SEE LEONG CHYE @SZE LEONG CHYE & ANOR

v.

UNITED OVERSEAS BANK (MALAYSIA) BERHAD & ANOTHER APPEAL

Federal Court, Putrajaya
Rohana Yusuf PCA, Abang Iskandar Abang Hashim CJSS, Nallini Pathmanathan, Vernon Ong Lam Kiat, Mary Lim Thiam Suan FCJJ
[Civil Appeal Nos: 01(f)-5-02-2017(B) & 02(f)-8-02-2017(B)]
22 April 2021

Land law: *Indefeasibility of title and interests — Charge — Charge registered by means of a forged land title — Validity — Whether chargee an immediate or subsequent purchaser — Whether chargee entitled to defence under proviso to s 340(3) National Land Code*

Contract: *Implied terms — Letter of undertaking — Circumstances under which a term might be implied — Officious bystander test and the business efficacy test*

The appeals herein concerned the validity of two bank charges on a piece of land registered by means of a forged title, and the inference of an implied term in an undertaking to refund monies paid in a sale and purchase agreement that was aborted. The facts showed that the owners of a piece of land ('the See brothers') brought an action for the recovery of their land ('the land') that was transferred by a fraudster to one Heveaplast Marketing Sdn Bhd ('Heveaplast') under a sale and purchase agreement. The See brothers also sought to invalidate the said two bank charges on the land ('the UOB charges') by Heveaplast in favour of United Overseas Bank Bhd ('UOB'). Heveaplast in turn sued the Registrar of Lands and Mines for indemnity and contribution. In a separate action, one Kum Hoi Engineering Industries Sdn Bhd ('Kum Hoi') sued UOB and Heveaplast for undertakings given by them to refund monies paid, to Kum Hoi's financier, Public Bank Bhd ('PBB'). This was because Heveaplast aborted a sale and purchase agreement ('SPA') that it entered into with Kum Hoi. A caveat had been lodged against the land when the See brothers discovered the fraudulent transfer. Heveaplast remained as the registered proprietor of the land and the UOB charges over the land remained intact. The two actions were heard together in the High Court. The High Court found that Heveaplast's title to the land and the UOB charges were a nullity as they were defeasible under s 340 of the National Land Code ('NLC'). Heveaplast's claim against the Registrar of Lands and Mines were dismissed. The High Court allowed Kum Hoi's claim for the refund of monies paid against Heveaplast and UOB. There were four appeals to the Court of Appeal. The Court of Appeal dismissed Heveaplast's appeals against the See brothers and Kum Hoi and UOB's appeal against Kum Hoi and Heveaplast.

However, the Court of Appeal allowed UOB's appeal against the See brothers rendering the UOB charges on the land, valid. The Court of Appeal found UOB to be a subsequent purchaser under s 340 NLC protected by the proviso to the same. The See brothers were therefore left with the UOB charges on the title to the land. As for UOB's undertaking, the Court of Appeal found that it was a condition precedent that PBB was obliged to lend monies on Heveaplast's ability to transfer the land to Kum Hoi, and that condition could not be satisfied due to the caveat lodged against the land. The Court of Appeal inferred an implied term in the undertaking in that respect. Hence, the See brothers and UOB were granted leave to appeal on questions of law, primarily to determine the validity of the UOB charges and whether the Court of Appeal correctly inferred the said implied term.

Held (dismissing the appeals):

Per Vernon Ong Lam Kiat FCJ delivering the judgment of the court:

(1) If a purchaser was an immediate purchaser, sub-s 340(2) NLC applied. Accordingly, the immediate purchaser's title or interest was not indefeasible. His title or interest in the land might be set aside by the rightful owner of the land if it was obtained through any one of the vitiating factors listed under sub-s 340(2). The fact that the immediate purchaser might have acquired his title or interest in good faith and for valuable consideration was irrelevant. If any of the vitiating factors were established, the immediate purchaser's title or interest in the land was liable to be set aside. However, if the purchaser was a subsequent purchaser, the proviso to sub-s 340(3) NLC applied. A subsequent purchaser's title or interest in the land was also not indefeasible if it was established that he was not a purchaser in good faith and for valuable consideration. If however, he was a purchaser in good faith and for valuable consideration, his title or interest in the land was indefeasible under the proviso to sub-s 340(3). (paras 67-68)

(2) Heveaplast became an immediate purchaser when it was registered as the owner of the land pursuant to the forged sale of the land. UOB became the subsequent purchaser when Heveaplast created the UOB charges in its capacity as immediate purchaser. As UOB was a subsequent purchaser, the proviso to sub-s 340(3) NLC applied. There was no evidence to show that UOB was not a *bona fide* purchaser for value. Hence, the UOB charges were indefeasible and could not be set aside. (para 70)

(3) The fact that the transfer of the land to Heveaplast and the registration of the UOB charges were done on the same day was irrelevant. That they should be treated as one transaction was misconceived because it ignored the system of registration of dealings under the NLC. Where more than one instrument of dealing was presented for registration over the same land, the time of presentation was noted and they would be registered according to the order in which they were presented. In the present case, there were two sets of instruments presented for registration ie one set for the transfer of the land to

Heveaplast and the other set for the UOB charges. In order for Heveaplast to create the UOB charges, the transfer must first be done to register Heveaplast as the owner of the land. Once Heveaplast became the registered owner, Heveaplast had the capacity to create the UOB charges. The transfer and the charge were registered in the order in which they were presented. As the UOB charges were registered after Heveaplast was registered as the owner of the land, Heveaplast was the immediate purchaser and UOB was the subsequent purchaser. Hence, the UOB charges were protected by the proviso to sub-s 340(3) NLC and were indefeasible, valid and enforceable. (paras 71-72, 75, 93)

(4) The letter of undertaking, the loan agreement between Kum Hoi and PBB and the SPA were inextricably linked and formed part of the same transaction. As the sale transaction had been aborted due to no fault on the part of Kum Hoi or PBB, it must follow that the condition precedent could not be satisfied. The underlying basis for the granting of the loan to Kum Hoi was that the land be transferred to Kum Hoi to enable Kum Hoi as registered owner of the land to create a charge in favour of PBB as security for the loan. Therefore, the Court of Appeal was correct to infer the implied term in the UOB undertaking. (para 90)

Obiter

In light of land fraud and forgery cases cropping up over the years, the time was ripe for Parliament as the legislative arm of the Government to take into the most serious consideration, the propriety of making provision for the setting up of an Assurance Fund. The Assurance Fund which was an integral feature of the Torrens system could be established to compensate innocent landowners and holders of interest in land deprived of their title and/or interest through no fault of their own. Such schemes were in place in Ontario and British Columbia, Canada and in Australia where almost all states had a fund to compensate persons who lost their interest in land through fraud. An Assurance Fund would also complement and enhance the credibility of the Torrens system of land registration under the NLC. (para 76)

Case(s) referred to:

Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2000] 1 MLRA 869 (overd)

Akay Holdings Sdn Bhd v. Arch Reinsurance Ltd [2016] MLRAU 309 (refd)

Andrew Christopher Chuah Choong Eng Chuan v. Ooi Woon Chee & Anor [2006] 2 MLRA 675 (refd)

Anthony Lawrence Bourke & Anor v. CIMB Bank Berhad [2019] 1 MLRA 548 (refd)

Au Meng Nam & Anor v. Ung Yak Chew & Ors [2007] 1 MLRA 657 (refd)

Baird Textile Holdings Ltd v. Marks & Spencer plc [2002] 1 All ER (Comm) 737 (refd)

Boonsoom Boonyanit v. Adorna Properties Sdn Bhd [1997] 1 MLRA 209 (refd)

BP Refinery (Westernport) Pty Ltd v. Shire of Hastings [1977] 180 CLR 266 (refd)

Cheng Keng Hong v. Government of The Federation of Malaya [1965] 1 MLRH 342 (refd)

CIMB Bank Berhad v. AmBank (M) Bhd & Ors [2017] 5 MLRA 1 (refd)

Codelfa Construction Pty Ltd v. State Rail Authority of New South Wales [1982] 149 CLR 337 (refd)

Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor [2012] 1 MLRA 311 (folld)

Dataran Rentas Sdn Bhd v. BMC Construction Sdn Bhd [2009] 1 MLRA 163 (refd)

Dato' Tan Chin Woh v. Dato' Yalumallai @ M Ramalingam v. Muthusamy [2016] 5 MLRA 613 (refd)

Dato' See Teow Chuan & Ors v. Ooi Woon Chee & Ors And Another Application [2013] 5 MLRA 1 (refd)

He-Con Sdn Bhd v. Bulyah Ishak & Anor [2020] 5 MLRA 98 (refd)

Heng Cheng Swee v. Bangkok Bank Ltd [1976] 1 MLRA 343 (refd)

Home Trust Co v. Zivic [2006] 277 DLR (4th) 349 (refd)

Hoo See Sen & Anor v. Public Bank Bhd & Anor [1988] 1 MLRA 46 (refd)

Ilyssia Cia Naviera SA v. Bamaodah, The Elli 2 [1985] 1 Lloyd's Rep 107 (refd)

Kamarulzaman Omar & Ors v. Yakub Husin & Ors [2014] 2 MLRA 432 (refd)

Kreditbank Cassel GmBH v. Schenkers Ltd [1927] 1 KB 826 (refd)

Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 1 MLRA 95 (refd)

Lim Choon Seng v. Lim Poh Kwee [2020] 5 MLRA 76 (refd)

Low Huat Cheng & Anor v. Rozdenil Toni & Another Appeal [2016] 6 MLRA 79 (refd)

Liputan Simfoni Sdn Bhd v. Pembangunan Orkid Desa Sdn Bhd [2018] MLRAU 484 (refd)

Manks v. Whiteley [1912] 1 Ch 735 (folld)

Marks & Spencer v. BNP Paribas Securities Services Trust Co (Jersey) Ltd [2016] AC 742 (refd)

MBF Property Services Sdn Bhd & Anor v. Balasubramaniam K Arumugam [2000] 1 MLRA 64 (folld)

Mohammad Buyong v. Pemungut Hasil Tanah Gombak & Ors [1981] 1 MLRH 848 (refd)

Mohamed Isa v. Abdul Karim & Ors [1970] 1 MLRH 572 (refd)

M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1993] 1 MLRA 107 (refd)

OCBC Bank (Malaysia) Bhd v. Pendaftar Hakmilik Negeri Johor Darul Takzim [1999] 1 MLRA 256 (distd)

Pacific & Orient Insurance Co Berhad v. Kamacheh Karuppen [2015] 3 MLRA 278 (refd)

Paul v. IRC [1936] SC 443 (refd)

Perwira Habib Bank Malaysia Bhd v. Lum Choon Realty Sdn Bhd [2005] 2 MLRA 53 (refd)

Pembangunan Maha Murni Sdn Bhd v. Jururus Ladang Sdn Bhd [1985] 1 MLRA 426 (refd)

Pengusaha Tempat Tahanan Perlindungan Kamunting Taiping & Ors v. Badrul Zaman PS Md Zakariah [2018] 6 MLRA 177 (refd)

PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd [1980] 1 MLRA 562 (refd)

Preston Corp. Sdn. Bhd. v. Edward Leong Nim Fay & Ors [1982] 1 MLRA 120 (refd)

Prudential Assurance Co Limited v. IRC [1993] 1 WLR 211 (refd)

Puspaleela R Selvarajah & Anor v. Rajamani Meyappa Chettiar & Other Appeals [2019] 2 MLRA 591 (refd)

Quah Hong Lian Neo v. Seow Teong Teck & Ors [1935] 1 MLRA 113 (refd)

Rajamani Meyappa Chettiar v. Eng Beng Development Sdn Bhd & Ors [2016] 3 MLRA 581 (refd)

Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong [1998] 1 MLRA 332 (refd)

Samuel Naik Siang Ting v. Public Bank Berhad [2015] 5 MLRA 665 (refd)

Shanklin Pier v. Deter [1951] 2 All ER 471 (refd)

Shayo (M) Sdn Bhd v. Nurlieda Sidek & Ors [2012] MLRHU 1208 (refd)

Smith and Snipes Hall farm v. River Douglas Catchment Board (1848) 50 ER 937 (refd)

Spatial Ventures Sdn Bhd v. Twintech Holdings Sdn Bhd [2013] MLRHU 512 (refd)

Takako Sakao v. Ng Pek Yuen & Anor [2009] 3 MLRA 74 (refd)

Tan Chiw Thoo v. Tee Kim Kuay [1996] 2 MLRA 154 (refd)

Tanjung Teras Sdn Bhd v. Kerajaan Malaysia [2015] MLRAU 468 (refd)

Tan Ying Hong v. Tan Sian San & Ors [2010] 1 MLRA 1 (folld)

Teh Bee v. K Maruthamuthu [1977] 1 MLRA 110 (refd)

The Bank of Nova Scotia Berhad v. Saunah Kasni & Ors [2015] MLRHU 319 (refd)

The Golf Cheque Book Sdn Bhd & Anor v. Nilai Springs Bhd [2005] 2 MLRA 509 (refd)

TR Sandah Ak Tabau & Ors v. Director Of Forest Sarawak & Anor And Other Appeals [2019] 5 MLRA 667 (refd)

T Sivam Tharamalingam v. Public Bank Berhad [2018] 4 MLRA 583 (refd)

Tulk v. Moxhay [1848] 50 ER 937 (refd)

Ungku Sulaiman Abd Majid & Anor v. pengarah Tanah Dan Galian Johor & Anor[2012] 4 MLRA 521 (refd)

Veheng Global Trades Sdn Bhd v. AmGeneral Insurance Berhad & Anor And Another Appeal [2019] 5 MLRA 194 (refd)

Legislation referred to:

Contracts Act 1950, s 24(a)

Courts of Judicature Act 1964, ss 69, 96

Evidence Act 1950, s 92(e)

National Land Code, ss 85(1)(a), (b), 89, 90, 241(1)(b) 295, 300, 319(1), 340(1), (2), (3)

Specific Relief Act 1950, s 30

Others referred to:

A Call to Revisit Tan Ying Hong v. Tan Sian San & Ors, 2016, 5 MLJ V

Kim Lewison QC, *The Interpretation of Contracts*, 2nd edn, Sweet & Maxwell at para 5.03

PK Nathan, *Nightmare For Registered Owners of Landed Property*, 2002, CLJ xxiii

Prof Teo Keang Sood, *Demise of Deferred Indefeasibility Under the Malaysian Torrens System?*,2002, Singapore Journal of Legal Studies, pp 403-408

Dato' Seri Visu Sinnadurai, *Law of Contract*, 2011, 4th edn, LexisNexis at 4.17

Teo Keang Sood and Khaw Lake Tee, *Land Law in Malaysia, Cases and Commentary*, 2012, 3rd edn, LexisNexis at 1.15, 4.52

Counsel:

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For the respondent: Andrew Chiew Ean Vooi (Nurul Syafiqah Nawi @ Sahwi and Vincent Ong Liang Jie with him); M/s Lee Hishamuddin Allen & Gledhill

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JUDGMENT

Vernon Ong Lam Kiat FCJ:

Introduction

[1] The central issues in these two appeals relate to (i) the indefeasibility of title and interest and the question of whether a party is an immediate or subsequent purchaser under s 340 of the National Land Code 1965 (NLC), and (ii) the circumstances under which a term may be implicated to a letter of undertaking.

[2] The parties in these appeals were brought together by a series of fortuitous events. It began with the transfer of land to Heveaplast Marketing Sdn Bhd ('Heveaplast') by way of fraud and forgery, the creation of two charges ('UOB charges') over the land by Heveaplast in favour of United Overseas Bank Bhd ('UOB'), the aborted sale of the land by Heveaplast to Kum Hoi Engineering Industries Sdn Bhd ('Kum Hoi') and the giving of undertakings to refund monies by UOB and Heveaplast to Kum Hoi's financier Public Bank Bhd ('PBB').

[3] The owners of the land, See Leong Chye @ Sze Leong Chye and See Ewe Lin ('See brothers') sued Heveaplast, UOB and the solicitors involved for damages and the recovery of the land on the ground that it was fraudulently transferred; in turn, Heveaplast sued the Registrar of Lands and Mines for an indemnity and contribution. In a separate action, Kum Hoi sued Heveaplast and UOB for the refund of monies paid. The two suits were heard together in the High Court.

[4] After a full trial, the High Court held that Heveaplast obtained the land through fraud and forgery of instruments ie, the sale and purchase agreement and the memorandum of transfer. The High Court also held that the forged instruments were a nullity and incapable of conferring any right, interest or title in favour of Heveaplast. The UOB charges created thereout were also a nullity. Consequently, both Heveaplast's title and UOB's interest are defeasible under s 340 of the NLC. Heveaplast's claim against the Registrar of Lands and Mines for indemnity and contribution was dismissed. The High Court also ordered Heveaplast and UOB to refund the monies to Kum Hoi.

[5] There were altogether four appeals to the Court of Appeal.

CA Appeal 489 - Heveaplast's appeal against the See brothers and three others;

CA Appeal 2129 - Heveaplast's appeal against Kum Hoi;

CA Appeal 33 - UOB's appeal against the See brothers and six others; and

CA Appeal 173 - UOB's appeal against Kum Hoi and Heveaplast.

[6] The Court of Appeal dismissed Heveaplast's CA Appeal 489 against the See brothers, Heveaplast's CA Appeal 2129 against Kum Hoi and UOB's CA Appeal 173 against Kum Hoi. However, the Court of Appeal allowed UOB's CA Appeal 33 against the See brothers and held that the UOB charges are valid.

[7] Leave was granted to the See brothers to appeal to the Federal Court arising from the Court of Appeal's decision in allowing UOB's CA Appeal 33 against the See brothers. Leave was also granted to UOB to appeal against the decision of the Court of Appeal on dismissing UOB's CA Appeal 173 against Kum Hoi.

[8] There are five questions of law in the See brothers' appeal and four questions of law in the UOB appeal. For convenience, the questions of law are numbered consecutively.

Question 1

Must the transaction in question have a valid registrable issue document of title prior to invoking a provision of s 340 of the National Land Code 1965?

Question 2

Whether an acquirer of registered charge of interest or title under the National Land Code 1965 by means of a nonexistent forged title acquire an immediate indefeasibility of title or interest?

Question 3

Can an acquirer of registered charge or interest registered by means of a non-existent forged title be regarded as an immediate purchaser or a subsequent purchaser since the acquirer of the interest was merely a conduit for the purchase?

Question 4

Can a person who has not acquired any title or interest as a result of the non-existent forged title, convey or pass any title or interest to another?

Question 5

Whether a chargee in whose favour a charge is created by a registered proprietor whose title is defeasible is a subsequent purchaser within s 340(3) of the National Land Code 1965 having regard to the decision in *OCBC Bank (Malaysia) Bhd v. Pendaftar Hakmilik Negeri Johor Darul Takzim* [1999] 1 MLRA 256? [Note: Question 5 is an additional question which was allowed after hearing of submissions of counsel in the See brothers' appeal.

Question 6

Whether the Court of Appeal when hearing an appeal under s 69, Courts of Judicature Act 1964 duty bound to infer the existence of an implied term in a contractual dispute when the issue was neither pleaded nor raised in the High Court?

Question 7

If Question 6 is answered in the affirmative, then under what circumstances is the Court of Appeal duty bound to make the said inference?

Question 8

Does the principle in *Manks v. Whiteley*, as applied in *MBF Property Services Sdn Bhd & Anor v. Balasubramaniam K Arumugam* , CA and *Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor*, FC, overcomes privity of contract and thereby entitling a third party financee to enforce an undertaking given by a chargee bank to a third party financier to refund the redemption sum if the charge cannot be registered?

Question 9

If Question 8 is answered in the affirmative, then what are the remedies that third party financee is entitled to seek against the chargee bank when the chargee bank fails to honour the undertaking?

The Salient Facts

[9] The See brothers were the registered proprietors in equal shares of a piece of land in the district of Petaling.

[10] On 28 December 2008, Heveaplast entered into a sale and purchase agreement ('SPA1') with individuals masquerading as the See brothers to purchase the land for RM5,230,754.00. Heveaplast obtained a loan from UOB to part-finance the purchase. Subsequently, on 22 April 2009 Heveaplast became the registered owner of the land and the UOB charges created by Heveaplast in favour of UOB were registered.

[11] Meanwhile and pending the completion of SPA1, on 12 February 2009 Heveaplast entered into another sale and purchase agreement ('SPA2') to sell the land to Kum Hoi. A deposit of RM889,555.60 was paid by Kum Hoi to Heveaplast. Kum Hoi obtained a loan of RM3,255,211.58 from PBB to part-finance the purchase on the security of a charge over the land to be created by Kum Hoi. On 19 June 2009 Heveaplast gave an undertaking to PBB to refund the monies in the event that the land cannot be transferred to Kum Hoi; whilst

on 29 July 2009, UOB gave an undertaking to PBB to refund the monies in the event the UOB charges cannot be discharged ('UOB undertaking').

[12] On 21 August 2009, PBB disbursed the loan redemption sum of RM3,255,211.58 to UOB. On 11 September 2009, PBB received the title for the land together with the discharge of charge forms.

[13] In early September 2009, the See brothers lodged police reports after discovering that their land was transferred to Heveaplast. On 14 September 2009, a Registrar's caveat was entered on the title to the land. Consequently, the transfer of the land to Kum Hoi, the discharge of charge, and the charge over the land in favour of PBB could not be registered.

[14] Meanwhile, Heveaplast remained as the registered proprietor of the land and the UOB charges over the land remained intact.

Decision Of The High Court

[15] In respect of the See brothers' suit, the learned judge set aside the registered title and interests of Heveaplast and UOB on the following grounds:

i. SPA1 and the memorandum of transfer dated 21 January 2009 for the transfer of the land from the See brothers to Heveaplast were forgeries;

ii. The signatures on SPA1 and on the memorandum of transfer were not made by the See brothers;

iii. Heveaplast and the solicitors involved were parties to the fraud;

iv. Heveaplast's title to the land is defeasible under s 340 of the National Land Code 1965 ('NLC');

v. UOB's interests under the UOB charges is defeasible under s 340 of the NLC.

[16] The learned judge allowed Kum Hoi's claim for the refund against UOB and Heveaplast on the ground that SPA2 and UOB's letters of undertaking were interlinked and that since Kum Hoi was not able to register the transfer of the land, both Heveaplast and UOB were required to refund the monies paid.

Decision Of The Court Of Appeal

[17] The Court of Appeal dismissed Heveaplast's CA Appeal 489 against the See brothers.

[18] In respect of CA Appeal 2129 by Heveaplast against Kum Hoi, the Court of Appeal found no reason to disturb the findings of the High Court for the simple reason that the letter of undertaking by Heveaplast is clear and

succinct; and that not to order a refund against Heveaplast would run contrary to common sense. It was simply complying with what was agreed in the letter of undertaking.

[19] However, the Court of Appeal allowed UOB's CA Appeal 33 against the See brothers and set aside the High Court order cancelling the UOB charges over the land. The Court of Appeal disagreed with the learned judge's finding that UOB's interest was not indefeasible under s 340 of the NLC as UOB was an immediate purchaser. This is what the Court of Appeal said:

> "43. The learned Judge, with respect, should have... asked the question whether UOB was a subsequent purchaser. This question, in our view, is an issue of fact. The salient facts which were not considered by the learned Judge were these:
>
> (a) UOB had derived interest as chargee of the Land from Heveaplast;
>
> (b) The financing of the property involved a two-stage transaction in the following manner:
>
> (i) The lodgement of the memorandum of transfer from the See Brothers to Heveaplast; and
>
> (ii) Then the lodgement of UOB's Charge.
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> 44. Though the above dealings were on the same day and were done simultaneously on 22 April 2009, it cannot be disputed nor can we ignore the fact that the lodgement of the UOB's Charge could not have been created until the first step of transfer to Heveaplast had been affected (*sic).* And since there was no suggestion that UOB was tainted by fraud or forgery, UOB was what you can call a purchaser for good consideration and without notice. Hence for the aforesaid reasons, we find that UOB is a subsequent purchaser and protected by the shelter of deferred indefeasibility provided for under s 340 of the NLC.
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> 45. Further, we say that the fact that Heveaplast's interest being an immediate purchaser was defeasible by the See Brothers did not, in our view, affect the indefeasibility of UOB's interest. Our view is supported by two decisions of the apex Court, namely *Kamarulzaman Omar & Ors v. Yakub Husin & Ors (supra)* and *Tan Ying Hong v. Tan Sian San & Ors (supra)*".

[20] The Court of Appeal dismissed UOB's CA Appeal 173 against Kum Hoi. The Court of Appeal agreed with the High Court's decision to refund the monies but on different grounds. In essence, the Court of Appeal took the view that UOB's letter of undertaking cannot be interpreted in a vacuum in that one cannot ignore the fact that the loan from PBB was to finance Kum Hoi's purchase of the land and the amount released was to satisfy or redeem the UOB loan to Heveaplast. The Court of Appeal applied the two tests referred to by this court in *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 1 MLRA 332: (i) the officious bystander test, and (ii) the business efficacy test. The Court of Appeal said:

"52. It is our view that the circumstances in this case pass the two tests, the "Oh of course" or "goes without saying" and "business efficacy". What we have here is Kum Hoi, the purchaser, buying the Land and such purchase is partly to be financed by Public Bank Berhad. It, so to speak, "goes without saying" that the obligation of Public Bank Berhad to lend is conditional on the ability of Heveaplast's ability to transfer the Land to Kum Hoi and that condition is what we call a condition precedent. Until and unless the aforesaid condition precedent is satisfied, Public Bank Berhad would not be able to become a chargee of the Land. Hence we say that there is an implied term in the letter of undertaking by UOB in that the same does not come into effect until such time the condition precedent has been satisfied. Here of course the same has not been complied with. As noted earlier in our Judgment, there is always a two-stage transaction involved: (1) the transfer of land to Kum Hoi; and (2) the charging of the Land to Public Bank Berhad.

53. Such implied term gives "business efficacy" for the simple reason that all the loans extended by any financial institution must be premised solely on the ground that the borrower has good title to the Land which would give good security to the financial institution. In the case before us, there is a complete lack of consideration in that Heveaplast cannot physically effect any sort of transfer of the Land to Kum Hoi. To sustain the learned counsel's submission in such circumstances would, in our view, defy any sense of reasonableness to a commercial contract.

54. As for the contention that since the redemption amount was released by Public Bank Berhad plus the letter of undertaking was given to Public Bank Berhad by UOB, the proper party to sue is Public Bank Berhad and not the Plaintiff is, in our view, ignoring the reality of the transaction. This is a circumstance in which the Court must look at the totality of the agreements entered between the parties to discern the intention of the parties.

55. It is settled principle of law that all agreements which form part of the same transaction must be read together and cannot be considered in isolation of each other...

56. ...

57. Reverting to the case at hand, there is little doubt that if not for the sale and purchase agreement of the Land between Heveaplast and Kum Hoi, the loan agreement would not have come into existence. No doubt that the redemption money was released by Public Bank Berhad to UOB but one cannot ignore the fact that the money paid originated from the loan account of Kum Hoi. Hence Public Bank Berhad was nothing but a conduit for the payment of the redemption amount by Kum Hoi to UOB. Hence we reject the contention of the UOB."

See Brothers' Appeal

[21] Before us leading counsel Datuk Sri Gopal Sri Ram argued that the proviso in sub-section 340(3) of the NLC does not apply because UOB is not a subsequent purchaser in good faith and for valuable consideration. First, UOB as the chargee acquired an immediate interest from the fraudster, ie

Heveaplast. Heveaplast was the immediate proprietor and it did not transfer its immediate title to any subsequent proprietor. Hence, it follows that there is no issue of subsequent title and/or interest in the present case. Sub-section 340(3) and its proviso do not apply here (*OCBC Bank (Malaysia) Bhd v. Pendaftar Hakmilik Negeri Johor Darul Takzim* [1999] 1 MLRA 256). Further, the position in *Tan Ying Hong v. Tan Sian San & Ors* [2010] 1 MLRA 1 ought to be revisited. The reasoning in *Tan Ying Hong* is flawed because the construction of s 340 of the NLC therein leads to an unjust, unsatisfactory or unfair result. It leaves the true proprietor with a charge on his title, due to no fault on his part. Parliament could not have intended for s 340 to produce such an outcome (*Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 1 MLRA 657).

[22] Section 340 cannot be interpreted in such a manner where the purported transfer by a fraudster can be set aside by the true proprietor, but the purported charge presented by the very same fraudster creates an indefeasible interest. In any event, UOB was an immediate interest holder based on the factual matrix of the case. The instruments of transfer and the UOB charges were purportedly registered at the exact same time. The UOB charges were created to finance the bogus sale and transfer of the subject land effected by a fraudster. The transfer of the subject land and the UOB charges were for all intents and purposes registered simultaneously. These transactions should therefore be treated as one (*The Bank of Nova Scotia Berhad v. Saunah Kasni & Ors* [2015] MLRHU 319, at para 66). On the facts, UOB was an immediate and not a subsequent purchaser; as such, UOB does not come within sub-section 340(3) of the NLC.

[23] It was also argued, in the alternative, that UOB acquired no interest through the purported UOB charges because no rights whatsoever can be derived from a forged instrument which is a nullity. It is void and of no effect (*Kreditbank Cassel GmBH v. Schenkers Ltd* [1927] 1 KB 826, at 835; dissenting opinion of Jeffrey Tan FCJ in *CIMB Bank Berhad v. AmBank (M) Bhd & Ors* [2017] 5 MLRA 1 at paras 55, 90 and 91). The setting aside of Heveaplast's title to the land causes the purported charges created thereout to be liable to annulment (*OCBC Bank*).

[24] It was therefore submitted that the Court of Appeal misdirected itself in holding that UOB was a subsequent purchaser within sub-section 340(3) of the NLC. That misdirection has occasioned a miscarriage of justice. Question No 5 should therefore be answered in the negative.

[25] We also considered the following points canvassed in the See brothers' written submission:

> (i) The Court of Appeal erred in law and/or in fact in holding that UOB was a subsequent purchaser in good faith and for valuable consideration for three reasons. One, the High Court did not make a 'plainly wrong' finding of fact which warrants appellate intervention (*Lim Choon Seng v. Lim Poh Kwee* [2020] 5 MLRA 76; *Veheng Global Trades Sdn Bhd v. AmGeneral Insurance Berhad & Anor And Another*

Appeal [2019] 5 MLRA 194; *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng & Ors*). Whether a purchaser was an immediate or subsequent purchaser was not determined by a tally of the number of transactions (dissenting judgment of Jeffrey Tan FCJ in *CIMB Bank*). The factual matrix in this case is the same, if not similar with *The Bank of Nova Scotia*. Transactions which are practically contemporaneous should be considered a single transaction (*Home Trust Co v. Zivic* (2006) 277 DLR (4th) 349). Reliance was also placed on the Court of Appeal decision in *OCBC Bank* which held that a chargee bank was an immediate purchaser under sub-section 340(2) of the NLC. It was also argued that UOB was negligent and careless because UOB had failed to notice that both the impugned title and Heveaplast's title were numbered as Version 3, which could not be the case as admitted by UOB's solicitor. Further, even though UOB (through its solicitors) was also aware that there was an on-going legal suit at the High Court involving the See brothers, UOB did not make any independent effort to probe further on this legal suit. Had UOB done so, it would have found out that the legal suit concerned the land where the ownership of the land was in dispute. As such UOB did not act in good faith (*T Sivam Tharamalingam v. Public Bank Berhad* [2018] 4 MLRA 583). Two, the authorities cited by the court of Appeal do not lend support to the Court of Appeal's findings. *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 2 MLRA 432; only affirmed that the NLC recognises the concept of 'deferred indefeasibility'; that is not an issue in dispute here. The Court of Appeal erred in relying on the obiter comments of the Federal Court in *Tan Ying Hong* in para [26] concerning the Court of Appeal's decision in *OCBC Bank*. It was also submitted that the proper construction of s 340 of the NLC is found in a Malayan Law Journal article entitled '*A Call to Revisit Tan Ying Hong v. Tan Sian San & Ors*' [2016] 5 MLJ V). The majority decision in *CIMB Bank* was flawed as it resulted in injustice, absurdity or anomaly, which went against the intention of s 340 of the NLC; the Federal Court in *CIMB Bank* having failed to consider the fact that there were two titles over the property in that case. Sub-section 340 of the NLC should be interpreted so as to protect registered proprietors of land by affording them certainty of title. Three, UOB is *nemo dat quod non habet*. The High Court having found that the SPA1 and the memorandum of transfer were null and void as they were forged documents. Having no right under the void instruments, Heveaplast was incapable of granting any interest to UOB through the impugned charges (*Quah Hong Lian Neo v. Seow Teong Teck & Ors.*[1935] 1 MLRA 113; dissenting opinion of Jeffrey Tan FCJ in *CIMB; OCBC; Boonsoom Boonyanit v. Adorna Properties Sdn Bhd* [1997] 1 MLRA 209);

(ii) The Court of Appeal erred in law and/or in fact in failing to consider and draw inferences from the evidence led before the High

Court, ie, the impugned title was *void ab initio.* In the first place, it was the See brothers' pleaded case that the impugned title was *void ab initio* because it was a forged title (*Kreditbank Cassel)*. The Court of Appeal failed to direct its mind to the fact that at all material times, the See brothers had never parted with the original title. Further, the Land Office witness confirmed that she had never sighted the impugned title and that the Land Office never issued the impugned title. Both the impugned title and Heveaplast's title were numbered as Version 3 title. In fact, the one and only Version 3 title which was issued by the Land Office was the Heveaplast title which was collected by Heveaplast's solicitors from the Land Office Registry after the registration of the transfer and UOB charges. Therefore, the impugned title was a forged document and is null and void. As such, UOB could not have obtained any interest under the impugned title (*Quah Hong Lian Neo; Boonsom Boonyanit*). Further, it is axiomatic that each piece of land can only have one valid title. There cannot be two valid titles existing side by side in respect of the same parcel of land. As such, the impugned title is void as against the original title (s 85(2) of the NLC; *Tan Chiw Thoo v. Tee Kim Kuay* [1996] 2 MLRA 154 (FC); *Rajamani Meyappa Chettiar v. Eng Beng Development Sdn Bhd & Ors* [2016] 3 MLRA 581 (CA) at para [62], [63] and [71]; *Shayo (M) Sdn Bhd v. Nurlieda Sidek & Ors* [2012] MLRHU 1208; *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 1 MLRA 95 (CA));

(iii) The Court of Appeal's interference on the findings of fact of the High Court and failure to draw proper inferences from the evidence occasioned a miscarriage of justice to the See brothers and the public at large. As a result of the Court of Appeal's decision, the See brothers, being the victims of a scam are forced to service the loan given by UOB to Heveaplast. The See brothers did not take the loan. No money was disbursed to the See brothers. This is a serious miscarriage of justice and can never be the object and purpose of s 340 of the NLC (*Au Meng Nam)*. Unlike other cases, even though Heveaplast defended itself in the suit, UOB did not apply for any relief against Heveaplast. Neither did UOB apply for a stay of execution of the High Court order; as such, the latest title with the endorsement of the two UOB charges has been destroyed in compliance with the High Court Order. Therefore, a reinstatement of the two charges on the original title will occasion another miscarriage of justice. To give effect to the Court of Appeal order would be a gross violation of the See brothers' art 13(1) rights under the Federal Constitution (*Rajamani* (CA) at paras [75] and [76]). In the circumstances, the Court of Appeal decision is liable to be set aside (*TR Sandah Ak Tabau & Ors v. Director Of Forest Sarawak & Anor And Other Appeals* [2019] 5 MLRA 667);

(iv) Questions 1 and 2 should be answered in the affirmative. Question 3 should be answered such that the acquirer of a registered

charge registered by means of a forged title is an immediate purchaser. Question No 4 should be answered in the negative.

UOB's Reply Submission

[26] Learned counsel for UOB argued that the only issue in this appeal is whether UOB is an immediate or subsequent purchaser. The Court of Appeal was correct in holding that the High Court erred in finding UOB was not entitled to the defence under the proviso to s 340(3) of the NLC. The UOB charges were presented after the presentation of the memorandum of transfer for registration. The land search shows that the UOB charges were registered after Heveaplast was registered as the owner of the land. UOB provided financing to Heveaplast and hence gave valuable consideration for the UOB charges. There was no suggestion that UOB was involved or knew about the fraud committed by Heveaplast prior to or at the time of the registration of the UOB charges. It was on these undisputed facts that the Court of Appeal applied the test in *Kamarulzaman*. The fact that Heveaplast's interest as immediate purchaser was defeasible by the See brothers was irrelevant (*Tan Yin Hong; Kamarulzaman)*. The Court of Appeal's decision is also consistent with the Federal Court's decision in *CIMB Bank and Low Huat Cheng & Anor v. Rozdenil Toni & Another Appeal* [2016] 6 MLRA 79). Questions 1 to 4 should not be answered for the following reasons:

i. Question 1 is vague as it does not specify (i) the transaction in question, (ii) what proviso of s 340 that would be involved. It is also unclear as to which "valid registrable issue document of title" it refers to. On the facts, there were two titles, (a) the title presented with the memorandum of transfer to transfer the land to Heveaplast, and (b) the title that was later registered in Heveaplast's name. Question 1 suggests that the chargee cannot rely on s 340 of the NLC unless there is a "valid registrable issue document of title". As such, knowing which title is important. The High Court did not make any finding on the issue of documents of title to transfer the land to Heveaplast; neither did the Court of Appeal. The Court of Appeal did, however, find that the land was registered in Heveaplast's name before the UOB charges were created, and that Heveaplast, as the immediate purchaser, could create the UOB charges although its title was defeasible. Therefore, it was argued that Question 1 should not be answered because it is not properly framed (*Dataran Rentas Sdn Bhd v. BMC Construction Sdn Bhd* [2009] 1 MLRA 163 (FC)), it does not relate to the facts (*Ungku Sulaiman Abd Majid & Anor v.Pengarah Tanah Dan Galian Johor & Anor* [2012] 4 MLRA 521 (FC), and it would not help to resolve the issues in the case (*Dato' See Teow Chuan & Ors v. Ooi Woon Chee & Ors And Another Application* [2013] 5 MLRA 1 (FC)).

ii. Question 2 presupposes that the charge was registered based on a "non-existent forged title". This is factually incorrect. As the UOB

charges were registered over the land after the land was registered in Heveaplast's name. Question 2 is also unclear as to what "acquirer of registered charge" and "registered charge of interest or title" mean. The present case involves a charge over the whole of an undivided share in an alienated land (s 241(1)(b) of the NLC). The issue of immediate indefeasibility has been settled by the Federal Court in *Tan Ying Hong and Low Huat Cheng.*

iii. Question 3 is also premised on the charge being registered based on a "non-existent forged title" - which is actually untrue. It is fraught with the same problems as Question 2. Question 3 also presupposes the chargee was a "conduit for the purchase". There was no finding of fact by the High Court or the Court of Appeal that UOB was a conduit for the purchase between Heveaplast and the See brothers.

iv. Likewise, Question 4 is also tainted with the erroneous suppositions as Questions 2 and 3. The UOB charges did not "convey or pass" any title or interest. A charge created under the NLC is different from a common law mortgage; in a mortgage the title passes from the mortgagor to the mortgagee whereas a duly registered charge under the NLC only creates a legal interest in the land (*Perwira Habib Bank Malaysia Bhd v. Lum Choon Realty Sdn Bhd* [2005] 2 MLRA 53 (FC)).

[27] Insofar as Question 5 is concerned, learned counsel submitted that on the facts, UOB is a subsequent purchaser. The question of *bona fides* on the part of UOB was never an issue in the High Court and the Court of Appeal. The argument that the transfer of the land to Heveaplast and the creation of the UOB charges was a single process transaction is misconceived. In addition, the High Court did not make any finding as to whether the title that was used for the transfer of the land to Heveaplast is *void ab initio* because it was not the pleaded case and there was no evidence to support the contention. At any rate, the land office accepted the title and registered the transfer to Heveaplast.

UOB's Appeal

UOB's Submission

[28] Learned counsel for UOB argued that the central issue is whether there is privity of contract between UOB and Kum Hoi. Question 8 should be answered in the negative.

[29] Learned counsel argued that Kum Hoi is not privy to the UOB undertaking. The High Court got around the privity issue by holding an agency existed. The High Court erred as there is no basis for 'implied contract' because (i) there was no dealing between UOB and Kum Hoi to form the basis for an implied contract (*Ilyssia Cia Naviera SA v. Bamaodah, The Elli 2* [1985] 1 Lloyd's Rep 107), and (ii) it is not necessary because parties never intended such an implied contract (*Baird Textile Holdings Ltd v. Marks & Spencer plc* [2002] 1 All ER (Comm) 737).

[30] The Court of Appeal wrongly applied the principles in *Manks v. Whiteley* (as in *Manks v. Whiteley* [1912] 1 Ch 735) in concluding, based on the agreements executed, PBB was a conduit for Kum Hoi to overcome the privity issue. First, the Court of Appeal's finding is inconsistent with Kum Hoi's pleaded case - which is that UOB is liable to repay the redemption sum as agent for Heveaplast. Second, *Manks v. Whiteley* concerns the construction of contract; specifically, it applies to the construction of interlocked documents (*Akay Holdings Sdn Bhd v. Arch Reinsurance Ltd* [2016] MLRAU 309). *Manks v. Whiteley* is not an exception to the doctrine of privity. The exceptions to the doctrine are (i) agency (*The Golf Cheque Book Sdn Bhd & Anor v. Nilai Springs Bhd* [2005] 2 MLRA 509); (ii) collateral contract (*Shanklin Pier v. Deter* [1951] 2 All ER 471); (iii) covenants relating to land (*Tulk v. Moxhay* (1848) 50 ER 937 (negative covenant) and *Smith and Snipes Hall farm v. River Douglas Catchment Board* [1848] 50 ER 937 (positive covenant)); statutory exception (*Pacific & Orient Insurance Co Berhad v. Kamacheh Karuppen* [2015] 3 MLRA 278; and (v) trust (*Takako Sakao v. Ng Pek Yuen & Anor* [2009] 3 MLRA 74). *Manks v. Whiteley* does not resolve the fact that there was an absence of consideration between UOB and Kum Hoi; therefore Kum Hoi cannot enforce the UOB undertaking. Third, the *Manks v. Whiteley* argument was neither raised in the High Court or the Court of Appeal. UOB was not given an opportunity to address the issue before the Court of Appeal arrived at its decision. This omission is a breach of natural justice (*Pengusaha Tempat Tahanan Perlindungan Kamunting Taiping & Ors v. Badrul Zaman PS Md Zakariah* [2018] 6 MLRA 177). The Court of Appeal also erred in finding that PBB was nothing but a conduit for the payment of the redemption amount by Kum Hoi to UOB. 'Conduit' implies that PBB was an agent for Kum Hoi. This is incorrect as Kum Hoi's case against UOB is not that PBB was a conduit/agent for Kum Hoi but that UOB was the agent for Heveaplast and that as such UOB was obliged to refund the redemption sum. Further, PBB was only Kum Hoi's banker; there is no proof of an agency relationship.

[31] Insofar as Questions 6 and 7 are concerned, it was submitted that both the High Court and the Court of Appeal found that UOB was not at fault as the UOB charges could not be discharged due to the Registrar's caveat which was entered over the land due to the See brothers' complaint. However, despite the aforesaid finding, the Court of Appeal held that it was 'duty bound' to infer an implied term to the UOB undertaking to the effect that the UOB undertaking has no effect until the land was transferred from Heveaplast to Kum Hoi. There is no duty on the Court of Appeal to infer an implied term in a contractual dispute when the issue was neither raised nor pleaded by the parties (*Dato' Tan Chin Woh v. Dato' Yalumallai @ M Ramalingam v. Muthusamy* [2016] 5 MLRA 613 (FC); *Pengusaha Tempat Tahanan Perlindungan Kamunting, Taiping & Ors v. Badrul Zaman PS Md Zakariah).* As such, Question 6 should be answered in the negative.

[32] Further, the implied term, found by the Court of Appeal is clearly inconsistent with the express term of the UOB undertaking - that if the UOB

charges cannot be discharged, UOB will refund the redemption sum to PBB. The Court of Appeal failed to consider the contradiction between the implied term and the express terms of the UOB undertaking (*Sababumi*; *BP Refinery (Westernport) Pty Ltd v. Shire of Hastings* [1977] 180 CLR 266; *Heng Cheng Swee v. Bangkok Bank Ltd* [1976] 1 MLRA 343 (FC); *Marks & Spencer v. BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742).

[33] Question 9 is a consequential question arising from the Court of Appeal's finding that it was an implied term of the UOB undertaking that it did not take effect until the land was transferred by Heveaplast to Kum Hoi. On that basis, Kum Hoi should only be entitled to claim for restitution against UOB; that was Kum Hoi's argument in the Court of Appeal. Whilst affirming the High Court order to refund, the Court of Appeal did not say anything about the High Court order to pay interest. It was argued that the order to pay interest amounts to a claim for damages arising from a breach of contract notwithstanding the Court of Appeal's finding. In the event this court finds that Kum Hoi is entitled to the redemption sum, the claim can only be based on restitution (*Tanjung Teras Sdn Bhd v. Kerajaan Malaysia* [2015] MLRAU 468, *Spatial Ventures Sdn Bhd v. Twintech Holdings Sdn Bhd* [2013] MLRHU 512).

Kum Hoi's Reply Submission

[34] Learned counsel argued that Questions 6 and 7 are premised on the contention that the Court of Appeal overstepped its jurisdiction by inferring the existence of an implied term in a contractual dispute although the issue was not pleaded. That contention is without merit because the Court of Appeal had properly inferred an implied term into the UOB undertaking based on the officious bystander and the business efficacy test (*Sababumi*). The Court of Appeal was entitled to make the inference because there were sufficient facts which gave rise to the implied term; further legal results do not have to be pleaded (*Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor* [2012] 1 MLRA 311). Further, in Kum Hoi's Reply to UOB's Defence, Kum Hoi pleaded that UOB has an obligation to return the redemption sum as the discharge of the UOB charges cannot be registered. Those pleaded facts were relevant and sufficient to give rise to an implied term as found by the Court of Appeal - that UOB's undertaking to PBB only comes into effect if Heveaplast had the ability to transfer the land to Kum Hoi. As this condition precedent was not satisfied, the Court of Appeal found that the UOB undertaking did not come into effect in that UOB could not rely on the words "for any reasons attributable to us" in the letter of undertaking to avoid returning the redemption sum to PBB. Therefore, the fact that Heveaplast was unable to transfer the land to Kum Hoi, which must result in the redemption sum being returned to Kum Hoi was pleaded and raised during the trial. Therefore, Questions 6 and 7 are abstract and should not be answered as the answers would not make any difference to the outcome of the Court of Appeal's decision.

[35] Questions 8 and 9 are also hypothetical and without factual basis. The Court of Appeal did not suggest that the *Manks v. Whiteley* principle overcomes the principle of privity of contract. Rather, the Court of Appeal after examining the contemporaneous documents made a finding that "if not for the sale and purchase agreement of the Land between Heveaplast and Kum Hoi, the loan agreement would not have come into existence". The Court of Appeal rightly discounted UOB's argument that the UOB undertaking was only given to PBB and not to Kum Hoi. It was Kum Hoi who had paid the redemption sum to UOB through PBB since the money originated from Kum Hoi's loan account in PBB. This is a concurrent finding of fact by the High Court and the Court of Appeal. The issue of interest which was awarded by the Court of Appeal was not disputed by UOB in its defence of Kum Hoi's claim. Further, interest is not an issue in UOB's memorandum of appeal to the Court of Appeal. At any rate, in wrongfully withholding the redemption sum UOB had the benefit of the use of Kum Hoi's money for the entire period during which Kum Hoi had also been expending further monies to service its loan with PBB.

Heveaplast's Reply Submission

[36] Learned counsel for Heveaplast informed the court that as Heveaplast has already been wound-up, he did not intend to proffer any submission in this appeal.

Indefeasibility Of Title Or Interest In Land

[37] As a start, we think that it is apposite to define the meaning of the words 'title', 'interest' and 'indefeasibility' in the context of land law in Malaysia. The words 'title to land' denotes legal ownership of the land; whilst the words 'interest in land' refers to the statutory interest in registered land which includes a registered lease, charge or easement, statutory lien, and a tenancy exempt from registration. Accordingly, a person who is the registered owner of a piece of land under the issue or register document of title is said to possess legal title to that piece of land. On the other hand, a person taking a lease (a lessee) or a charge of the land (a chargee) acquires only an interest in the land. In this connection, it is also helpful to note the distinction between the words 'issue document of title' and 'register document of title'. The former is the document prepared for issue to the proprietor of any land, being a copy of, or an extract from, the register document of title relating thereto (ss 85(1)(b) and 90 of the NLC); it is the title deed kept by landowners. The latter refers to any document registered, or prepared for registration, under the NLC and evidencing or, as the case may be, intended to evidence title to land (s 85(1)(a) of the NLC). The register document of title is accessible to the public in order to enable the public to conduct land searches at the land registry. The words 'indefeasibility of title or interest' in the Torrens system connotes the measure of conclusiveness given to a title or interest in alienated land on registration of the dealing in statutory form. Once a title or interest is registered, it cannot be set aside except otherwise statutorily provided under sub-section 340(2) of the

NLC (See Teo Keang Sood and Khaw Lake Tee, Land Law in Malaysia, Cases and Commentary, Third Edition, LexisNexis 2012 at [4.52]). The register is everything in the sense that the register document of title is conclusive evidence of entries thereon (See s 89 of the NLC).

[38] The concept of indefeasibility is fundamental to the Torrens system and although Raja Azlan Shah CJ (as HRH then was) stated in *PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd* [1980] 1 MLRA 562 that, 'the concept of indefeasibility of title is so deeply embedded in our land law that it seems almost trite to restate it', yet this concept has been brought into question by the decision in *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2000] 1 MLRA 869 (FC) ('*Adorna Properties*'). In *Adorna Properties*, the Federal Court departed from the prevailing view when it held that s 340 of the NLC conferred immediate indefeasibility instead of deferred indefeasibility. Until then, the view was that deferred indefeasibility applied (*Mohammad Buyong v. Pemungut Hasil Tanah Gombak & Ors* [1981] 1 MLRH 848; *M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1993] 1 MLRA 107).

[39] Recall that in *Adorna Properties*, an imposter obtained a certified true copy of *Boonyanit's* land titles from the land registry on the pretext that the original titles had been lost. The imposter subsequently procured a forged passport in *Boonyanit's* name and sold the land to *Adorna* for valuable consideration; and *Adorna* became the registered proprietor of the land. *Boonyanit* sued *Adorna* alleging that the transfer of the land to *Adorna* had been procured by forgery and/or fraud. She asked for, *inter alia*: (i) a declaration that she is the registered owner of the land, (ii) to set aside the transfer of the land to *Adorna*, (iii) to cancel the memorials in the register of land in favour of *Adorna*, and (iv) to restore her name as the registered owner of the land. The High Court dismissed her claim. The learned judge found that *Boonyanit* was the registered owner of the land but that forgery was not proved beyond reasonable doubt. The learned judge also ruled that even if forgery was proved, *Adorna's* title was immediately indefeasible under s 340 of the NLC. *Boonyanit* appealed to the Court of Appeal on two main grounds, (i) that the learned judge applied the wrong standard of proof for civil forgery, and (ii) that s 340 of the NLC created a deferred, not immediate, indefeasible title in a third party purchaser. The Court of Appeal allowed *Boonyanit's* appeal and set aside the judgment and order of the High Court. The Court of Appeal held that (i) the standard of proof to be applied in civil forgery is the balance of probabilities and that on the totality of the evidence *Boonyanit* had clearly established that the signature on the memorandum of transfer was forged, and (ii) the words 'any purchaser' in s 340 of the NLC refers to a subsequent and not to an immediate purchaser, hence creating a deferred defeasibility which benefits subsequent purchasers. Therefore, *Adorna* was an immediate purchaser whose title was defeasible once forgery was established; it did not matter that *Adorna* was a *bona fide* purchaser for value without notice. The Court of Appeal allowed *Boonyanit's* claim thereby restoring to her the lands which had been unlawfully transferred to *Adorna.*

[40] *Adorna* took the matter to the Federal Court. The Federal Court agreed with the Court of Appeal on the standard of proof for civil forgery. However, the Federal Court departed on the issue of indefeasibility. It held that s 340(1) of the NLC confers immediate indefeasibility of the registered proprietor when it decided that *Adorna* had acquired an indefeasible title because it was a *bona fide* purchaser for value without notice. The fact that the instrument of dealing is forged and thereby defective is irrelevant because registration will cure the defect in the instrument. In short, *Boonyanit* could not recover her lands despite the fact that her signature on the instrument of transfer was forged.

[41] Unfortunately, *Adorna Properties*, instead of resolving the problem of fraud and forgery in land transactions, exacerbated it. Much disquiet and criticism was expressed in legal and academic circles on the Federal Court decision in *Adorna Properties* (See PK Nathan, Nightmare For Registered Owners of Landed Property, [2002] CLJ xxiii; Prof Teo Keang Sood, *Demise of Deferred Indefeasibility Under the Malaysian Torrens System?* Singapore Journal of Legal Studies, 2002, pp 403-408). In *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 1 MLRA 657 (CA) at para [31], Raus Sharif JCA (as he then was) recognised that much criticism had been levelled against the Federal Court decision in *Adorna Properties* and that to some, that decision was plainly wrong and should be disregarded. His Lordship further opined in para [34] that the Federal Court should review its decision in *Adorna Properties.*

[42] For about nine years *Adorna Properties* reigned until the law on indefeasibility was finally corrected by the Federal Court in *Tan Ying Hong* in 2010. The single question for consideration in *Tan Ying Hong* was whether an acquirer of a registered charge or other interest under the NLC by means of a forged instrument acquires an immediate indefeasible interest or title. This was essentially a question of construction to be given to s 340 of the NLC.

[43] The facts in *Tan Ying Hong* are rather peculiar. In March 1985, *Tan Ying Hong* received a notice of demand from United Malayan Banking Corporation's ('UMBC') solicitors demanding for payment of monies due and owing under an overdraft facility and a fixed loan which was granted to Cini Timber Industries Sdn Bhd The loan facilities were secured by two charges ('UMBC Charges') over a piece of land registered in *Tan Ying Hong's* name. It transpired that even though *Tan Ying Hong* was the registered owner of the land in question, he was in fact oblivious of that fact as he never applied for the land. In court, he admitted that he did not own the land and that he never charged the land to UMBC. It also turned out that the UMBC Charges which were purportedly created by him were transacted under a forged power of attorney by a fraudster. In a bid to extinguish his liability under the UMBC Charges he asked that the UMBC Charges be declared null and void. The High Court dismissed his action and held that the UMCB Charges were valid under sub-section 340(3) of the NLC on the ground that UMBC was a purchaser in good faith and for valuable consideration. *Tan Ying Hong's* appeal to the Court of Appeal was dismissed. The Court of Appeal applying *Adorna Properties*

held the UMBC Charges were valid because UMBC had obtained immediate indefeasibility and that there was no evidence that UMBC had any knowledge of the fraud, misrepresentation or forgery leading to the creation of the UMBC Charges.

[44] *Tan Ying Hong* succeeded at the Federal Court. Zaki Tun Azmi CJ (as he then was) in his inimitable style said that he was "legally obligated to restate the law since the error committed in *Adorna Properties* is so obvious and blatant. It is quite a well-known fact that some unscrupulous people have been taking advantage of this error by falsely transferring titles to themselves." The Federal Court held that on the facts, (i) UMBC was an immediate purchaser who was subject to the exception to indefeasibility under sub-section 340(2)(b) of the NLC, and (ii) the UMBC Charges were registered using void instruments as they were executed under a forged power of attorney. Therefore, the proviso to sub-section 340(3) which protects a subsequent purchaser did not shield the UMBC Charges; and the fact that UMBC, an immediate purchaser, had acted in good faith and for valuable consideration is of no relevance.

[45] In essence, *Tan Ying Hong* reaffirmed the principle that s 340 of the NLC conferred deferred indefeasibility. *Tan Ying Hong* also clarified that sub-section 340(3) merely provides that any title or interest of any person or body which is defeasible by reason of any circumstances stated in sub-section 340(2) shall continue to be liable to be set aside in the hands of subsequent holders of such title or interest. Sub-section 340(3) is also subject to the proviso which reads: "Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser." Even though sub-section 340(3)(a) and (b) refer to the circumstances specified in sub-section 340(2), they are restricted to subsequent transfers or interests in the land and do not apply to an immediate purchaser of title or interest in land.

[46] Notwithstanding the clear and unequivocal pronouncement of this court in *Tan Ying Hong*, the problem of competing claims involving questions of indefeasibility arising from fraud and/or forgery in land transactions did not, of course, go away, as the following line of cases will attest. So it was that the ghost of *Adorna Properties* was not laid, and it has continued to haunt the concept of indefeasibility to this day.

[47] *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 2 MLRA 432 (FC) is a case of competing claims between the original landowner and purchasers who purchased the land from fraudsters. The issues in that case were whether a default judgment is a specific finding that fraud was committed, and whether the purchasers were immediate or subsequent purchasers. In that case a one-third undivided share in two plots of land belonging to one Saribu Badai (deceased) were transmitted to four individuals under a distribution order which was procured by fraud. These four fraudsters sold and transferred the one-third undivided share to two purchasers. The remaining owner of the

undivided two-third share of the land and beneficiaries of Saribu Badai's estate sued the fraudsters and the two purchasers. Judgment in default was entered against the fraudsters and the High Court ordered the cancellation of the distribution order. However, the High Court held that since the two purchasers were *bona fide* purchasers for value, their title was protected by sub-section 340(3) as applied in *Adorna Properties*. The High Court distinguished *Tan Ying Hong* on the facts and held that the default judgment against the fraudsters was proof that fraud was committed. The Court of Appeal agreed with the High Court.

[48] Leave to appeal to the Federal Court was granted on two questions of law relating to (i) what effect if any, did the judgment in default (which set aside the distribution order) have on the transfers by the fraudsters to the two purchasers, and (ii) whether the two purchasers were protected by s 340 of the NLC? On the first question, the Federal Court held that when an allegation was unanswered, it must be assumed as proved. Given that the alleged fraud passed unanswered by the fraudsters, the trial court was warranted to hold that with the default judgment, the appellants need not prove fraud by them. More importantly, in answering the second question the Federal Court observed that both the trial court and the Court of Appeal failed to inquire whether the two purchasers were immediate or subsequent purchasers. Only a subsequent purchaser was entitled to raise the shield of indefeasibility. An immediate purchaser of title tainted by any one of the vitiating elements acquired a title that was not indefeasible; and that the *bona fides* of an immediate purchaser was not a shield to defeasibility. On the facts, the Federal Court found that the fraudsters, from whom the two purchasers obtained title, were not immediate purchasers. The fraudsters had no title to pass to the two purchasers. The fraudsters were imposters of those entitled to the estate of the deceased. The two purchasers who were the immediate purchasers, acquired a title that was not indefeasible. When the fraudulent title of the fraudsters was set aside by the default judgment, the defeasible title of the two purchasers was also defeated. As such, the two purchasers being immediate purchasers were not protected by the proviso to sub-section 340(3) of the NLC. Consequently, the undivided shares of the two purchasers in the lands were cancelled from the register and the undivided share of the deceased in the lands were restored to the estate of the deceased on the register.

[49] The next case was a contest between an equitable mortgagee bank and a purchaser who acquired his title to the land from a bare trustee. In *Samuel Naik Siang Ting v. Public Bank Berhad* [2015] 5 MLRA 665 (FC), the question of law for consideration was whether the title of a *bona fide* registered owner without notice under the NLC can be defeated by a non-registered interest of an assignee/lender under an earlier sale and purchase agreement in respect of the same piece of land with other purchasers other than the appellant. In that case, Majlis Perbandaran Manjung ('MPM') was the registered owner of a piece of land which was subsequently sub-divided into various lots. Pursuant to a joint-venture agreement, MPM appointed Bersatu Maju Properties Sdn

Bhd ('BMP') as the developer to develop the land into a mixed development project. Between 201 and 2002, MPM and BMP sold the sub-divided lots to a number of purchasers ('the First Purchasers'). Public Bank Bhd ('PBB') granted the First Purchasers loans to part-finance their respective purchases. As the individual titles to the respective lots were not yet issued, the First Purchasers executed deeds of assignment assigning absolutely all their respective titles, rights to and/or interest in the lots in favour of PBB. In addition, MPM and BMP issued PBB with letters of undertaking, whereby they both undertook to deliver the documents of title to the lots upon issuance thereof to PBB to facilitate the execution of the transfer documents in favour of each of the First Purchasers and the execution of legal charges in favour of PBB. Later, even though temporary documents of title were issued to the lots in question MPM and BMP failed to notify and deliver the individual titles to PBB. Instead, in 2004, MPM and BMP entered into various sale and purchase agreements and sold the lots to other third parties, one of whom was Samuel Naik. The title to the lots were then registered in the name of these new purchasers. When PBB discovered the subsequent sales, PBB lodged caveats on the lots. PBB also sued MPM, BMP and the new purchasers claiming *inter alia* for a declaration that the First Purchasers were the rightful owners of their respective lots, that the sale and purchase agreements between MPM, BMP and the new purchasers were void, and that the transfers of the lots to the new purchasers were *void ab initio* and that the registration of such transfers be set aside. The High Court allowed PBB's claim and set aside the transfer of the lots to the new purchasers. Samuel Naik's appeal to the Court of Appeal was dismissed.

[50] On the aforesaid set of facts, the Federal Court found that the Form 14A which effected the transfer of the lot to Samuel Naik was a void instrument. Since MPM had already received the full purchase price from the First Purchasers, MPM was therefore a bare trustee and not permitted in law to sell or transfer the land to the new purchasers. Therefore, the subsequent sale and transfer to the new purchasers were *void ab initio* as MPM did not have any legal or requisite capacity to enter into such agreements. Samuel Naik was an immediate purchaser of the lot from its registered proprietor MPM, and as such his title to the land was defeasible. Accordingly, Samuel Naik could not enjoy the protection of the proviso to sub-section 340(3) of the NLC.

[51] In 2017, in a case involving forgery, the competing claims of two chargee banks were decided on the question of whether a chargee bank comes within the meaning of 'purchaser' under the proviso to sub-section 340(3) of the NLC; and if so, whether a chargee bank was an immediate or subsequent purchaser. In *CIMB Bank Berhad v. AmBank (M) Bhd & Ors* [2017] 5 MLRA 1 (FC), a charge was created in March 2006 by the landowners over their land in favour of Southern Bank Berhad ('SBB'); SBB's business became vested with CIMB Bank Bhd in September 2006 ('CIMB Charge'). AmBank (M) Bhd's charge ('AmBank Charge') was registered in 2009 to secure a loan granted to a fraudster to finance the purported purchase of the land. The registration of AmBank's Charge and the transfer of the land to the fraudster

was preceded by the discharge of CIMB charge. The discharge of the CIMB Charge, the transfer of the land to the fraudster and the AmBank Charge were registered in November 2009. CIMB's action was predicated on the ground that the CIMB Charge is subsisting and that the AmBank Charge is invalid and should be set aside. The High Court made the following findings of fact - (i) the discharge of the CIMB Charge purportedly signed by CIMB had been forged, (ii) the document of title was also a forgery, and (iii) the registering authority was negligent to have acted on the forged document of title. On these facts the High Court set aside the AmBank Charge on the ground that AmBank was an immediate purchaser; as such, AmBank's interest was defeasible and not shielded under sub-section 340(3) of the NLC. The Court of Appeal, however, took a different view and held that Ambank was a subsequent purchaser whose interest was protected by the proviso to sub-section 340(3) of the NLC in accordance with the principle of deferred indefeasibility. The AmBank Charge was restored by the Court of Appeal.

[52] The Federal Court dismissed CIMB's appeal holding that a chargee comes within the meaning of purchaser under the proviso to sub-section 340(3) of the NLC. AmBank is a subsequent purchaser as it had derived interest as chargee of the land from the fraudster who became the registered owner of the land. The CIMB Charge was discharged before the fraudster was registered as the proprietor of the land. CIMB's interest in the land had been extinguished by the forged discharge resulting in the fraudster becoming the immediate purchaser. The fact that the fraudster's interest being an immediate purchaser was defeasible did not affect the indefeasibility of AmBank's Interest. AmBank was accordingly a subsequent purchaser which was protected by the proviso to sub-section 340(3) of the NLC.

[53] The following year, the question of the validity of a charge under which the charger obtained the title to the land by fraud came up in *T Sivam Tharamalingam v. Public Bank Berhad* [2018] 4 MLRA 583 (FC). This time, the contest was between the original registered owner of the land and the chargee, Public Bank Berhad ('PBB'). In May 2006, Nagarajan the son of the original registered owner fraudulently transferred the land to himself. Nagarajan and one Sithra Velusamy ('Sithra') obtained a fixed loan from PBB on the security of a charge which was registered over the land in favour of PBB ('PBB Charge'). A common solicitor handled the fraudulent transfer of the land and the subsequent loan transaction. In July 2006 the common solicitor came to know about the father's rival claim on the land. In 2007, the father sued his son to recover the land. The High Court ruled in favour of the father, set aside the transfer and restored the father's name as the registered owner in the register. Meanwhile, the father passed away. In 2013, the administrator of the father's estate filed an action to set aside the PBB Charge on the ground that the charge was defeasible and invalid as it was created pursuant to a fraudulent transfer. PBB argued that the PBB Charge was indefeasible as PBB is a subsequent purchaser in good faith and for valuable consideration. The High Court set aside the PBB Charge. The High Court ruled that (i) the PBB Charge was

defeasible as the land was fraudulently transferred despite PBB not having any knowledge of the fraud, (ii) the PBB Charge was invalid in law as it was based on a void instrument of transfer, and (iii) the principle of *nemo dat quod non habet* would defeat PBB's position as a *bona fide* purchaser since Nagarajan did not have good title. PBB succeeded at the Court of Appeal which set aside the High Court order. The Court of Appeal opined that the High Court failed to appreciate that PBB was a subsequent purchaser in good faith and for valuable consideration and enjoyed protection under the proviso to sub-section 340(3) of the NLC.

[54] An appeal to the Federal Court by the administrator of the father's estate was heard on two questions of law relating to (i) whether a solicitor's knowledge of encumbrances over a piece of land is imputed to his client for the purposes of sub-section 340(3) of the NLC and (ii) whether a solicitor's knowledge of fraud can be imputed to his client. The Federal Court ruled that (i) a solicitor's knowledge of encumbrances over a piece of land is imputed to his client for the purposes of sub-section 340(3) of the NLC and (ii) the general rule is that the knowledge of a solicitor is regarded by law as the knowledge of the client; an exception to the rule is only admitted where the solicitor is complicit in the fraud.

[55] The Federal Court set aside the Court of Appeal order and reinstated the High Court order *albeit* on different grounds. On the facts, the land was already registered in Nagarajan's name at the time when PBB granted the loan to Nagarajan and Sithra, who then created a charge in favour of PBB. As such, PBB was not the immediate acquirer of the interest in the land. PBB as the registered chargee, was the subsequent holder of interest in the land. The key issue was whether PBB was a purchaser in good faith falling within the proviso to sub-section 340(3) of the NLC. And if so, then the charge was indefeasible. Despite the suspicious and uncertain circumstances under which the loan and charge transactions were carried out, PBB still proceeded to disburse the loan to Nagarajan and created the charge on the land without making further inquiries. The courts would be slow to assist a chargee who failed to take ordinary precautions that ought to have been undertaken before registering the charge and as such, are not entitled to the protection of the court. The element of 'carelessness and negligence' also negated good faith on the part of PBB. Therefore, PBB lacked good faith in the entire transaction and its statutory defence of being a purchaser in good faith and for value under the proviso to sub-section 340(3) of the NLC was defeated. The PBB Charge was therefore set aside for being defeasible.

[56] In September of the same year, the Federal Court heard another appeal *Liputan Simfoni Sdn Bhd v. Pembangunan Orkid Desa Sdn Bhd* [2018] MLRAU 484 (FC) which also involved fraud and forgery and competing claims between an innocent landowner and a purchaser of the land. The questions of law for consideration related to the principle of good faith for purpose of sub-section 340(3) of the NLC and whether the title obtained by a subsequent purchaser

under a void instrument is defeasible. In October 2004, a fraudster claiming to be the original landowner Pembangunan Orkid Desa Sdn Bhd ('Orkid') applied to the Pendaftar Tanah dan Galian ('PTG') for a replacement title on the ground that the original title had been misplaced. A replacement title was issued in May 2005. In January 2006, the fraudster masquerading as Orkid sold the land to Chai Sit Trading Sdn Bhd ('Chai Sit'). Chai Sit was subsequently registered as the landowner in May 2006. In August 2006, Chai Sit sold the land to Liputan Simfoni Sdn Bhd ('Liputan Simfoni'). Due to certain intervening factors, Liputan Simfoni was only registered as the landowner in February 2010. After discovering the fraud, Orkid sued Liputan Simfoni, Chai Sit and the PTG for the recovery of the land. The High Court restored the land to Orkid on the ground that the transfer of the land from Chai Sit to Liputan Simfoni was obtained by means of a void instrument which, in turn, rendered the title of Liputan Simfoni defeasible under sub-section 340(2) of the NLC. Liputan Simfoni's appeal to the Court of Appeal was dismissed. Liputan Simfoni appealed to the Federal Court.

[57] The Federal Court ruled that the relevant time for the determination of good faith of a subsequent purchaser for the purpose of sub-section 340(3) of the NLC is the circumstances prior to and at the time of the registration of the transfer by the land officer. The Federal Court further held that the concept of good faith for the purposes of sub-section 340(3) is wider than the general common law principle of good faith. In addition to the absence of fraud, deceit, dishonesty, a subsequent purchaser like Liputan Simfoni is also required to take ordinary precautions and investigations that a reasonable prudent purchaser would have taken in the circumstances. Whether a subsequent purchaser acts as a reasonable prudent purchaser is a question of fact to be decided based on the facts of each case. Consequently, Liputan Simfoni's appeal was dismissed and the decision of the courts below were affirmed.

[58] In 2019, another case of land fraud culminated in the Federal Court in *Puspaleela R Selvarajah & Anor v. Rajamani Meyappa Chettiar & Other Appeals* [2019] 2 MLRA 591; this time a competing claim between the original landowner and a subsequent purchaser. Briefly, Rajamani the original registered landowner had been in possession of the original manual document of title ('IDT1') to the land at all material times. In 2002, the Pentadbir Tanah Daerah Klang and the Pendaftar Hakmilik Negeri Selangor (jointly referred to as 'PTD') generated a computerised issue document of title for the land in Rajamani's name ('IDT2'); IDT2 was never issued to anyone. In 2005 a fraudster passing off as Rajamani sold the land to Infinite Income Sdn Bhd ('Infinite Income') for RM1.2 m. Meanwhile, the fraudster applied to the PTD for a replacement title on the ground that the original title was lost. In April 2006, the replacement title ('IDT3') was issued in Infinite Income's name as the registered owner. In August 2006, Infinite Income sold the land to Eng Beng Development Sdn Bhd ('EBDSB') for RM1.8 m. A computerised document of title ('IDT4') to the land was issued with EBDSB as the registered owner subject to a charge

created by EBDSB in favour of CIMB Bank. Rajamani sued for the recovery of the land and for damages citing EBDSB, Infinite Income, the lawyers who acted for the fraudster and Infinite Income respectively, and the PTD as the defendants. The High Court dismissed Rajamani's claim against the lawyers who acted for the fraudster holding that they do not owe a duty of care to Rajamani. The claim against EBDSB was also dismissed on the ground that IDT3 used for the transfer of the land to Infinite Income was not invalid and that the subsequent transfer of the land to EBDSB was valid. As EBDSB was a subsequent purchaser in good faith for value, EBDSB's title in the land was indefeasible. However, the High Court allowed the claim against the lawyer who acted for Infinite Income in both sale transactions because the lawyer had actual knowledge of the fraud committed by Infinite Income. Rajamani appealed to the Court of Appeal which ruled that the lawyers who acted for the fraudster were liable in negligence. The Court of Appeal also allowed the appeal against EBDSB.

[59] Arising from the Court of Appeal's decision, three appeals to the Federal Court were mounted. The first appeal was brought by the lawyers who acted for the fraudster, the second appeal by EBDSB, and the third appeal by the lawyer who acted for Infinite Income in the first sale transaction between Infinite Income and the fraudster and in the second sale transaction between Infinite Income and EBDSB. Ultimately, the Federal Court addressed two questions of law - (i) In deciding whether a solicitor who acted for a fraudster owner of land who sold the land owes a duty of care to the real owner of the land; and (ii) Whether a replacement title in continuation generated by the land registry, when the original issue document of title was at all material times in the possession of the original owner, is: (a) valid and capable of validly passing title to the subject land to a subsequent purchaser in good faith and for valuable consideration within the meaning of the proviso to sub-section 340(3) of the NLC; or (b) *void ab initio* and incapable of so passing title?

[60] The Federal Court allowed the first appeal on the ground that the courts should not impose a duty of care on solicitors who acted for a fraudster owner of land who sold the land, towards the real owner of the land, as there is no foreseeability, no proximity, and there are policy considerations against imposing such a duty. The third appeal by the lawyer who acted for Infinite Income was dismissed. The second appeal by EBDSB was allowed. The Federal Court held that on the facts (i) EBDSB was a subsequent purchaser, and that (ii) a replacement title in continuation generated by the land registry, when the original issue document of title was at all material times in the possession of the original owner, is valid and capable of validly passing title to the subject land to a subsequent purchaser in good faith and for valuable consideration within the meaning of the proviso to sub-section 340(3) of the NLC. More importantly, the Federal Court also made a consequential order for the PTD to pay damages to Rajamani to be assessed by the High Court.

[61] The last in this line of land fraud cases *He-Con Sdn Bhd v. Bulyah Ishak & Anor* [2020] 5 MLRA 98 involves a contest between a beneficial owner of a landed property and a chargee bank. In 1997, Nor Zainur Rahmat ('Zainur') entered into a sale and purchase agreement with He-Con Sdn Bhd ('He-Con') to purchase a three-storey shop office. The purchase price was paid in full. As the issue document of title to the property had not yet been issued, He-Con created an irrevocable power of attorney naming Zainur as the attorney of the property. Zainur later appointed his wife as his substitute attorney. Meanwhile, Zainur passed away in June 2002 and his widow and another person were appointed as administrators of the estate of the deceased. In 2011, the widow discovered that (i) the title to the property had been issued but it was registered in He-Con's name, and (ii) there was also a registered charge in favour of AmBank (M) Berhad ('AmBank') to secure a loan facility granted to He-Con. As He-Con defaulted in the repayment of the loan facility, the property was scheduled for auction pursuant to an order for sale. The administrators of Zainur's estate sued He-Con and its directors, and AmBank for the recovery of the property. The High Court found that Zainur was the beneficial owner of the property because Zainur had paid the full purchase price and that He-Con was holding the property as a bare trustee; as a bare trustee He-Con did not have the power to charge the property in favour of AmBank. However, the High Court also found that AmBank was a *bona fide* party as it had taken all steps to verify the status of the property before the giving of the loan. Therefore, AmBank could proceed with the auction of the property. The Court of Appeal took a different view and set aside the AmBank Charge. It found that (i) AmBank was an immediate holder of the charge, (ii) He-Con was only a bare trustee and had no authority in law to sell, transfer or deal with the property; and the learned High Court Judge erred in ruling that AmBank was a *bona fide* party and was not negligent in causing the charge to be registered in its favour.

[62] AmBank's appeal to the Federal Court was dismissed. On the facts, the wife administrator got the better title because the deceased husband had paid for the property in full. This had rendered He-Con a mere bare trustee and the wife administrator the equitable beneficial owner of the property. As such, He-Con had neither title nor interest in the property to be transferred to AmBank. The transaction between He-Con and AmBank resulted in AmBank being the immediate purchaser in the context of the deferred indefeasibility scheme under the Torrens system and s 340 of the NLC. As such, proviso to sub-section 340(3) of the NLC did not apply to AmBank. The facts as found by the courts below had invariably led to that conclusion, applying the T*an Ying Hong's* principle. The fact that AmBank was a *bona fide* purchaser for value without notice is irrelevant.

Our Decision

[63] At the outset, it must be appreciated that unlike the Court of Appeal (or the High Court sitting as an appellate court on matters emanating from the subordinate courts) where appeals are by way of rehearing, appeals to the

Federal Court are by way of questions of law, for which prior leave must be obtained pursuant to s 96 of the Courts of Judicature Act 1964. The purpose of s 96 is not to allow for correction of ordinary errors committed by the lower courts as of right, particularly where the relevant laws are well settled. Courts of the first instance and the appeal courts hear the facts of the case, while the Federal Court deals with points of law. The Federal Court bases its assessment on the facts as established by the courts below, and only looks to see if the law (substantive and procedural law) was correctly interpreted and applied, and if the judgment in question was sufficiently and comprehensively substantiated. The appeal shall be confined to matters, issues or questions in respect of which leave to appeal is granted. Ultimately, this means the opportunities for having an earlier court ruling overturned in the Federal Court are limited. The aim of allowing leave to appeal to the Federal Court is to promote the uniformity of the law, to ensure its further development and to provide legal protection where necessary.

See Brothers' Appeal

[64] The seven subsequent decisions of this court after *Tan Ying Hong* underscores the problems faced by trial courts when adjudicating on the issue of indefeasibility of a title or interest in land, and the related issue of whether a party is an immediate or subsequent purchaser. In our view, the aforesaid cases are illustrative of this court's adherence to the settled law on deferred indefeasibility and its application to the particular facts of each case. The ratio *decidendi* which emanates therefrom may be distilled as follows:

> Section 340 of the NLC confers deferred indefeasibility on title or interest in land. The indefeasibility of the interest of an immediate purchaser who acquires an interest under a charge by means of a forged instrument is deferred and liable to be set aside pursuant to sub-section 340(2) of the NLC: *Tan Ying Hong*
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> When an allegation of fraud against a party is unanswered under a default judgment, the allegation of fraud is taken to have been made out and need not to be proved. Fraudsters masquerading as the rightful landowners are not immediate purchasers and have no title to pass. Purchasers who acquired title to the land from these fraudsters are immediate purchasers, whose title are not indefeasible. As immediate purchasers, their title was not protected by the proviso to sub-section 340(3) of the NLC: *Kamarulzaman Omar*
>
> A purchaser of land who has paid the full purchase price becomes the beneficial owner of the land; and the vendor who has received the full purchase price becomes the bare trustee for the purchaser. As a bare trustee, the vendor has no capacity in law to sell or transfer the land to any third party. A third party who acquires the land from such a vendor ranks as an immediate purchaser whose title is defeasible under sub-section 340(2) of the NLC. The third party's

title can be defeated by a prior non-registered interest of an equitable mortgagee under a deed of assignment in respect of the same piece of land: *Samuel Naik*

A chargee falls within the meaning of the word 'purchaser' under the proviso to sub-section 340(3) of the NLC. A bank deriving its interest as a chargee of the land from a fraudster who became the registered owner of the land is a subsequent purchaser: *CIMB Bank*

The law recognises and enforces an overriding rule that in making and carrying out conveyancing transactions that commonly deal with a number of transactions and dealings to transfer real property, parties should act in good faith. Good faith does not simply mean absence of fraud, deceit or dishonesty; it also requires acting honestly, reasonably or fairly. An element of carelessness or negligence on the part of a purchaser negates good faith. Knowledge of a dispute as to the ownership of property and knowledge of fraud allegation could vitiate good faith. Good faith is also negated if a purchaser is not complicit in the fraud but has knowledge of the fraud affecting the title to the land. Ultimately, the elements of good faith are not closed and it depends on the circumstances of each case: *T Sivam Tharamalingam*

The question of whether a party was a *bona fide* purchaser for value is a question of fact. The relevant time for determining the good faith of a subsequent purchaser is the circumstances prior and at the time of the registration of the transfer by the land officer: *Liputan Simfoni*

A solicitor who acted for a fraudster owner of land who sold the land, does not owe a duty of care to the real owner of the land where there is no element of foreseeability and/or proximity; and there being policy considerations against imposing such a duty. A replacement title in continuation generated by the land registry, when the original issue document of title was at all material times in the possession of the original owner, is valid and capable of validly passing title to the subject land to a subsequent *bona fide* purchaser for value within the meaning of the proviso to sub-section 340(3)of the NLC: *Puspaleela R Selvarajah*

A vendor who has been paid the full purchase price for the land (for which issue document of title has not yet been issued) holds the land as a bare trustee for the purchaser. As such, notwithstanding that the issue document of title is subsequently issued in the vendor's name, the vendor is incapable of any further dealing with the land. A bank who takes a charge on the land from the vendor is an immediate purchaser whose interest is defeasible under sub-section 340(2) of the NLC. The charge is liable to be set aside because the proviso to sub-section 340(3) of the NLC is not applicable to the charge of an

immediate purchaser. The fact that the bank is a *bona fide* purchaser for value is immaterial: *He-Con Sdn Bhd*

National Land Code 1965

[65] The NLC is a uniform code of land law. It is a complete and comprehensive statement of land law for all states of Peninsular Malaysia. The NLC is based on the Torrens land administration system which is a system of titles and interests by registration under which the register is conclusive or as some would put it - the register of titles is everything (see s 89 of the NLC; *Teh Bee v. K Maruthamuthu* [1977] 1 MLRA 110). According to learned co-authors Teo Keang Sood and Khaw Lake Tee, of Land Law in Malaysia, Cases and Commentary, Third Edition, LexisNexis 2012 at [1.15], the NLC incorporates the 'curtain' and 'mirror' principles that persons dealing with the registered owner of the land need not be concerned to ascertain the validity of the information pertaining to the land as indicated on the register and the circumstances under which such proprietor came to be registered.

[66] Even though the concept of indefeasibility of title is central to the Torrens system of land administration, indefeasibility is not absolute in the sense that it is unimpeachable and cannot be challenged or set aside.

Whether A Title Or Interest Is Defeasible Or Indefeasible?

[67] The question of whether a title or interest in land is defeasible or indefeasible is a question of mixed fact and law. In our view, the answer to this question depends on whether the purchaser is an immediate or subsequent purchaser. This is a question of fact which turns on the particular circumstances of each case. If the purchaser is an immediate purchaser, then the law applicable to that purchaser's title or interest is sub-section 340(2) of the NLC. Accordingly, the immediate purchaser's title or interest is not indefeasible. His title or interest in the land may be set aside by the rightful owner of the land if it was obtained through any one of the vitiating factors listed under sub-section 340(2) of the NLC - fraud, misrepresentation, forgery, insufficient or void instrument. The fact that the immediate purchaser may have acquired his title or interest in good faith and for valuable consideration is irrelevant and of no avail. So long as any of the vitiating factors are established on the evidence, the immediate purchaser's title or interest in the land is liable to be set aside (See *Tan Ying Hong*; *Kamarulzaman Omar & Ors v. Yakub Husin & Ors*; *Samuel Naik Siang Ting v. Public Bank Berhad*; *He-Con Sdn Bhd v. Bulyah Ishak & Anor*).

[68] If, however, the facts show that the purchaser is a subsequent purchaser, then the law applicable is the proviso to sub-section 340(3) of the NLC. This means that a subsequent purchaser's title or interest in the land is also not indefeasible if it can be shown that he was not a purchaser in good faith and for valuable consideration; put another way, if the subsequent purchaser is not a *bona fide* purchaser for value, then his title or interest in the land may be set

aside. If however, the subsequent purchaser is a purchaser in good faith and for valuable consideration, then his title or interest in the land will become indefeasible under the proviso to sub-section 340(3) of the NLC (see *T Sivam Tharamalingam*; *CIMB Bank Bhd*; *Liputan Simfoni*; *Puspaleela R Selvarajah*).

[69] The two preceding paragraphs, we think sum up the operation of the principle of deferred indefeasibility of title and/or interest under s 340 of the NLC.

[70] Applying the aforesaid principles, we agree with the findings of the Court of Appeal that on the facts, UOB is a subsequent purchaser. We say this because Heveaplast became an immediate purchaser when it was registered as the owner of the land pursuant to SPA1. In their capacity as immediate purchaser Heveaplast created the UOB Charges. As a purchaser which acquired the interest from the immediate purchaser is a subsequent purchaser, it must follow that UOB is a subsequent purchaser. As a subsequent purchaser, the proviso to sub-section 340(3) of the NLC applies. Accordingly, it is only necessary to ascertain if UOB is a *bona fide* purchaser for value, and if not, UOB's interest in the land under the UOB Charges is defeasible and may be set aside. Since there was no evidence to the contrary, UOB's interest in the land pursuant to the UOB Charges is indefeasible and may not be set aside. For the foregoing reasons, the proviso to sub-section 340(3) is applicable as UOB is a subsequent purchaser in good faith and for valuable consideration. We do not agree with See brothers' counsel's contention that the decision in *Tan Ying Hong* is flawed and ought to be revisited.

[71] We also take the view that the fact that the transfer of the land to Heveaplast and the registration of the UOB Charges were effected on the same day do not in law and in fact mean that they were registered simultaneously as contended by learned counsel for the See brothers. To further argue that since the two dealings were registered simultaneously they should be treated as one transaction is misconceived because it ignores the system of registration of dealings under the NLC.

[72] Ordinarily, the registration of an instrument of dealing is effected by the making of a memorial of the dealing on the register document of title under the hand and seal of the Registrar or Land Administrator. The registration of land dealings under the NLC is preceded by the presentation at the land registry of the duly executed, attested and stamped prescribed forms together with the prescribed registration fee and necessary documents for registration. The entry of the instrument in the presentation book is conclusive evidence as to the time and date of presentation of the instrument of dealing at the land registry (s 295 of the NLC). Where more than one instrument of dealing is presented for registration over the same land simultaneously, the time of presentation is noted as instruments affecting the same land and are registered according to the order in which they were presented for registration (s 300 of the NLC). In this case, two instruments of dealing were presented at the land

registry simultaneously. One set of instruments for the transfer of the land to Heveaplast and another set for the registration of the UOB Charges. In order for Heveaplast to create the UOB Charges, it must of necessity follow that the transfer must first be effected to register Heveaplast as the owner of the land. Once Heveaplast becomes the registered owner of the land, Heveaplast has the capacity to create the UOB Charges. Accordingly, the transfer and the charge were registered in the order in which they were presented for registration. As such, the UOB Charges were only registered after Heveaplast was registered as the owner of the land. This finding is corroborated by the fact that the land was transferred to Heveaplast vide Presentation No 2735/2009, after which the land was charged by Heveaplast to UOB vide Presentation No 2736/2009.

[73] We have also considered the alternative argument that UOB acquired no interest under the UOB Charges because no rights can be derived from a forged instrument. Learned counsel for the See brothers relied on the dissenting judgment of Jeffrey Tan FCJ in *CIMB Bank Bhd* at paras [90] and [91], where his Lordship opined, *inter alia* that whether a purchaser is an immediate or subsequent purchaser is not determined by a tally of the number of transactions. Transactions could be contrived by fraudsters and accomplices. A purchaser is a subsequent purchaser only if his title or interest was derived from an immediate purchaser in good faith and for valuable consideration. For the title or interest of the subsequent purchaser to be indefeasible, both immediate and subsequent purchasers must be purchasers in good faith and for valuable consideration. And if there was no immediate purchaser in good faith and for valuable consideration, the interest of the subsequent purchaser was immediate and defeasible.

[74] With respect, we are unable to agree with the aforesaid alternative argument. Sub-section 340(2) which deals with the title or interest of an immediate purchaser provides that such title or interest is defeasible - ie, it can be set aside if the title or interest is tainted with fraud, misrepresentation, forgery or an insufficient or void instrument. It explicitly refers to the title or interest of an immediate purchaser. It matters not whether an immediate purchaser is a *bona fide* purchaser for value or not. Once any of the above vitiating factors are proved, that immediate purchaser's title or interest is liable to be set aside. As clarified by this court in *Tan Ying Hong*, even if the immediate purchaser's title is derived under a void instrument, a person who acquires his title from the immediate purchaser is in law and in fact a subsequent purchaser. Therefore, sub-section 340(2) does not apply to a subsequent purchaser; instead, the subsequent purchaser is sheltered by the proviso to sub-section 340(3) to the extent that his title or interest is indefeasible so long as he is a *bona fide* purchaser for value.

[75] Accordingly, we decline to answer Question 1 on the ground that it is vague and improperly framed as it does not identify the transaction in question. Questions 2, 3 and 4 need not be answered as they are premised on non-existent facts and relate to settled law on indefeasibility. Lastly, Question 5 has

no bearing on the facts and issues of this case. It is clear that UOB took the UOB Charges from Heveaplast after Heveaplast became the registered owner of the land. Applying the concept of deferred indefeasibility to the finding that Heveaplast was the immediate purchaser and UOB was a subsequent purchaser, the inevitable result is that the UOB Charges are protected by the proviso to sub-section 340(3) of the NLC. In *OCBC Bank*, the issue before the High Court concerned an application by a chargee bank to remove a registrar's caveat which was lodged on the land. The registrar's caveat was lodged as the registrar decided that it was necessary for the prevention of fraud. The registrar's decision was predicated on a police report by one Ng Kim Hwa who alleged that the land belonged to him and that he never transferred the land to one Ng See Chow, the current registered owner who created the charge. The bank's application to remove the caveat was dismissed by the High Court. The Court of Appeal dismissed the bank's appeal holding that the registrar had ample grounds to exercise his discretion under s 320 of the NLC when he entered his registrar's caveat. It is important to note that at the time the appeal was heard in the Court of Appeal, Ng Kim Hwa had commenced proceedings in the High Court against Ng See Chow and the bank claiming the land from them. That suit was still pending. As such, the question of whether Ng See Chow was a fraudster land owner remains unanswered. At any rate, the circumstances empowering the registrar to consider to exercise his discretion and to enter a registrar's caveat are set out in para (a) to (c) of sub-section 319(1) of the NLC; the prevention of fraud or improper dealing falling under para (a). We are therefore constrained to say that the opinions expressed by the Court of Appeal in *OCBC Bank* insofar as they relate to defeasibility of the chargee bank's interest are strictly obiter as they are not directly relevant nor necessary for the decision of the case.

[76] In the light of the land fraud and forgery cases that keeps cropping up over the years, we think that the time is ripe for Parliament as the legislative arm of the Government to take into the most serious consideration the propriety of making provision for the setting up of an Assurance Fund. The Assurance Fund which is an integral feature of the Torrens system can be established to compensate those innocent land owners and holders of interest in land who are deprived of their title and/or interest through no fault of their own. Exemplars of such schemes have been in place in the provinces of Ontario and British Columbia, Canada and in Australia where almost all states have got a fund to compensate persons who lost their interest in land through fraud. An Assurance Fund would also complement and enhance the credibility of the Torrens system of land registration under the NLC.

UOB's Appeal

[77] We will now address UOB's Appeal and Questions 6 to 9. UOB's Appeal is principally founded on the complaint that the Court of Appeal wrongly inferred the existence of an implied term in a contractual dispute where one

party is not privy to the UOB undertaking and where the implied term was not in issue.

Implied Terms

[78] Case law reports on the law of contract are replete with the problem of the implication of terms. In most cases, the parties to a contract may have been content to express only the most important terms of their agreement, leaving the remaining details to be understood. The court will then be asked to imply a term or terms to remedy the deficiency. However, it is often the case where subsequent dispute reveals that there are contingencies for which the parties have not anticipated and have not provided in their written contract. The question then is whether the court can imply a term to cover the contingency which has unexpectedly arisen.

[79] The law on implied terms is part of the common law and is quite settled. As noted by Peh Swee Chin FCJ in *Sababumi*, there is no express provision in the Contracts Act 1950 (Act 136) on implied terms and s 92(e) of the Evidence Act 1950 allows for the implication of terms on account of usage or custom from the market or trade.

[80] Learned author Dato' Seri Visu Sinnadurai in his tome *Law of Contract* Fourth Edition LexisNexis at 4.17 encapsulated the law on implied terms as arising in three situations: (a) custom and usage pertaining to a particular type of transaction; (b) implied by the courts, based on the intention of the parties, and (c) certain provisions contained in statutes, or generally by law. These three situations were described as the three types of implied terms by Peh Swee Chin FCJ in *Sababumi.*

[81] Implied terms on the basis of custom and usage may be inferred if such custom or usage is to be part of the express agreement made between the parties. The basis for such implication is that the parties did not intend to express in writing all these custom and usage at the time when the contract was made and that they were willing to be bound by any custom or usage that were accepted in transactions of that nature. However, custom or trade usage which are inconsistent with the express terms of the agreement will not be implied (*Cheng Keng Hong v. Government of The Federation of Malaya* [1965] 1 MLRH 342). In order to establish trade usage, it is necessary to show that the usage possess three basic characteristics: (i) notoriety, (ii) certainty, and (iii) reasonableness (*Preston Corp. Sdn. Bhd. v. Edward Leong Nim Fay & Ors* [1982] 1 MLRA 120). In *Pembangunan Maha Murni Sdn Bhd v. Jururus Ladang Sdn Bhd* [1985] 1 MLRA 426 (SC), the tests of notoriety and certainty were applied by the Supreme Court in determining whether real estate agents were entitled to a commission based on the purchase price in land sale transactions. In holding that no custom had been established in this connection, Syed Agil Barakbah SCJ said "the facts involved must be so sufficiently notorious that it becomes proper to assume its existence without proof... Judicial notice, however, will

be given to any custom or usage which has repeatedly been recognised by the courts and it passes into the law of the land;... if it has been frequently, or at all events more than once, proved in the superior court as shown by reported cases." The Supreme Court added that whilst there may be a common practice that estate agents are paid commission either by the vendor or by the purchaser or sometimes by both, that is a rule which yields to circumstances and depends on negotiations between the parties. On the criteria of reasonableness of such a usage, Salleh Abbas FJ (as he then was) remarked in *Preston Corporation* that an alleged usage is unreasonable if it conflicts with the ordinary sense of justice commonly understood by reasonable men.

[82] Terms based on the intention of the parties may be implied by the courts. What the court seeks to ascertain is the presumed intention and not the actual intention of the parties; intention which is imputed to the parties from their actual circumstances. Such terms may be inferred from the evidence that the parties to the contract must have intended to include it in the contract. In this context, the contrast between actual and presumed intention was explained by Mason J in *Codelfa Construction Pty Ltd v. State Rail Authority of New South Wales* [1982] 149 C. L. r 337 at 346 as follows:

> "The implication of a term is to be compared, and at the same time contrasted, with rectification of a contract. In each case the problem is caused by a deficiency in the expression of the consensual agreement. A term which should have been included has been omitted. The difference is that with rectification the term which has been omitted and should have been included was actually agreed upon; with implication the term is one which the parties would have agreed had they turned their minds to it - it is not a term actually agreed upon. Thus, in the case of the implied term the deficiency in the expression of the consensual agreement is caused by the failure of the parties to direct their minds to a particular eventuality and to make explicit provision for it. Rectification ensures that the contract gives effect to the parties' actual intention; the implication of a term is designed to give effect to the parties' presumed intention."

In a case where a term which was actually agreed upon was omitted in the written agreement due to a mutual mistake of the parties, the written agreement may be rectified pursuant to s 30 of the Specific Relief Act 1950. Where, however, an event has occurred for which the parties ought to have foreseen but overlooked, then a term may be implicated so as to give effect to the parties' presumed intention to remedy the deficiency.

[83] Whether such terms may be inferred is determined by two well-established tests: (i) the officious bystander test, and (ii) the business efficacy test. Peh Swee Chin FCJ in *Sababumi* described the officious bystander test as a subjective test, that such a term to be implied is something so obvious that it goes without saying so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common 'Oh, of

course'. The business efficacy test was described as a test to ascertain whether the implied term should be of a kind that will give business efficacy to the transaction of the contract between the parties; business efficacy to mean the desired result of the business in question.

[84] The third type of implied terms are those which do not depend on the intention of the parties, actual or presumed, but on a rule of law; such as the terms, warranties or conditions which, if not expressly excluded, the law imports, as for instance under the Sale of Goods Act 1957. Law in this regard includes statute (e.g., Consumer Protection Act 1999, Employment Act 1955, and Industrial Relations Act 1967) and previous decided cases on specific facts.

[85] It can be discerned from the decided cases on implied terms that whether the term will be implied is a question of law for the court. Other than implication of a term by law, a term will only be implied under situations (a) and (b) (see para [83] *ante*) if the following conditions are satisfied:

(i) it must be reasonable and equitable;

(ii) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it;

(iii) it must be so obvious that it goes without saying;

(iv) it must be capable of clear expression; and

(v) it must not contradict any express term of the contract.

These conditions may overlap and conditions (ii) and (iii) may be alternative or cumulative. (See Kim Lewison, Q. C., *The Interpretation of Contracts*, Second Edn, Sweet & Maxwell at para 5.03; *B P Refinery (Westernport) Party Ltd v. Shire of Hastings* [1978] 52 A.L.J.R 20 (PC).

[86] In *Sababumi*, the question was whether there ought to be implied into an agreement a term to the effect that the Federal licence fell within the scope of the agreement. In this case, Sandakan Turf Club ('STC') was licensed to carry on gaming and public lotteries in Sabah under the Sabah Gaming Ordinance 1930 ('Original Licence'). Pursuant to a 1987 agreement, STC granted Sababumi exclusive rights to conduct off-course and on-course betting and gaming for 20 years. In 1992, the Original Licence was cancelled and an amended licence was issued to STC; unlike the Original Licence, the amended licence was stated to be not transferable. The amended licence was later cancelled because of the newly enforced Pool Betting Act 1967. STC obtained a new licence ('Federal Licence') which also prohibited any transfer or assignment to third parties. Sababumi contended that the Federal Licence fell within the scope of the 1987 agreement. The High Court applied the 'officious bystander' test and ruled that there ought to be implied into the 1987 agreement that the Federal Licence fell within the scope of the 1987 agreement; as such the 1987 agreement remained valid and enforceable. The Court of Appeal took a different view on two

grounds: (i) since the 1987 had clearly spelt out the rights and obligations of the parties and had made express provisions for contingencies that covered the present situation, it would militate against the inclusion of an implied term contended for, and (ii) the 1987 agreement could not further subsist or be enforceable because the assignment of the rights under the Original Licence and the Federal Licence were illegal and void. The Federal Court did not agree with the reasoning of the Court of Appeal on ground (i). It ruled that the express terms of the 1987 agreement could not be inconsistent with or inhibitory against the implied term contended for. However, as the 1987 agreement would involve the contracting parties to do the very act prohibited or forbidden by statute, the 1987 agreement had become illegal and unenforceable under s 24(a) of the Contracts Act 1950. Consequently, Sababumi's appeal was also dismissed, the order of the Court of Appeal upheld, though for different reasons.

[87] In *MBF Property Services Sdn Bhd & Anor v. Balasubramaniam K Arumugam* [2000] 1 MLRA 64 (CA), the issue was whether three documents forming part of the same transaction, and if so, whether they should be read together. Balasubramaniam ('Bala') entered into a sale and purchase agreement ('SPA') with a housing developer Kesturi Sakti Sdn Bhd ('Kesturi') to purchase a property. Bala obtained a loan from a financial institution (MBF Finance Bhd) to finance the purchase of the property. It was a term of the loan facility that interest on the loan shall be payable monthly until the issuance of the certificate of fitness, thereafter repayment of the loan by equal monthly instalments of principal and interest. Contemporaneous with the signing of the SPA, MBF Property Services ('MPS'), acting in the capacity as the attorney for Kesturi issued a letter to Bala. According to that letter, MPS agreed to pay directly to MBF Finance Bhd all the interest accrued on the loan during the period of construction of the property until the loan is fully drawn down with the certificate of fitness ('CF'). This letter was also copied to MBF Finance Bhd. Bala filed an action in the High Court for a declaration that he need not make any payments to MBF Finance Bhd until the issuance of the CF. Both MBF Finance Bhd and MPS argued that under the loan agreement, MBF Finance Bhd reserved the right to call Bala to commence repayment of the loan without taking into account the issuance of the CF. The Court of Appeal rejected this argument on the basis that the three documents, the SPA, the agreement with MPS and the loan agreement with MBF Bhd, must be read together as they form part of the same transaction, citing *Manks v. Whiteley.*

[88] In *Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd*, the question posed was: Where interlocking agreements are contemporaneously executed, can the termination clause in one of them be invoked without regard to performance under the other agreements, where each was executed on the faith of the others being executed, and was a consideration for the same. In this case, there were four agreements executed by the plaintiff and the defendants on the same date - the property development agreement ('PDA'), the main agreement, the new property development agreement, and the property sales agreement. Under the PDA, the plaintiff was given development

rights over the property owned by the first defendant for 15 years commencing from 14 July 1994. In October 2007, the defendants issued a termination notice to the plaintiff on the ground that the plaintiff had not done any development work on the land. It was only after the termination notice was issued that the plaintiff started the development works. The plaintiff sued for wrongful termination. The High Court held that the PDA was a commercial agreement and ought to be construed in a commercially sensible manner. It was therefore reasonable to assume that the parties intended to have the whole development property land developed within the 15 year period. It was not the intention of the parties to give the plaintiff the liberty to commence development at the tail end of the 15 year period. The Court of Appeal agreed with the High Court, adding that as time was of the essence of the PDA, the plaintiff was not at liberty to commence development at its own leisure. Before the Federal Court, the plaintiff argued that the lower courts erred in construing the PDA as a stand-alone agreement. The four agreements were interlocking and should be considered as a whole. It was also contended that pursuant to the four agreements the plaintiff had bought the right to remain on the development land and develop the whole or any part thereof at its own pace and discretion; and that the plaintiff's payment of RM40m under the other agreements should be taken into account. The Federal Court accepted the general rule is that where several deeds are executed at the same time, reference should be made to all the deeds to ascertain the intention of the parties (*Manks v. Whitely*; *Mohamed Isa v. Abdul Karim & Ors* [1970] 1 MLRH 572). The Federal Court adopted a commercial sensible construction as it is more likely to give effect to the intention of the parties. Whilst the four agreements may have connection to each other, on the facts the Federal Court did not think that they form a single transaction. While these agreements may seek to achieve a common end result, it does not mean they must necessarily be invoked together to achieve that goal. Equally, the combined effect of several separate transactions arising from each of the agreements could achieve the same goal. The test, is whether a particular agreement of several agreements executed contemporaneously can be viewed as a separate transaction or whether it must be taken to be part of one transaction. Although the PDA may be regarded as an ancillary agreement it does not mean that it cannot be construed as a separate stand-alone agreement (*Prudential Assurance Co Limited v. IRC* [1993] 1 WLR 211).

[89] In *Prudential Assurance Co Limited v. IRC*, three agreements were executed simultaneously on the same date - (i) an agreement to purchase a freehold property, (ii) a development agreement, and (iii) an agreement for the transfer of the land. Sir Donald Nicholls V-C found that the three agreements were all part of one transaction in the sense that together they comprised a single package or bargain. And at p 217 he said:

> Clearly the end result intended by the parties was that the land, previously belonging to the developers, would become the property of the taxpayer company together with the new buildings being constructed by the developers. The commercial object of the transaction was that the taxpayer company

> would acquire a development being carried out for it by the developer with funds provided by the taxpayer company.
>
> However, I am unable to characterise the transaction by which that end result was sought to be achieved as a sale of the land with finished buildings thereon. That, manifestly, was not the legal shape of this transaction. The sale agreement was, as the parties intended, completed independently of the carrying out of the building works under the development agreement.

Reference was also made to the decision in *Paul v. IRC* [1936] SC 443 where Lord President Normand observed thus:

> While the question is, in the sense which I have described, one of fact, there must be materials from which the inference can be drawn the two contracts, one for feu and the other for building, in reality embody one bargain. Before that inference can legitimately be drawn, it is necessary that the facts should establish, first, that the superior and the building contractor were one and the same person, or that the one was the agent or the nominee of the other; and secondly, that the contracts are so interlocked that, if default is made on either, the other is not enforceable by either side.

[90] In our considered view, it cannot be denied that the letter of undertaking, the loan agreement and SPA2 are inextricably linked and form part of the same transaction. We are not persuaded that the Court of Appeal was not justified to rule that there is an implied term in the UOB undertaking that the undertaking does not come into effect until such time as the condition precedent has been satisfied (see [20] *ante*). The overall facts bear out the Court of Appeal's finding. As the sale transaction had been aborted due to no fault on the part of Kum Hoi or PBB, it must follow that the condition precedent could not be satisfied. The underlying basis for the granting of the loan to Kum Hoi was that the land must have been transferred to Kum Hoi so as to enable Kum Hoi *qua* registered owner of the land to then create a charge in favour of PBB as security for the loan. We are therefore in entire agreement with the decision of the Court of Appeal in this regard.

[91] Questions 6 and 7 which touch on s 69 of the CJA 1964 are misconceived for the simple reason that civil appeals to the Court of Appeal are by way of rehearing; the Court of Appeal is vested with all the powers and duties of the High Court, including making inferences of fact and the giving of any judgment which ought to be given. We have perused the pleadings and are satisfied that (i) the material facts relating to the UOB undertaking, the loan agreement and SPA2 were pleaded, and (ii) evidence was led to substantiate the pleaded facts giving rise to the implication. As such, UOB was not taken by surprise. We therefore do not see the necessity to answer Questions 6 and 7.

[92] Insofar as Questions 8 and 9 are concerned, we do not think that the issue of privity of contract is really relevant or material. What the Court of Appeal did was to apply the well-established principles in *Manks v. Whiteley*, followed

in *MBF Property Services Sdn Bhd* and *Damansara Realty*. The Court of Appeal adopted the correct approach when it considered all the contemporaneous documents and concluded that the UOB undertaking could not stand alone. It must be read together with the other documents forming part of the same transaction. Whether the documents in question ought to be read together is a question of mixed fact and law. At any rate, in the particular circumstances of this case, we are of the view that PBB in the matter of disbursing the loan is in the capacity of an agent to Kum Hoi. First, the monies paid out to UOB came from Kum Hoi's loan account in PBB; in other words, it was monies which belonged to Kum Hoi, monies which Kum Hoi obtained under a loan from PBB. And in disbursing the loan sum to UOB, PBB acted in the capacity of an agent for Kum Hoi (See *Andrew Christopher Chuah Choong Eng Chuan v. Ooi Woon Chee & Anor* [2006] 2 MLRA 675; *Hoo See Sen & Anor v. Public Bank Bhd & Anor* [1988] 1 MLRA 46; *Anthony Lawrence Bourke & Anor v. CIMB Bank Berhad* [2019] 1 MLRA 548). Accordingly, the question of the Court of Appeal overcoming the doctrine of privity of contract does not arise. Further, insofar as Question 9 relates to the issue of interest payable on the redemption sum, we are satisfied that it is also a non-issue as it was not pleaded in UOB's defence, nor was it an issue that arose in the Court of Appeal. We therefore also decline to answer Questions 8 and 9.

Conclusion

See Brothers' Appeal

[93] On the facts, the Court of Appeal was correct to find that UOB is a subsequent purchaser under s 340 of the NLC. The argument that UOB is not a purchaser in good faith was only raised in the Federal Court; it was not raised in the High Court or Court of Appeal. There was no evidence led in the High Court to support the suggestion that the giving of the loan by UOB was not *bona fide* and for valuable consideration. Accordingly, the proviso to sub-section 340(3) of the NLC is applicable to protect the interest acquired by UOB under the UOB Charges. Consequently, UOB's interest under the UOB Charges is indefeasible, valid and enforceable. For reasons stated in [75] ante, we decline to answer Questions 1 to 4. We also decline to answer Question 5 as it did not relate to the particular facts of this case and the decision of *OCBC Bank* is inapplicable to the facts of this case. For the foregoing reasons, we dismiss the See Brothers' appeal with no other as to costs.

UOB's Appeal

[94] The Court of Appeal did not err in holding that the UOB's letter of undertaking, the loan agreement between Kum Hoi and PBB and the SPA2 between Heveaplast and Kum Hoi must be read together as they form part of the same transaction. In so doing, the Court of Appeal had correctly applied the settled principles of law to the facts before coming to its finding. For the

reasons stated in [91] and [92] *ante*, we do not think that it is necessary to answer Questions 6 to 9. In the result, we dismiss UOB's appeal against Kum Hoi with costs.

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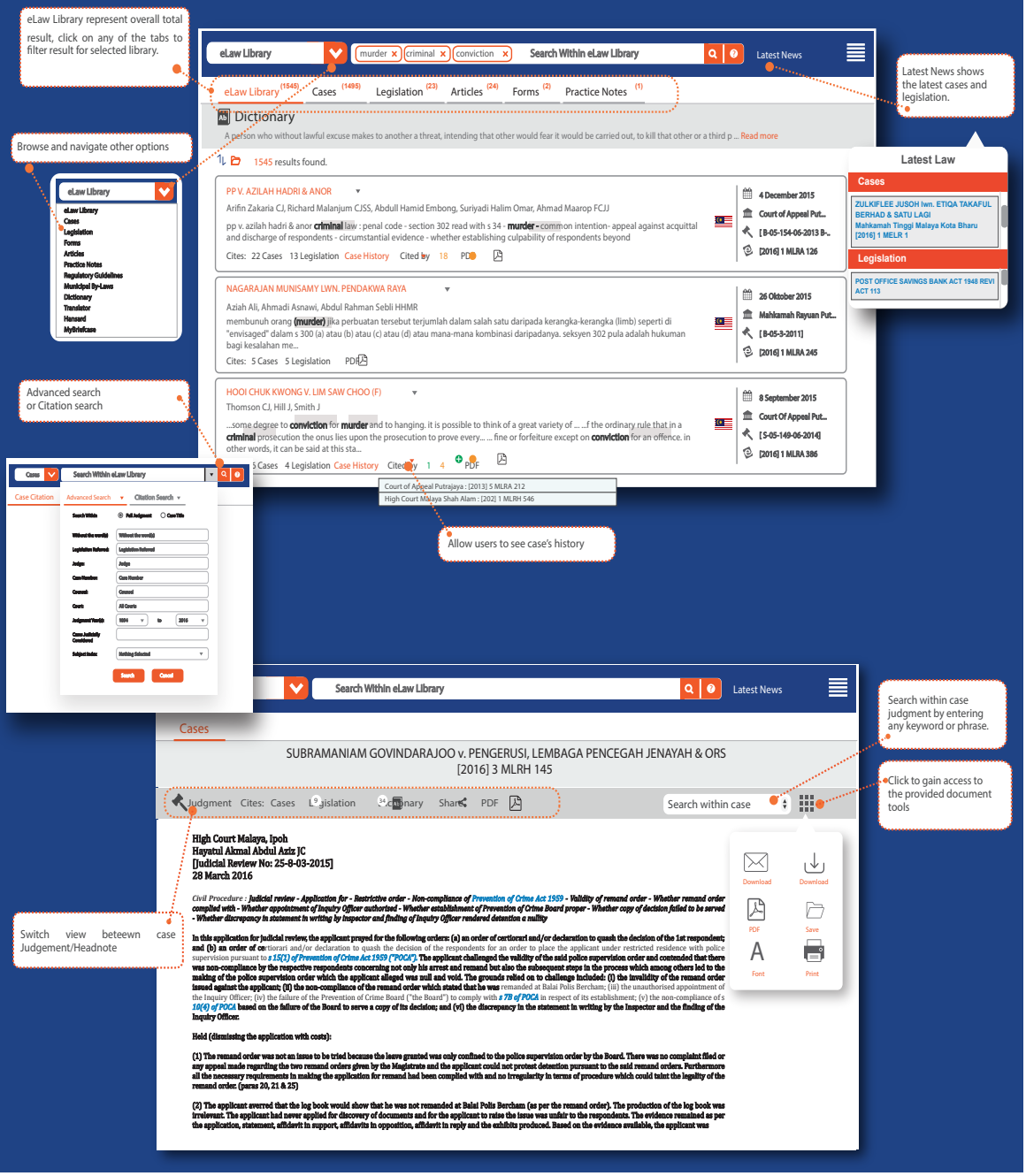

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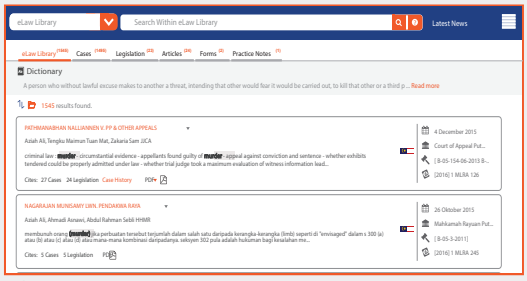

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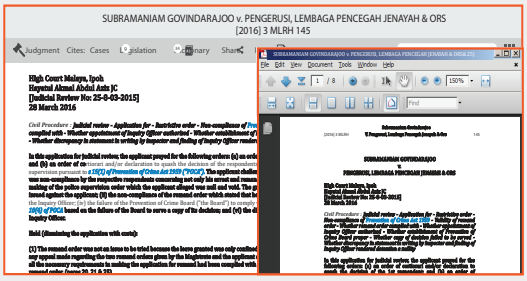

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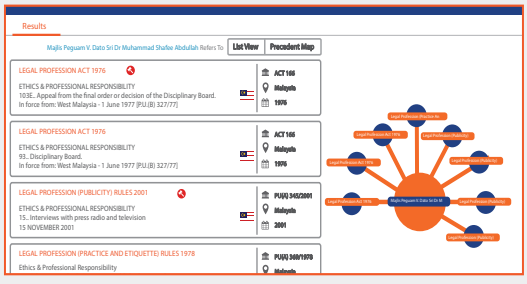

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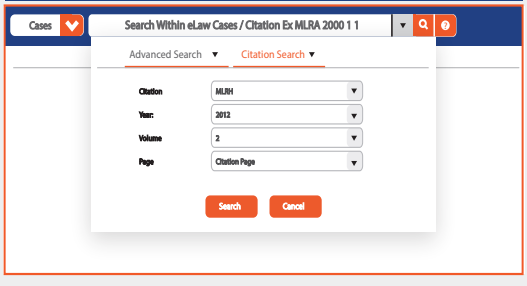

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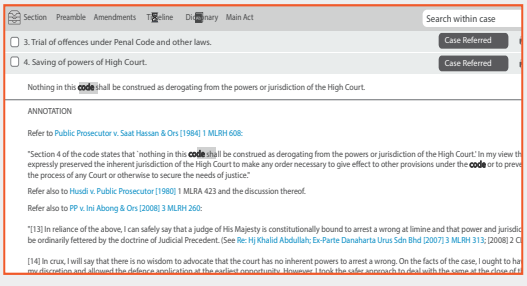

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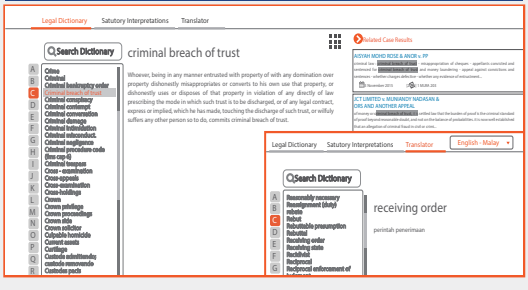

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