, each dealing with the implications of the "indefeasibility" with which registration supposedly invests title. Assoc Prof Crown goes on to analyse the iconic expositions of Torrens jurisprudence in various jurisdictions, indicating along the way a number of interesting parallels and contrasts, not least in the context of "*in personam* equities" and the modern (but also ancient) vice of identity fraud. On this basis he advocates a "root and branch" reform of Singapore's doctrine of "immediate indefeasibility", together with the introduction of a comprehensive insurance scheme. The article culminates, almost inevitably, in an examination of the

Court of Appeal's decision in *United Overseas Bank v Bebe bte Mohammad*,[7] a case which is pregnant with importance for the future of Singaporean land law and also attracts attention in another article in this special issue (contributed by Assoc Prof Tang Hang Wu).

8 The second essay in this collection has been contributed by Ms Lee Suet Fern and Ms Linda Esther Foo. These authors direct their attention to the emergence of the real estate investment trust in Singapore. In a penetrating paper they begin to unlock for the reader the secrets of a relatively novel investment device that, at least for many land lawyers, is still shrouded in mystery and unfamiliarity. The article provides a most illuminating description of the nature and function of real estate investment trusts, tracing their origins to developments in the United States during the 1960s. The REIT has gained prominence in many jurisdictions as an important vehicle for facilitating the financial input of small investors in the real estate property market. The paper by Ms Lee and Ms Foo tracks the fluctuating fortunes of the REIT in Singapore over the volatile period of the last decade. Against the backdrop of comparative experience in Australia and elsewhere, there is a detailed discussion of the regulatory regime applicable to REITS and of various inadequacies exposed in the legal framework surrounding REITS. The authors likewise comment on the impact of the Business Trusts Act 2004 (Act 30 of 2004) and the alternative regulatory mechanism introduced by this legislation. The paper concludes with the strong suggestion that the underlying trust structure of the REIT may not be conducive to future development of this device in Singapore and that corporatisation of Singapore REITS may now provide superior protection for both creditors and unit-holders.

9 In Prof Teo Keang Sood's article on "Collective Sales in Singapore – Selected Issues" we turn to a phenomenon that has attracted enormous attention and controversy both in Singapore and elsewhere. The Land Titles (Strata) Act (Cap 158, 2009 Rev Ed) facilitates the collective sale of strata developments with or, in some cases, without the consent of all the unit owners. In his fascinating article (and doubtless drawing on his experience as a member of a Strata Titles Board), Prof Teo reviews certain key aspects of the process of "*en bloc* sale" in Singapore. Few devices in the law of real property throw so clearly into tension individual and collective interests and, indeed, the interest of the State in promoting urban regeneration. Accordingly, Prof Teo describes the way in which the Land Titles (Strata) Act attempts to balance the competing interests involved in *en bloc* transactions. His paper examines a number of interesting and significant problems. What are the duties with which a collective sale committee is charged? How far is the fiduciary principle applicable to

7 [2006] 4 SLR 884.

the actions and deliberations of such a committee? How are conflicts of interest handled or averted? How are matters concerning price resolved? How have the courts understood the concept of "good faith" that is so obviously a precondition of a valid collective sale? Above all, Prof Teo focuses on the various means employed to protect the interests of any dissenting minority of unit owners. The potentially mandatory nature of the collective sale immediately touches on one of the raw nerves of any vigilant property lawyer. The compulsory divesting of one private individual's ownership for the commercial gain of another private individual or entity has always been viewed as suspect. Indeed, Justice Michael Kirby of the High Court of Australia once declared that the prohibition against the arbitrary deprivation of property is "an essential idea which is both basic and virtually uniform in civilised legal systems".[8] So potent is this instinct that Justice Samuel Chase, one of the earliest justices of the United States Supreme Court, wrote that "a law that takes property from A and gives it to B" is "contrary to the great first principles of the social compact … [and] cannot be considered a rightful exercise of legislative authority".[9] True it is that Singapore enjoys no constitutional protection for property. However, Prof Teo's article, while pointing to certain aspects of the collective sale process which require review or reform, neatly demonstrates the importance of the public interest in ensuring the optimal use of Singapore's land resources and the socially beneficial promotion of urban redevelopment.

10 The next contribution comes from Mr Brian Sloan, who is fast becoming the academic voice of proprietary estoppel in England and is the holder of a lectureship at King's College Cambridge founded in memory of the late Bob Alexander QC, himself no stranger in Singapore. Mr Sloan has chosen to draw attention to certain recent developments in England relating to the law of proprietary estoppel. These developments will undoubtedly have an impact, one way or another, on the future of estoppel doctrine in Singapore (as indeed elsewhere in the common law world). Mr Sloan highlights, in particular, two decisions of the (now superseded) House of Lords, namely *Yeoman's Row Management Ltd v Cobbe*[10] and *Thorner v Major*.[11] The former case brought into question the applicability of proprietary estoppel in the context of oral agreements for the sale of land. The latter ruling concerned the role of proprietary estoppel in the area of testamentary promises. In *Yeoman's Row* the House of Lords so vigorously denounced the invocation of estoppel doctrine that some commentators feared that

8 *Newcrest Mining (WA) Ltd v Commonwealth of Australia* (1997) 190 CLR 513 at 659.

9 *Calder v Bull* 3 US (Dall) 386 (1798) at 388. See, more recently, the controversy raised by *Kelo v City of New London, Connecticut* 545 US 469, 162 L Ed 2d 439 (2005).

10 [2008] 1 WLR 1752; [2008] UKHL 55.

11 [2009] 1 WLR 776; [2009] UKHL 18.

this doctrine had now met its Waterloo. In *Thorner* the House of Lords was required to revitalise the doctrine whilst maintaining the integrity of the approach adopted in the earlier case. Against this background Mr Sloan's article provides a stimulating and provocative review of the current status of the principle of proprietary estoppel. He points unerringly to the difficulties inherent in any attempt to rationalise or reconcile differing stances on estoppel by sheer reference to factual context. He also brings us up to date with the flurry of case law on estoppel which has been generated during the past year by the Law Lords' rulings in *Yeoman's Row* and *Thorner*. And, for good measure, he argues that some of the problems exposed in the law of estoppel may find a more satisfactory resolution in statutory intervention of the kind provided in New Zealand by the Law Reform (Testamentary Promises) Act 1949 (NZ).

11 Writing in a closely associated area, our next contributor, Assoc Prof Tang engages with the difficult topic of constructive trust. In one of his more enigmatic phrases, Justice Benjamin Cardozo described the constructive trust as "the formula through which the conscience of equity finds expression".[12] Constant repetition of this celebrated aphorism has tended to conceal the multiplicity of divergent contexts in which constructive trust terminology has since been applied. The constructive trust is doubtless one of the most mysterious and versatile tools of modern law – and, for precisely these reasons, is easily misunderstood. In his paper on "The Constructive Trust in Singapore – Five Persistent Puzzles", Assoc Prof Tang therefore sets out to unravel some of the difficulties which have long beset constructive trust doctrine. This is no mean task because any exploration of the constructive trust inevitably reaches deep into the heart of equity jurisprudence. It necessarily poses questions that focus ultimately on the nature of the judicial process. It raises important queries about the texture of curial adjudication. Once again, we meet the age-old tension between desiderata of certainty and fairness. No discussion of these matters can ever be exhaustive or conclusive, but Assoc Prof Tang flags up a number of related issues which will, in coming years, require satisfactory resolution. In his paper he pushes to one side some of the lazy confusions that have contributed to the doubts and ambiguities which still hover over this branch of the law. He identifies five key "puzzles" surrounding the modern application of the constructive trust. He deals with the equivocal usage of the terminology of "institutional" and "remedial" constructive trusts. He moves on to survey the principal contexts in which constructive trust doctrine has a role to play. He discusses the relationship between personal and proprietary remedies and illuminates the relevance of the constructive trust in matters of bankruptcy and title registration. In addressing the place of the

12 *Beatty v Guggenheim Exploration Co* 225 NY 380 (1919) at 386.

constructive trust in land law, the discussion inevitably draws upon the application of constructive trust doctrine in areas outside the law of realty. Again necessarily, the treatment is heavily comparative; and the overall objective is a greater understanding of the proper connection between the constructive trust, notions of unconscionability, and the reversal of unjust enrichment. It is difficult to resist the author's conclusion that the coherent development of the law of constructive trusts in Singapore requires some significant resolution of the issues which he exposes to view.

12 Rather different matters are addressed in the article which follows. In a paper entitled "Compulsory Acquisition of Land in Singapore – A Fair Regime?", Mr Vincent Hoong, the Chief Executive of the Singapore Land Authority, has combined with his colleagues Ms Tay Lee Koon, Ms Manimegalai Vellasamy and Mr Bryan Chew, to present a wide-ranging review of the current law and practice of compulsory purchase in Singapore. It is, of course, universally acknowledged that, in certain kinds of circumstance, the public interest will demand that privately held land be surrendered for the greater good of the community. Indeed, the parallel terminology of "eminent domain" contains a semantic allusion to the idea that the State, in the name of the people, has always held an overriding form of ownership of the nation's land resources. Not least is this so in land-scarce Singapore. Of course, the process of compulsory acquisition by the State has generally been premised, throughout the common law world, on a showing of public necessity for the acquisition and the payment of a fair price to the expropriated owner. In an intriguing paper, the authorial team provides an insightful exploration of the process of compulsory purchase under the Land Acquisition Act (Cap 152, 1985 Rev Ed), tracing eminent domain right back to its earliest roots in Singapore. Underlying the entire article are the questions of public necessity and fair price. The authors take us on an illuminating journey through the interstices of the valuation process; they examine and rationalise the amendments made to the controlling legislation; and they provide a helpful account of the practice of *ex gratia* payment to those who must bear the burden of a compulsory divesting of title. There is also reference to the special problems that arise in connection with tenanted land. The article culminates in a survey of a number of recent "landmark" cases which have attracted particular public attention and controversy. The outcome is a skilful overview of an area which, by reason of the mandatory nature of the expropriation involved, prompts striking parallels with the earlier paper of Prof Teo.

13 This special issue on land law is brought to a close by an article that goes right to the heart of the subject of land. Eyebrows may initially be raised by the suggestion that environmental law is an integral component of the law of real property. But on reflection – as future

years may well demonstrate – the truth is more likely to be that land law will finally take its place as an intrinsic part of the new universal environmental law which will come to dominate our legal thinking. Therefore last, but certainly not least, we have a paper on "Land Law and the Environment – Re-examining the Concept of Ownership and Forging New Rights and Obligations in a Changed World" contributed by Assoc Prof Lye Lin Heng. This article ranges across the breadth of environmental law, highlighting the ways in which this sector of the law not only gives content to the obligations of land ownership, but also redefines the nature of our conceptualism about ownership itself. The paper resonates with the powerful echo of Aldo Leopold's famous "land ethic". It explores notions of stewardship and public trust which will surely help to shape the future of our land law. While concentrating on Singapore's emerging environmental law, Assoc Prof Lye also provides a dazzling array of comparative references to legal regimes in Australia, India, the Philippines and elsewhere. Her paper ends with a plea for greater judicial and legislative engagement with the imperative of environmental welfare.

14 In summary, the contributions to this special issue of the *Singapore Academy of Law Journal* are, I believe, especially rich and varied in their coverage. Together they form a vivid picture of land law in Singapore and of the place of Singaporean land law within the wider common law world. There is much here that will inform and stimulate the reader, even if from time to time the reader is also provoked to disagreement or critical reflection. What is certain is that our contributors have provided an impressive and engaging insight into some of the directions in which Singapore's law of real property may in future proceed.

15 In conclusion, I must also express my gratitude to Ms Eileen Khoo and the staff of the Singapore Academy of Law for their extraordinary care and skill in helping to edit this special issue.