CONTRACTUAL OBLIGATIONS IN THE PASSING OF PROPERTY FOR SALES OF BULK GOODS UNDER MALAYSIAN LAW: THE ROLE OF EQUITY

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Abstract

A contractual obligation requires both buyer and seller to make payment for and to deliver the goods, respectively. Failure to comply these obligations by either party, principle of equity requires that the other party is able to compel the party found to be in non-compliance to accomplish the same. Similar obligation is to be observed in relation to the sale of property in goods which requires failure to transfer the ownership has to be remedied. Malaysian law requires the delivery of property in goods to the buyer, failure to do so the buyer may sue the seller for damages for non-delivery.[289] However, there may be situations where both parties performed their obligations respectively but neither payment nor property in goods is recoverable. This paper is going to examine whether existing law provides any remedies relating to the above issue or equitable principle shall be applicable in providing the remedies.

Keywords: *Ubi jus ibi remedium* , Sale of Bulk Goods, Role of Equity, Contractual Obligations, Passing of Property.

1. Introduction

Ubi jus ibi remedium.[290] A fundamental role of the law is to facilitate the fulfilment of expectations. A contract of sale establishes that where payment is made for goods, delivery of such goods must take place, and vice versa. Such is the function of the transfer theory, whereby contractual duties assist the passing of rights and entitlements.[291] Consequently, a contract of sale creates obligations

[289] Section 57 of the Sale of Malaysian Goods Act 1957.

[290] Latin for, "Where there is a right, there is a remedy." The principle that where one's right is invaded or destroyed, the law gives a remedy to protect it or damages for its loss. Further, where one's right is denied the law affords the remedy of an action for its enforcement. This right to a remedy therefore includes more than is usually meant in English law by the term "remedy", as it includes a right of action. Wherever, therefore, a right exists there is also a remedy. Ashby v White (1703) 14 St Tr 695, 92 ER 126. To be found at http://www.oxfordreference.com/view/10.1093/oi/authority.20110803110448446 (last visited 25th September 2016).

[291] David Pearce, 'Property and contract: where are we?' in Alistair Hudson, New Perspectives on Property Law, Obligations and Restitution (2004, Cavendish), 87, 102.

upon both buyer and seller to make payment for and to deliver the goods, respectively. Should one party be unable to meet these obligations, fairness requires that the other party is able to compel the first to accomplish the same, be it through personal actions or proprietary compensation.

Similarly, a property owner's actions in voluntarily setting aside property to be sold and receiving consideration for the same creates the expectation that ownership in such property will pass. In other words, where the obligations under a contract of sale have been performed by payment and delivery, property in the goods ought to transfer from seller to buyer. This is the effect of the labour theory of property, whereby the extent of the property's appropriation is determined by the extent its owner allows labour to be mixed with it.[292] It follows once again that failure to recognize the appropriate movement of ownership ought to be remedied in order to properly fulfill the expectations of the parties.

The real world, however, is messier than theory. What if both payment and delivery have been completed, but neither payment nor goods are recoverable through no fault of either party? Does the law provide a remedy for this? Or is there the need for equity to see as done what ought to be done?

2. The issue at hand

The scenario where the parties could be left high and dry despite doing everything contractually required of them is, unfortunately, a reality in the sale of bulk goods under Malaysian law. As commodities such as palm oil, grains and sugar are often transported *en masse* by a single carrier between multiple sellers and buyers, such bulk goods have yet to be sufficiently ascertained or identified to each individual contract of sale.[293] Consequently, no property in such goods can pass,[294] and no specific performance is available for such goods until and unless they are physically set aside.[295]

As such ascertainment may only take place upon unloading and/or distribution, weeks or even months elapse before a pre-paying buyer finally becomes the owner of goods which have already been delivered.[296] Throughout this time, the buyer effectively bears the unusual risk of losing both the purchase price and the goods due to the lack of a legal proprietary interest in either.[297] For example,

[292] John Locke, The Second Treatise of Civil Government and a Letter Concerning Toleration (1946, OUP), para 27, in James Penner, The Idea of Property in Law (2000, OUP), 189.
[293] Pemunya Kargo atas Kapal 'Istana VI' v Pemilik Kapal atau Vesel 'Filma Satu' dari Pelabuhan Jakarta Indonesia and other actions [2011] 7 MLJ 145, at para. 41. For English authorities on this point, see e.g. Philip Head & Son Ltd v Showfronts Ltd [1970] 1 Lloyd's Rep 140; Re Goldcorp Exchange Ltd [1995] 1 AC 74.
[294] Section 18, Sale of Goods Act 1957.
[295] Section 58, Sale of Goods Act 1957.
[296] The seller fulfills his obligation of delivery once the goods have been loaded aboard a carrier: Section 23(2), Sale of Goods Act 1957.
[297] This is unusual because risk normally passes with ownership: Section 26, Sale of Goods Act 1957.

where a seller goes bankrupt while the bulk goods are in transit, a pre-paying buyer is merely an unsecured creditor who is at most entitled to a meager dividend once the distribution of property is completed.[298] This is not what the parties expect, and this is not what the law ought to condone, let alone prescribe.

Such unfairness has dire ramifications for the commercial well-being of the country. As things stand, Malaysia commands of more than US$228 billion worth of merchandized goods exports as of 2013, amounting to more than 73% of its gross domestic product in the same year.[299] Any loss of confidence in Malaysia's ability to safeguard these transactions would easily result in a significant loss of income for the nation. It would also jeopardize the country's position as the 25th largest trading nation in terms of registered fleets, with the 5th largest container port throughput in the world.[300]

Consequently, it is vital that Malaysian laws facilitate the expectations of commercial players instead of hinder them. In order to suggest a way forward, the shortcomings of existing Malaysian sale of goods legislation must first be explored in greater detail. Next, the experiences of English jurisprudence, which is generally binding on Malaysian commercial matters,[301] in developing equitable principles to overcome these inadequacies will be analyzed to suggest a solution for Malaysia. Finally, the willingness of Malaysian courts to exercise discretion in implementing equitable solutions will be discussed to determine the utility of equity in fulfilling the expectations of bulk traders.

3. The gap between theory and reality in existing Malaysian sale of goods legislation

As mentioned in the opening remarks, the performance of contractual obligations under the contract of sale – i.e. payment and delivery – ought to be sufficient to transfer ownership of the goods from seller to buyer. The necessary mixing of labour happens when the seller accepts payment for the goods and loads a bulk of goods onto the carrier for delivery, thereby placing the goods beyond his control. By appropriating the bulk goods to the contract(s) of sale, the seller may no longer exercise ownership rights over the same by exchanging them with similar goods from his general stock.[302]

At the same time, however, the fact that goods are only segregated in bulk means that insufficient labour has been mixed with the bulk to fully transfer property in the goods to the buyer(s). Such physical separation or ascertainment

[298] M G Bridge, The International Sale of Goods (3rd edn, 2013, OUP), 7.03.
[299] <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Country=MY&Language=F> accessed 9 August 2015.
[300] UNCTAD Review of Maritime Transport 2014, 44, 64 <http://unctad.org/en/PublicationsLibrary/rmt2014_en.pdf> accessed 23 June 2015.
[301] See Sections 3 and 5 of the Civil Law Act 1957.
[302] Carlos Federspiel & Co SA v Charles Twigg & Co Ltd [1957] 1 Lloyd's Rep 240, 255 (per Pearson J).

is necessary to clearly identify which goods are to be owned by the buyer.[303] Consequently, exclusive ownership of goods in bulk sales only transfers to the buyer upon unloading and distribution, and not upon delivery to the carrier where the bulk goods are at best intermediately ascertained.

Summarily, even though the obligations of payment and delivery under the contract of sale have been performed, these do not translate into transfer of ownership of bulk goods from seller to buyer. To conflate matters, current commercial practice has buyers making payments up front in exchange for documents of title, often in multiple sub-sales, before the bulk goods are even loaded upon a ship.[304] This means that the obligations to the goods *in personam* evolve much faster than the rights *in rem* thereto. While this is fine as long as the goods remain within the seller's control, the risk of complications arising magnifies during the period in limbo when the bulk goods are in transit upon the carrier.

It is therefore clear that Malaysian law, as it stands, is impractical and ineffective at safeguarding the interests of the parties in bulk sales. This contradicts the purpose of the sale of goods legislation which is to protect the parties and to facilitate the transfer of ownership.[305] As such, it is imperative for a remedy to be found, lest the law slip into disrepute.

4. The role of equity in giving effect to contractual obligations for bulk sales

It is widely accepted that equity mitigates the harshness of law by assisting the provision of suitable remedies for those whose rights have been affected.[306] It is also widely acknowledged that equity is not limited to merely providing solutions but can also create enforceable interests in property, even in commercial matters.[307] It therefore follows that recognizing an equitable proprietary interest for pre-paying buyers of bulk goods would help ensure that they are not left without a remedy in the event a personal action against the seller becomes impossible while the goods have yet to be fully ascertained.[308]

The question therefore arises whether the Malaysian courts could resort to equity to better give effect to bulk sale contracts. As no Malaysian decision on point has yet to arise, reference must be made to the prevailing English precedent of *Re Wait.*[309] In this case, the issue was whether the pre-paying buyer

[303] Peter Nicol, 'The Passing of Property in Part of a Bulk' (1979) 42 MLR 129, 129.
[304] This practice is commonly known as 'cash for documents': M G Bridge, The International Sale of Goods (3rd Edition, 2013, OUP), 7.16.
[305] Lee Mei Pheng and Ivan Jeron Detta, Business Law (2009, OUP), 304
[306] Dudley v Dudley (1705) 24 ER 118, 119 (Lord Cowper); in P Radan and C Stewart, Principles of Australian Equity and Trusts (2009, LexisNexis Butterworths), 25.
[307] See, for example, the Quistclose trust in Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567.
[308] This is the historical position of English law with regards future or unascertained goods: Tailby v Official Receiver (1886-90) All Er Rep 486; Holroyd & Ors v Marshall & Ors [1861-73] All ER Rep 414.
[309] [1927] 1 Ch 606. This decision would apply directly to Malaysia by virtue of Sections 3 and 5 of the Civil Law Act 1957.

was entitled to recover his share of bulk goods which were in transit and had yet to be fully ascertained when the seller became insolvent. While the buyer succeeded in the Divisional Court, the Court of Appeal disagreed and restored the decision of the County Court at first instance. Given that the judges in the Court of Appeal disagreed on the role of equity in sale of goods transactions, it becomes necessary to evaluate the reasons provided by Their Lordships on this matter.

In the first majority judgment, Lord Hanworth MR ruled that as the buyer's share of goods were not physically segregated from the bulk, the buyer did not have a right of ownership to the goods under which he could claim specific performance.[310] In doing so, His Lordship relied exclusively on specific appropriation as the basis for legal ownership, only upon which the equitable remedy of specific performance would arise.[311] While such a literal interpretation appears to be in conformity with the wordings of Sections 16 and 52 of the Sale of Goods Act 1893 (now 1979),[312] it is submitted that His Lordship failed to appreciate that to do so would leave the buyer without an effective remedy. This is because whatever right the buyer had to the purchase price would only entitle him to a minimal remedy as an unsecured creditor, and the buyer would be more fairly compensated by being able to recover the goods which the seller had already delivered. Such a right would be recognized if the parties' mixing of labour with the goods were to give rise to an equitable proprietary interest.

Unfortunately, the second majority judgment of Atkin LJ stepped further away from this resolution. Not only did His Lordship exclude the possibility of specific performance for sales of unascertained bulk goods,[313] Atkin LJ declared that the Sale of Goods Act 1893 thoroughly determined the rules governing commercial transactions and therefore excluded any conflicting equitable principles.[314] Once again, while His Lordship's preference for certainty is commendable, the implications of this approach are rather less so. The most notable consequence of Atkin LJ's reasoning is that the secured creditors in the seller's bankruptcy are unjustly enriched from the contributions of the pre-paying buyer who loses both the goods and the purchase price. Given that equitable proprietary interests are recognized in order to prevent such unjust enrichment,[315] it follows that the judgment of Atkin LJ has unduly hobbled the protective and remedial capabilities of the law.

Atkin LJ's dismissal of equity, therefore, appears to be a glaring oversight on the intermediate role of equity in doing "*that which ought to be done*".[316] As the

[310] [1927] 1 Ch 606, 621
[311] Id., 622-623.
[312] These sections of the English legislation are in pari materia with Sections 18 and 58 of the Sale of Goods Act 1957, the Malaysian legislation.
[313] [1927] 1 Ch 606, 633.
[314] Id., 635 – 636.
[315] Iwan Davies, 'Continuing Dilemmas with Passing of Property in Part of a Bulk' (1991) JBL 111, 129.
[316] Tailby v Official Receiver (1888) 13 App. Cas. 523, 546 (Lord Macnaghten).

actions to transfer property remain beyond the control of the contracting parties even though payment and delivery to the carrier have been made, Atkin LJ's deference to certainty instead creates more insecurity in the sale of bulk goods. Indeed, the current commercial practice where parties treat documents of title as representing ownership of bulk goods is more accurately reflected by the recognition of equitable proprietary interests in the bulk.[317]

Conversely, Sargant LJ's dissenting judgment in *Re Wait* gives greater prominence to the role of equity. According to His Lordship, the reason why pre-paying buyers ought to gain equitable interests in bulk goods is to prevent sellers from defrauding buyers by disposing more goods from the bulk than are required to satisfy the buyer's share.[318] By equating contracts of sale for bulk goods to specific legacies in wills, whereby a bequest is made before ascertainment is possible,[319] Sargant LJ was of the opinion that the assistance of equity was required in order to give full effect to the contract.[320] Consequently, His Lordship's dissenting judgment better fulfills the parties' contractual expectations by making use of the flexibility and fairness of equity.

Perhaps the most telling part of Sargant LJ's dissenting judgment is His Lordship's observation that "*ordinary business is not conducted dishonestly*".[321] In making this statement, Sargant LJ recognized that the parties wished to honour their contractual obligations by paying for and delivering the goods, and noted that both the Official Receiver and the bank as the seller's creditor had acted honestly in reserving enough goods to meet the buyer's claim and opening a separate account for the buyer, respectively.[322] In the absence of such noble intentions, it has been proposed that a trust of the buyer's share in the bulk goods be recognized, given that maxim that equity regards as done what ought to be done.[323] By delivering the bulk goods to the carrier in return for payment, the seller therefore allows the buyer to become a co-owner of the bulk in equity. It therefore follows that recognizing such equitable interests would better fulfill the parties' contractual expectations beyond the rigid framework of the common law.

5. Would Malaysian courts be willing to adopt equity as a solution?

Given the compelling reasons for adopting Sargant LJ's dissenting judgment in *Re Wait*, the final question to be answered is whether Malaysian courts would be willing to exercise their discretion to do so. While Malaysian courts have traditionally deferred to English principles – thereby giving precedence to the

[317] Law Commission and Scottish Law Commission, Sale of Goods Forming Part of a Bulk (Law Com No. 215, Scots Law Com. No. 145), 3.4
[318] [1927] 1 Ch 606, 645 – 646.
[319] Id., 651.
[320] Id., 647.
[321] Id., 656.
[322] Ibid.
[323] Sarah Worthington, 'Sorting out ownership interests in a bulk: gifts, sales and trusts' (1999) JBL 1, 11.

majority decision in *Re Wait* – that trend has changed somewhat over the past few decades. In 1989, two of Malaysia's most senior judges called for Malaysia to forge its own common law in line with local values instead of depending on English cases.[324] The rationale behind this was that English law was seen as obsolete and detracted from national identity. Indeed, it has been suggested that as the legal reasoning behind the common law has developed throughout a long history of dealing with human affairs, Malaysian common law should take logical next step of evolving in accordance with local situations.[325] As such, Malaysian courts have free reign to develop their own precedents in line with local conditions independently of the English authorities.

An example of how Malaysian common law can evolve independently of English jurisprudence can be seen in *Saad Marwi v Chan Hwan Hwa & Anor*.[326] This case is particularly notable for the Court of Appeal's recognition of unconscionable bargains as a species of equitable fraud, even though it fell short of the proof of undue influence required under Section 16 of the Contracts Act 1950.[327] In ordering that a contract for the sale of land procured by unfair advantage and inequality of bargaining power be vitiated, Gopal Sri Ram JCA pointed out that Malaysian courts are free to adapt rules of common law and equity to suit local conditions and "*are not to treat ourselves as being bound hand and foot by English cases*."[328] As His Lordship considered that the English doctrine of unconscionable bargains was too narrow and catered to the needs of a society quite different from Malaysia's, His Lordship preferred the wider and more flexible interpretation of the doctrine in Canada which was better geared towards doing practical justice in the circumstances.[329] This goes to show that, even in commercial matters, Malaysian courts are merely guided and not bound by English decisions – a particularly important consideration for the inclusion of equity in the sale of bulk goods.

Equitable assignments have also been recognized in the Federal Court case of *Public Finance Bhd v Scotch Leasing Sdn Bhd (In Receivership) (Pewira Habib Bank, Intervener)*.[330] The issue in this case was whether the prior contractual assignment of book debts by the assignee leasing company to the assignor finance company was valid even though no notice had been provided to the debtor debenture holder. In holding that there was a valid equitable assignment, Peh Swee Chin FCJ recognized that equity would allow such assignments to prevail even though the debtor was unaware and did not consent to such

[324] Tan Sri Abdul Hamid Omar, The Star, 2 March 1989; Tan Sri Hashim Yeop Abdullah, New Straits Times, 25 June 1989; in Wan Arfah Hamzah, A First Look at the Malaysian Legal System (2009, Oxford Fajar), 139
[325] Wan Arfah Hamzah, A First Look at the Malaysian Legal System (2009, Oxford Fajar), 141-142
[326] [2001] 3 CLJ 98.
[327] The appellant had conceded that the learned judge at first instance was entitled to reject the defence of undue influence: [2001] 3 CLJ 98, at 104d.
[328] [2001] 3 CLJ 98, at 115a.
[329] Id., at 115f – 116a.
[330] [1996] 3 MLJ 369.

assignments.[331] As a result, the assignor's contractual rights to the debts were recognized as creating equitable interests in the assignee's property, which were then excluded from the debenture holder's claims. This shows that Malaysian courts would be willing to recognize equitable proprietary interests where legal ownership rights fall short – precisely the position of a pre-paying buyer of an undivided share of bulk goods which have been delivered to a carrier. Consequently, it is submitted that Malaysian conditions are more accurately mirrored by the dissenting judgment of Sargant LJ in *Re Wait* which ought to be adopted by the Malaysian courts.

Further support for the permissive approach in Sargant LJ's dissenting judgment may be found in other Commonwealth jurisprudence, particularly the New Zealand High Court decision in *Swindle v Matakana Estates Ltd (in liquidation).*[332] This case again involved the question of ownership for a pre-paying buyer of unbottled wine stored in bulk vats and barrels during the seller's liquidation. In holding that the pre-paying buyer acquired a security interest in the wine despite it having been blended with wine belonging to the company in liquidation, Kós J emphasized that even though Section 18 of the Sale of Goods Act 1908 prevailed over the parties' contractual intentions to transfer property in the wine, this merely prevented the pre-paying buyer from acquiring absolute ownership and did not prevent him from becoming a co-owner of the mixed bulk stock.[333] This shows that a more liberal interpretation to Section 18 which allows equitable co-ownership of bulk goods would better promote fair and honest business relationships. Indeed, the New Zealand High Court's interpretation in *Swindle v Matakana Estates* allowed the pre-paying buyer to succeed in their action for conversion against the liquidators![334]

The ultimate question, nonetheless, is whether the strong reasons for recognizing equitable co-ownership of bulk goods would expressly be recognized by the Malaysian courts. Reference must therefore be made to the most pertinent Malaysian decision which deals with the interpretation of Section 18 of the Sale of Goods Act 1957: *Pemunya Kargo atas Kapal 'Istana VI' v Pemilik Kapal atau Vesel 'Filma Satu' dari Pelabuhan Jakarta Indonesia and other actions.*[335] One of the questions to be answered by the High Court in this case was whether property had passed in a cargo of palm oil which had been purchased via three separate contracts. The total share of palm oil for all three contracts had been stored in a separate compartment on the ship when an alleged act of conversion took place – one of the main bases for the suit.

[331] Id., at 381A – 382A.
[332] [2012] 1 NZLR 806. Contrast the literal approach taken by the Indian Supreme Court in P.S.N.S. Ambalavana Chettiar & Company Ltd and another v Express Newspapers Ltd Bombay (1968) 2 MLJ 34 which did not recognize any co-ownership in bulk goods.
[333] [2012] 1 NZLR 806, at 829.
[334] Id., at 835.
[335] [2011] 7 MLJ 145.

In deciding this question in the affirmative, Nallini Pathmanathan J began with the trite principle in *The Aliakmon*[336] that only an owner can sue in tort for conversion; it is insufficient to have a contractual right to do so. Her Ladyship then considered Section 18 of the Sale of Goods Act 1957 and noted that ascertainment and appropriation is required for property to pass. Based on the facts, the learned High Court judge reasoned that the cargo was ascertained as it was stored separately, and that such cargo was appropriated to the contract by its delivery to the carrier by the seller.[337]

At this point, it is apparent that the learned High Court judge has taken a very literal and direct approach to the application of English precedent and Malaysian statutes. This suggests that Malaysian courts are likely to give deference to established common law rules over equitable principles which are merely persuasive. There may also be less room to adduce case law from other commonwealth jurisdictions which may support a broader approach than the English position. That said, this case involved clear facts which demanded a straightforward and simple approach without the need to resort to equity, as there was no lacuna to be addressed here. There was also little need for Her Ladyship to ponder on hypothetical situations involving intermingled goods as it was not directly in issue.

It is nonetheless submitted that the Malaysian courts may be persuaded to take a more practical approach to the question of passing of property. This can be seen from Nallini Pathmanathan J's subsequent actions in addressing the issue of appropriation. The learned High Court judge determined that the lack of physical segregation of the goods between the three bills of lading did not prevent property from passing to the buyer. In doing so, Her Ladyship applied the English decision of *The Elafi*[338] on ascertainment by exhaustion and reasoned that as the price and purchaser for all three bills of lading are the same and the cargo is homogenous throughout these three contracts, there is no practical reason to allocate the bulk between contracts and therefore the plaintiff's goods have been appropriated.[339]

The learned High Court judge's reasoning suggests that a more equitable approach could be adopted by Malaysian courts when interpreting the rules governing the passing of property. It would have been patently unfair to split hairs as to which contract the goods are ascertained to. This would pave the way to recognizing equitable proprietary interests in bulk goods, given equity's role in preventing fraud and promoting honest transactions between parties. Whether this would extend to creating a trust of a buyer's share in a specific bulk which has yet to be fully segregated, however, is not addressed in this case and has yet to be explicitly determined.

[336] Leigh & Sullivan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon [1986] 2 All ER 145
[337] [2011] 7 MLJ 145, at 168
[338] Karlshamns Olje Fabriker v Eastport Navigation Corporation, The Elafi [1981] 2 Lloyds LR 679
[339] [2011] 7 MLJ 145, at 170-171

To sum up, while Malaysian and New Zealand authorities favour the adoption of Sargant LJ's permissive interpretation to Section 18, the case of *Pemunya Kargo atas Kapal 'Istana VI'* suggests that the Malaysian courts would *prima facie* prefer a literal interpretation of the statutory rules and would directly apply more settled English authorities. This would not bode well for traders as the restrictive views of *Re Wait* could still prevail. That said, this case nevertheless keeps the door open for the recognition of equitable co-ownership in bulk goods and could suggest a more practical approach to fulfilling the parties' expectations. How exactly this will be developed, though, remains to be seen.

6. Conclusion

"*Equity remains also, the saving supplement and complement of the Common Law…prevailing over the Common Law in cases of conflict but ensuring, by its persistence and by the very fact of its prevailing, the survival of the Common Law and the enduring influence of English jurisprudence as a whole in the history of civilization.*"[340]

In performing their obligations under a contract of sale, the parties expect that once the buyer has paid the purchase price, ownership of the goods will be transferred by virtue of the seller's delivery. In sales of bulk goods, however, the passing of property lies beyond the parties' control due to the requirement of physical ascertainment in Section 18 of the Sale of Goods Act 1957. To make matters worse, the prevailing interpretation of the law is impractical and anomalous as it leaves the pre-paying buyer without a secured interest in bulk goods which have been delivered by the seller. This uncertain position risks not only the security of the transaction but also the confidence of commercial players in the ability of the law to facilitate the same, with potentially severe consequences on trade-dependent countries like Malaysia.

In the absence of other methods of intervention, the question arises whether Malaysian courts would be willing to recognize equitable co-ownership for pre-paying buyers of delivered bulk goods in order to ensure the fair and effective execution of contractual obligations. That they are able to do so is not in question: there are strongly persuasive authorities from both local and Commonwealth jurisdictions which permit equity to intervene in commercial matters where the common law falls short. Whether Malaysian courts will actually exercise this discretion instead of falling back on restrictive precedents, though, has yet to be properly tested and remains to be determined. It is nonetheless hoped that Malaysian courts will be cognizant of the wider importance of fairness and honesty in commercial transactions in interpreting and applying relevant precedent instead of blindly following the letter of the law.

[340] Frank Kitto, 'Foreword to the First Edition' in R Meagher, J Heydon and M Leeming, Meagher, Gummow and Lehane's Equity: Doctrines and Remedies (4th edn, 2002, LexisNexis Butterworths); in P Radan and C Stewart, Principles of Australian Equity and Trusts (2009, LexisNexis Butterworths), 25.

In the interests of both certainty and fairness, therefore, it would perhaps be best for co-ownership of delivered bulk goods to be expressly recognized by legislation. This has already been done in England by virtue of the Sale of Goods (Amendment) Act 1995. It would be in Malaysia's best interests to at least explore the viability of an equivalent amendment, given the legal and historical similarities between the countries. Not only would this clear up any confusion in interpreting the law, it would also show Malaysia's good faith in ensuring the interests of commercial players are protected in order to maintain the nation as a conducive platform for international trade. As this will take time to realize, equity can hold the line in the interim by ensuring the appropriate rights and remedies of all interested parties are recognized. In the words of one commentator, "*Views are changing as the traditional transforms into the modern and courts come to terms with the need to police the negotiation and enforcement of commercial contracts in a more positive way, harnessing good faith, fairness and unconscionability: generally equity.*"[341] Expectations, after all, are best fulfilled with complete and effective performance.

[341] Malik Imtiaz Sarwar, 'Equity and Commerce: An Alternative Perspective' [1997] 3 MLJ cxlix, clxxvii.