SETIAKON ENGINEERING SDN BHD

v.

MAK YAN TAI & ANOR

Federal Court, Putrajaya
Abdul Rahman Sebli CJSS, Nallini Pathmanathan, Harmindar Singh Dhaliwal, Abdul Karim Abdul Jalil, Hanipah Farikullah FCJJ
[Civil Appeal No: 02(f)-55-09-2023(W)]
29 July 2024

Land Law: *Indefeasibility of title and interests — Indefeasibility of land title transferred to subsequent purchaser under s 340(3) and vested in it by s 89 National Land Code — Effect of judgment in default being set aside — Whether justifiable to treat all steps taken during intervening period in reliance on default judgment as null and void or void ab initio — Fraud and collusion — Good faith and valuable consideration — Immediate or subsequent purchaser of land — National Land Code, ss 5, 89, 340(2), (3)*

This appeal concerned the indefeasibility of a land title that was transferred to a subsequent purchaser under s 340(3) and vested in it by s 89 of the National Land Code ("Code"). The original registered owner of the land was Wong Soo @ Wong Har ("deceased"), who had passed away in 2017. One Chia Moy King ("Chia Moy"), acting purportedly as the attorney of one "Lim Moy", had filed an Originating Summons ("OS") at the High Court against the deceased to deprive her of her title to the land. Judgment in default ("JID") in terms of the OS was entered against the deceased on 30 September 2014 allegedly for her failure to attend court; the effect of the JID was that there existed a court order declaring Lim Moy to be the lawful and beneficial owner of the land. Armed with the JID, Chia Moy successfully obtained cancellation of the deceased's title and a replacement title was issued by the Land Office in Lim Moy's name as the original owner of the land. On 27 October 2014, less than a month after the JID was obtained, Chia Moy, purportedly acting under Lim Moy's power of attorney, entered into an agreement with Paragon Capacity Sdn Bhd ("Paragon") for the sale of the land to Paragon for RM15 million, allegedly in cash ("Paragon Agreement"). Paragon subsequently entered into a sale and purchase agreement with the appellant for the land at the purchase price of RM17 million, which was followed by the registration of the land in the appellant's name. On a successful application by the respondents, who were the children and attorneys of the deceased, the JID was set aside. The OS that was used to obtain the JID was eventually heard by the Court and also dismissed. The respondents then proceeded to file the present suit against Chia Moy, Paragon and the appellant claiming, *inter alia*, that the deceased was fraudulently deprived of her land by Chia Moy by way of the JID, and that any purported sale and purchase and/or transfer of the land was null and *void ab initio*. The appellant's defence to the respondents' claim was that it was a *bona*

fide purchaser for value without notice and had acquired indefeasible title to the land by virtue of the proviso to s 340(3) of the Code. The defence found favour with the trial judge and the respondents' claim was dismissed. Aggrieved, the respondents appealed to the Court of Appeal, which unanimously allowed their appeal. Hence, the present appeal by the appellant in which the following questions of law were raised: (1) in the absence of any allegation of fraud or collusion, whether the Court of Appeal was correct in law to hold that the purchaser should have done due diligence before purchasing the subject land and had therefore failed to discharge or prove that it was a *bona fide* purchaser for value; (2) whether, apart from the undertaking of a proper search in the land registry to satisfy itself that the vendor was the registered proprietor of the subject land, an intended purchaser was obliged to investigate the history of the vendor's title to prove that as a purchaser it had not acted negligently and/or was a *bona fide* purchaser; (3) whether, in determining if the appellant was a *bona fide* purchaser for value under s 340(3) of the Code, the following were conclusive matters on which it could be held as the Court of Appeal did that a purchaser was not a *bona fide* purchaser, namely: (a) the short period of ownership of the subject land by the person who sold the subject land to the appellant; (b) not conducting a formal valuation prior to purchasing the subject land; (c) the payment of earnest deposit by a purchaser prior to conducting a search of the subject land at the land registry; and (d) the early settlement of the purchase price for the subject land by a purchaser to a sale and purchase agreement; and (4) where a judgment in default was set aside but the successful party failed to apply for or obtain an order under O 42 r 7(2) of the Rules of Court 2012 that the order should take effect from an earlier date, whether it was justifiable to treat all steps taken during the intervening period (being three years in this case) in reliance on the default judgment as null and void or *void ab initio*.

Held (dismissing the appeal by way of majority decision):

Per Abdul Rahman Sebli CJSS delivering the majority judgment of the court:

(1) Except for Question (4), the first three questions, although crafted as questions of law, were in reality questions of fact seeking to overturn the finding of fact by the Court of Appeal that the appellant failed to prove its defence of good faith and for valuable consideration. Clearly, the question of whether the appellant had proved the defence must depend on the facts and circumstances of the case, and this included the question whether the steps taken by the appellant were sufficient to discharge that burden. This Court would deal with Question (4) first before dealing with Questions (1), (2) and (3). (paras 42-43)

(2) With regard to Question (4), the knock-on effect of the setting aside order was to nullify and wipe out all transactions and dealings in the land, beginning with the fraudulent transfer of the land to Lim Moy, which rendered her replacement title *void ab initio*, ie void at inception. This had to be the effect of the setting aside order because with the setting aside of the JID, the position

would be as if no court order had ever been issued declaring Lim Moy to be the lawful and beneficial owner of the land, which in turn meant that there was never any legal basis for the Land Office to cancel the deceased's title and issue the replacement title in Lim Moy's name. It must therefore be taken as a matter of fact and law that the deceased's title was never cancelled and replaced with the replacement title in Lim Moy's name. Section 89 of the Code, which provided for conclusiveness of title upon registration, did not assist the appellant as both Lim Moy's and Paragon's titles and, for that matter, the appellant's title were all subject to the provisions of s 340 of the Code. With the setting aside order, the land reverted to its pre-cancellation status and both Lim Moy and Paragon could not derive any benefit from Lim Moy's replacement title as it had been extinguished. Since Paragon could not derive any right or benefit from the void replacement title, it followed that it could not pass the same non-existent right or benefit to the appellant, ie *nemo dat quod non habet* (no one can give what he does not have). (paras 68-71)

(3) Even if the *nemo dat* rule did not apply and Paragon could pass the void and defeasible title to the appellant, the appellant was still caught by s 340(3) of the Code which in some way was an exception to the common law rule as it recognised and validated the transfer of a void and defeasible title provided it was acquired in good faith and for valuable consideration by the subsequent purchaser, meaning to say acquired without any element of fraud, deceit or dishonesty. Unlike s 340(2) of the Code, which vitiated the title irrespective of whether it was acquired in good faith or otherwise, s 340(3) conferred on the title the shield of indefeasibility if it was acquired in good faith and for valuable consideration. In the present case, it must be remembered that by operation of s 89 of the Code the appellant's title to the land was already vested in it upon registration. In fact, that was the position taken by the appellant in the present appeal. Therefore, the question was not whether the previous proprietor had title to pass to the appellant, but whether the appellant as the "subsequent purchaser" (as claimed by the appellant) had acquired the title in good faith and for valuable consideration. However, in this instance, the appellant's title was clearly a title that had become defeasible under s 340(2) as it was the subject of a fraud by Chia Moy. The latent defeasibility of the title would only be clothed with the shield of indefeasibility by s 340(3) if the appellant had purchased the land in good faith and for valuable consideration. (paras 78 & 82)

(4) The Torrens system was indeed a system that vested or divested title or interest in land, except that the vesting of title under s 89 must not be conflated with the indefeasibility of title under s 340. What was vested and divested by registration under s 89 was the title and not indefeasibility of the title. The two were in large part separate and should remain so. There was a good reason why s 89 provided for "conclusiveness" of title, and that was to give notice to the whole world that the title to the land belonged to and was owned by the person or body whose name appeared in the register document of title as proprietor and by no others. This was to save the prospective purchaser from the trouble and expense of going behind the register to investigate who the owner of the

land was and the conditions and restrictions the land was subject to just by looking at the register document of title. But where there was a challenge to the title acquired by a subsequent purchaser under s 340(3), the indefeasibility of the title must in all cases be decided based on the facts and circumstances of each case and not by registration alone, as the mirror and curtain principles had no role in determining indefeasibility of title. The vesting of title under s 89 was only conclusive evidence of ownership of the title. It was not conclusive evidence of indefeasibility of the title. There was nothing in s 89 that gave rise to such interpretation. Paragraph (a) merely provided for vesting of title and para (b) for matters specified therein, none of which had anything to do with indefeasibility of title. Therefore, in a dispute involving title acquired by a subsequent purchaser, it was s 340(3) of the Code and not s 89 that determined indefeasibility of the title. (paras 99-101)

(5) Although the word "fraud" was not used and not pleaded against the appellant (it was pleaded against Chia Moy who did not defend the suit), all particulars of the fraudulent and deceitful acts were properly pleaded and disclosed in the respondents' Statement of Claim in their suit against Chia Moy, Paragon and the appellant. There could be no doubt whatsoever that the designed object of all these acts and omissions, as pleaded, was to unlawfully deprive the deceased of her land or to cheat her of her existing right over the land. In any event, there was no necessity for the respondents to plead fraud against the appellant as they were not alleging fraud against it. Their allegation of fraud was against Chia Moy which on the evidence had been proved, which rendered the appellant's title defeasible under s 340(2) and liable to be set aside under s 340(3). Neither was it the respondents' duty as attorneys of the deceased to prove in the negative that the appellant had not purchased the land in good faith and for valuable consideration. It was for the appellant as the subsequent purchaser to prove in the affirmative that it had purchased the land in good faith and for valuable consideration. In this instance, the haste in which the transfers were carried out from the time the title was registered in Lim Moy's name to the time the land was sold by Lim Moy to Paragon in cash for RM15 million, which the appellant had every reason to suspect Paragon had no financial capacity to pay the RM15 million cash to Lim Moy, was compelling evidence that there was bad faith on the part of all those involved in the fraudulent scheme to deprive the deceased of her land. Despite the substantial price it was paying for the land, the appellant did not even bother to obtain a valuation report to ascertain the market value of the land before proceeding with the purchase. It was obvious that the appellant had taken advantage of the "conclusiveness" of title under s 89 and used it as a convenient excuse to turn a blind eye on the suspicious circumstances surrounding the status of the land. Hence, there was no basis to interfere with the finding of fact by the Court of Appeal that the appellant had not purchased the land in good faith and for valuable consideration. (paras 113, 114, 118, 119 & 122)

(6) Another issue raised by the parties, which was whether the appellant was an immediate or subsequent purchaser of the land, was equally important

in determining whether the appellant's title to the land was indefeasible by virtue of the proviso to s 340(3). Having regard to Chia Moy's role in the fraudulent registration of the land in Lim Moy's name, his role in the transfer of the land from Lim Moy to Paragon, and his role in the execution of the Paragon Agreement, it was clear that the purported purchase of the land by Paragon from Lim Moy was not a purchase that was made in good faith and for valuable consideration. It could not possibly have been made in good faith as Chia Moy knew when he entered into the agreement to sell the land to Paragon that he was dealing with property that was obtained by fraud as he himself was the fraudster. There was therefore no purchase of the land by Paragon, the so-called immediate purchaser. In all probability, Lim Moy either knowingly or unknowingly had been made use of by Chia Moy to carry out his mischievous design to sidestep s 340(2) and to take advantage of the proviso to s 340(3). Chia Moy knew that when Paragon passed the title to a "subsequent purchaser", the subsequent purchaser would acquire indefeasibility of title to the land. As for the element of valuable consideration which must be present in order to constitute a valid purchase of the land, there was no proof that the purchase price of RM15 million had been paid by Paragon to Lim Moy. The truth was Paragon did not have the RM15 million cash to pay for the land as stipulated in the Paragon Agreement. Clearly, therefore, the purported purchase of the land by Paragon was not only lacking in good faith but also lacking in valuable consideration. Both elements must be present to constitute a valid purchase of the land. All these shenanigans unwaveringly pointed to the fact that Paragon was not the purchaser of the land within the meaning of s 5 of the Code. The only reasonable inference that would account for all the known facts was that it was the appellant who was the immediate purchaser of the land. Taking Paragon out of the picture, there was no other person or body who had purchased the land other than the appellant, in whose name the title to the land was for the time being vested, and it was an undisputed fact that it paid Paragon RM17 million for the land. (paras 123, 131, 132, 133 & 134)

(7) Having regard to the totality of the evidence, the surrounding circumstances and the probabilities of the case, it would be naive to think that the appellant did not have the slightest suspicion that the land it purportedly purchased from Paragon was the subject of a fraud or impropriety. Good faith demanded more from the appellant than merely to conduct a land search and enquiring from Paragon's solicitors when and how they acquired the land and requesting for a copy of the Paragon Agreement. To allow a subsequent purchaser in circumstances such as in the present case to rely solely on the register document of title to establish good faith was to defeat the object behind the proviso to s 340(3) rather than to put its object into effect. The series of events leading to the transfer of the land to the appellant within such a short period of time showed a pattern which could not possibly be pure coincidence. The designed object was to cheat the deceased of her existing right to the land. (paras 140-141)

(8) The Paragon Agreement was a scam conjured up by Chia Moy acting alone or in collusion with others to pave the way for a purchaser like the appellant to

purchase the land as "subsequent purchaser" with only one objective in mind, and that was to cleanse the title of the stain that had rendered it defeasible under s 340(2) of the Code. Once registered in the so-called subsequent purchaser's name, Chia Moy knew, or so he thought, that the tainted title would be wiped clean as a whistle, thus clearing the path for him to laugh his way to the bank. This, it appeared, had become the standard operating procedure or *modus operandi* by fraudsters to deprive unsuspecting landowners of their land as could be seen from the numerous cases that came before this court. It had made a total mockery of the law. (paras 143-144)

(9) For all the reasons given, the answer to Question (4) was in the affirmative. As for Questions (1), (2) and (3), there was no need to answer them as the answers to the questions would depend on the peculiar facts and circumstances of each case. (para 145)

Per Nallini Pathmanathan FCJ (dissenting):

(10) In the present case, as both Paragon and the appellant were not before the High Court in the course of the setting aside and the subsequent hearing of the OS between Lim Moy and the deceased, they were not bound by the order of court either the setting aside of the JID or the subsequent order dismissing Lim Moy's claim to have the property transferred to her. Any conclusion that such order could bind Paragon and the appellant would amount to a breach of natural justice, given that their rights in the land were indefeasible, save and unless fraud, forgery, or a void instrument as envisaged under the Code in s 340(2) of the Code was established and done so in their presence. This was the trite and well-recognised position in law, by reason of s 89 of the Code. For that reason, it followed that the order obtained by the respondents dated 14 November 2017, setting aside the order for transfer obtained by Lim Moy dated 30 September 2014 and the subsequent order refusing to grant the declaration sought by Lim Moy under the OS, did not have the effect of annulling or invalidating the third party vested rights and title acquired by Paragon and, subsequently, the appellant in respect of the land, under the Code during the interim period prior to the order of 30 September 2014 being invalidated. The order of 14 November 2017 did not have the effect of rendering the title of the purchasers, Paragon and the appellant, *void ab initio* in relation to the titles acquired by Paragon and the appellant. There was no finding by the Court of fraud, forgery or the use of a void instrument expressly. The Court set aside the order of transfer of Lim Moy effectively depriving her of registered ownership. But that order did not have the effect of depriving Paragon and the appellant of title. (paras 201, 202 & 206)

(11) It was the accepted position in law that a judgment operated from the date it was pronounced, unless the Court specifically ordered it to be of retrospective effect. The setting aside by the deceased in November 2017 was not specified nor ordered by the Court to take effect retrospectively. Even if the Court order had ordered that the setting aside operated retrospectively, it could not dispose of or invalidate third party rights for the reason that any such order would amount

to a fundamental breach of natural justice. Any such order would have been open to be set aside for failure to accord the succeeding registered proprietors the right to be heard, before depriving them of title to the land. Perhaps more significantly, the effect of allowing the setting aside of a judgment or order which would have the effect of divesting third parties of their registered title to land, would be to allow litigants to circumvent the operation and effects of the Code, particularly ss 89 and 340, which recognised title primarily by registration and specified when and how such titles became defeasible as well as the remedies available in such an instance. It would enable a litigant to seek to set aside the registration of title by use of a court order, notwithstanding that third party rights in rem were affected. That would be compounded, as was the case here, where the third parties were not accorded an opportunity to be heard. As such, it followed that an order of setting aside a judgment relating to ownership of land between two parties ought not to have the effect of divesting third parties of their rights *in rem* or title to the land unless they were party to any such adjudication and divestment of title. (paras 210-213)

(12) In conclusion, it followed that the order of November 2017 setting aside of the judgment in default obtained by Lim Moy on 30 September 2014: (a) did not have retrospective effect as it took effect from the date of its pronouncement; (b) did not have the effect of setting aside or rendering *void ab initio* the transfer of the land to Paragon and, subsequently, the appellant. The latter acquired title by registration and therefore remained the registered owner of the land on and after 30 November 2017 until the date of the order of the Court of Appeal, and which was the subject matter of dispute in this appeal; (c) as fraud was neither pleaded nor proved expressly or impliedly in the course of the trial of this case, there was no basis to consider defeasibility of title under s 340(3) of the Code on the basis of fraud or forgery; (d) as for s 340(2), namely that registration was effected using a void instrument, the instrument of transfer was not void as of 2015, when the property was transferred to the appellant as there was insufficient evidence to establish that such instrument of transfer was vitiated by fraud, forgery or that Lim Moy or Paragon had no title to pass. The factual matrix showing that the land was held by the deceased for many years prior to registration in her name in 1984 as security for a loan threw doubt as to whether it could be concluded that there was fraud or that the transfers to Paragon and the appellant were effected utilizing a void instrument, thereby rendering all transactions between 2014 and 2017 *void ab initio*; and (e) it was not in dispute that the Statement of Claim made no plea of fraud or forgery resulting in a transfer pursuant to a void instrument. There were instead allegations and averments suggesting but not proving fraud or forgery. (para 223)

(13) The threshold for actual fraud was that there must be a deliberate and dishonest attempt to deprive the unregistered claimant of his claim or interest in the land. It was, on the facts, difficult to establish, on a balance of probabilities, a deliberate and dishonest attempt to deprive the deceased of her title given the possibility that the deceased's title was obtained as security for a loan which was possibly repaid. The fact remained that, as pleaded, the claim by the

plaintiffs was premised on the effect of the order of 17 September 2017 being set aside and having the effect of rendering all transfers thereafter null and *void ab initio*. While this may have been determined between the primary parties, Lim Moy and the deceased, the crux of this appeal turned on whether the Court of Appeal was correct in determining that the effect of the 2017 order was to render all subsequent transfers of the property during the pendency of the 2014 order invalid. In the absence of evidence of forgery, fraud or a void instrument under s 340 of the Code, it was not tenable to so conclude. The instrument of transfer to the appellant was not a void instrument at the point when the land was transferred to it in 2015. This in turn meant that the stringent requirements of s 340(2) and (3) of the Code did not come into play, or were triggered. As s 340 of the Code did not come into play, particularly as there was no basis for invoking it premised on the Statement of Claim, the setting aside order obtained by the deceased in November 2017 did not have the effect of vitiating third party title to the land nor rendering the title of the appellant *void ab initio*. It then followed that the title to the land which was registered in the name of the appellant remained indefeasible. The Court of Appeal erred in concluding that the setting aside order on 14 November 2017 had the effect of nullifying and invalidating the titles of both Paragon and the appellant as of right. This was borne out by the erroneous use of the words '*void ab initio*'. In these circumstances it would follow that as the appellant's title remained indefeasible, the appeal should be allowed. (paras 235-239)

Case(s) referred to:

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

Ang Game Hong & Anor v. Tee Kim Tiam & Ors [2019] 6 MLRA 477 (refd)

Assets Co Ltd v. Mere Roihi [1905] AC 1176 (refd)

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

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 1 MLRA 183 (refd)

Bank Bumiputra Malaysia Bhd v. Mahmud Mohamed Din (Datin Hajjah Salma Md Jamin, Intervener) [1988] 3 MLRH 653 (refd)

Bayangan Sepadu Sdn Bhd v. Jabatan Pengairan Dan Saliran Negeri Selangor & Ors [2022] 2 MLRA 1 (refd)

Borthwick v. Elderslie Steamship Company [1905] 2 KB 516 (distd)

Bresknar v. Wall [1972] ALJR 68 (distd)

Chiew Lip Seng v. Perwira Habib Bank Malaysia Bhd [1998] 3 MLRH 722 (refd)

Datuk Jagindar Singh & Ors v. Tara Rajaratnam [1983] 1 MLRA 391 (refd)

Director of Public Prosecutions v. Head [1959] AC 83 (refd)

Frazer v. Walker [1967] 1 AC 569; [1967] 2 WLR 411; [1967] 1 All ER 649 (refd)

Gibbs v. Messer & Co [1891] AC 248 (refd)

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

Iftikar Ahmed Khan v. Perwira Affin Bank Berhad [2018] 1 MLRA 202 (refd)

Instantcolor System Sdn Bhd v. Inkmaker Asia Pacific Sdn Bhd [2017] 3 MLRA 333 (refd)

Inter-Continental Mining Co Sdn Bhd v. Societe Des Etains De Bayas Tudjuh [1974] 1 MLRA 324 (refd)

Jalani Mohamed & Anor v. Shahrom Abdullah & Anor [2024] 2 MLRA 933 (refd)

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

Kesarmal Letchman Das And Another v. NKV Valliapa Chettiar Nagappa Chettiar [1954] 2 WLR 380 (refd)

Kheng Chwee Lian v. Wong Tak Thong [1983] 1 MLRA 502; [1983] 1 MLRA 66 (refd)

Lee Ah Chor v. Southern Bank Bhd [1990] 2 MLRA 6 (refd)

Letchumanan Chettiar Alagappan @ L Allagapan & Anor v. Secure Plantation Sdn Bhd [2017] 3 MLRA 501 (refd)

Liputan Simfoni Sdn Bhd v. Pembangunan Orkid Desa Sdn Bhd [2017] MLRAU 268 (refd)

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

Melawangi Sdn Bhd v. Tiow Weng Theong [2020] 2 MLRA 391 (refd)

Miller v. Minister of Pensions [1947] 2 All ER 372 (refd)

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

Ong Ban Chai & Ors v. Seah Siang Mong [1998] 1 MLRA 393 (refd)

Ong Chat Pang & Anor v. Valliapa Chettiar [1971] 1 MLRA 828 (distd)

Overseas Realty Sdn Bhd v. Wong Yau Choy & Ors; Tetuan Tay Ibrahim & Partners (Third Party) [2014] 4 MLRH 683 (refd)

Perwira Affin Bank Bhd v. Sardar Mohd Roshan Khan & Another Appeal [2009] 1 MLRA 540 (refd)

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

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

Ranjit Singh Jarnail Singh v. Malayan Banking Berhad [2015] 1 MLRA 463 (refd)

Regina v. Paddington Valuation Officer And Anor Ex parte Peachey Property Corporation Ltd (No 2) [1966] 1 QB 380 (refd)

Sardar Mohd Roshan Khan v. Perwira Affin Bank Bhd [2010] 1 MLRA 35 (refd)

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

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

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

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

Temenggong Securities Ltd & Anor v. Registrar Of Titles Johore & Ors [1974] 1 MLRA 163 (refd)

The Chartered Bank v. Yong Chan [1974] 1 MLRA 176 (refd)

Uptown Properties Sdn Bhd v. Pentadbir Tanah Wilayah Persekutuan & Ors [2012] 2 MLRH 270 (refd)

Waimiha Sawmilling Co (In liquidation) v. Waione Timber Co Ltd [1923] NZLR 1137 (refd)

Waimiha Sawmilling Co Ltd v. Waione Timber Co Ltd [1926] AC 101 (refd)

Legislation referred to:

Bankruptcy Act 1967, s 105

Courts of Judicature Act 1964, s 96

Evidence Act 1950, s 101

National Land Code, ss 5, 89(a), (b), 256, 320, 340(1), (2)(b), (3)

Rules of Court 2012, O 42 r 7(1), (2), O 83

Other(s) referred to:

Teo Keang Sood & Khaw Lake Tee, *Land Law in Malaysia, Cases and Commentary*, 3rd Edn, p 183

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JUDGMENT

Abdul Rahman Sebli CJSS (Majority):

[1] This appeal concerns the indefeasibility of a land title that was transferred to a subsequent purchaser under s 340(3) and vested in it by s 89 of the National Land Code ("the Land Code") which reads as follows:

> "Section 89
>
> Conclusiveness of register of documents of title
>
> Every register document of title duly registered under this Chapter shall, subject to the provisions of this Act, be conclusive evidence-
>
> (a) that title to the land described therein is vested in the person or body for the time being named therein as proprietor; and
>
> (b) of the conditions, restrictions in interest and other provisions subject to which the land is for the time being held by that person or body, so far as the same are required by any provision of this Act to be specified or referred to in that document."

[2] While the provision provides for conclusiveness of title, the conclusiveness of the title is "subject to the provisions of this Act". A provision of the Act that s 89 is subject to is s 340 which confers indefeasibility of title upon registration except in certain circumstances, which means indefeasibility of title is not absolute even after registration. The section is reproduced below:

> "Registration to confer indefeasible title or interest, except in certain circumstances
>
> 340. (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible-
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient instrument or void instrument; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.
>
> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection (2)-
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:
>
> 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 purchaser.
>
> (4) Nothing in this section shall prejudice or prevent-
>
> (a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or
>
> (b) the determination of any title or interest by operation of law."

[3] The expression "indefeasibility of title" is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which the registered proprietor enjoys: per Lord Wilberforce in the Privy

Council case of *Frazer v. Walker* [1967] 1 AC 569; [1967] 2 WLR 411; [1967] 1 All ER 649 which emanated from New Zealand. He went on to say that this conception, which is central in the system of registration, does not mean that the registered proprietor is protected from any claim whatsoever as there were provisions in the New Zealand Land Transfer Act 1952 by which the entry in the register may be cancelled or corrected, or he may be exposed to claims *in personam*. While recognising the immunity of the registered proprietor from adverse claims, the learned judge clarified at p 585 (AC):

> "First, in following and approving in this respect the two decisions in *Assets Co Ltd v. Mere Roihi* and *Boyd v. Mayor, Etc., of Wellington*, Their Lordships have accepted the general principle that registration under the Land Transfer Act 1952, confers upon a registered proprietor a title to the interest in respect of which he is registered which is (under ss 62 and 63) immune from adverse claims, other than those specifically excepted. In doing so they wish to make clear that this principle in no way denies the right of a plaintiff to bring against a registered proprietor a claim *in personam* founded in law or in equity, for such relief as a court acting *in personam* may grant. That this is so has frequently, and rightly, been recognised in the Courts of New Zealand and Australia: see, for example *Boyd v. Mayor, Etc., of Wellington* and *Tataurangi Tairuakena v. Mua Carr*."

[4] A title that is not indefeasible is a title that is liable to be defeated: see the earlier Privy Council case of *Kesarmal Letchman Das And Another v. NKV Valliapa Chettiar Nagappa Chettiar* [1954] 2 WLR 380. In *Land Law in Malaysia, Cases and Commentary* by Teo Keang Sood & Khaw Lake Tee, 3rd edition at p 183, the learned authors amongst others wrote that the effect of registration is to defeat all prior and subsequent unregistered claims, citing amongst two other cases *Bank Bumiputra Malaysia Bhd v. Mahmud Mohamed Din (Datin Hajjah Salma Md Jamin, Intervener)* [1988] 3 MLRH 653. This must be so because the shield of indefeasibility is accorded to registered titles and not to unregistered claims to title.

[5] If, however, the party who acquires the registered title has been guilty of fraud, his title will not defeat an unregistered interest in land: see *PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd* [1980] 1 MLRA 562 per Raja Azlan Shah CJ (Malaya). That is not the case in the present appeal as the original registered owner of the land, namely Wong Soo @ Wong Har ("the deceased") did not acquire the title by fraud. The focus of this appeal should therefore be on the question whether the deceased's title to the land could be defeated by the title that was subsequently registered in the appellant's name.

[6] It is undisputed that the title that was for the time being vested in the appellant was a title that was vested in the deceased before it was cancelled and registered in another person's name, then transferred to a company's name before it was subsequently registered in the appellant's name. In short, it was not a "prior or subsequent unregistered interest" that could be defeated by registration.

[7] The appellant's title is now being challenged by the respondents who are the children and attorneys of the deceased who passed away on 16 August 2017. They acted as their mother's attorneys as she was over 87 years old and physically immobile at the material time. She was the original owner of the land held under title number GM1226, Lot 2487, Mukim Batu, Kuala Lumpur ("the land") since February 1975 and had been paying Quit Rent and Assessment for the land until 2014.

[8] The material facts leading to the present appeal are as follows. On 9 January 2014, the 1st respondent went to the Kuala Lumpur City Hall (DBKL) to change the mailing address for assessment of the land (Cukai Pintu) which was originally registered as AL-1447 7 87, Welfare Road, Sungai Buloh. She was shocked to discover that unbeknownst to her and to her late mother, the mailing address had mysteriously been changed to C- 52-1, Jalan Danau Lumayan, Off Jalan Tasik Permaisuri, Bandar Tun Razak, Cheras 56000, Kuala Lumpur by an unknown individual.

[9] In the deceased's Last Will and Testament, her address was also not the Bandar Tun Razak address. It was at 11-5, Lumina Kiara Condominium, No 16, Jalan Duta Kiara, 50480 Kuala Lumpur.

[10] Upon discovering the change of address, the respondents went to the Kuala Lumpur Land Office ("the Land Office") to investigate. They found out that a Change of Address Form had been submitted by an unknown person without the deceased's knowledge. The signature appearing on the Change of Address Form was a forged signature of the deceased.

[11] On 15 January 2014, the 1st respondent lodged a police report after her application to lodge a private caveat on the land was rejected by the Land Office. Some months later the respondents discovered that on 4 August 2014 one Chia Moy King ("Chia Moy") had filed an Originating Summons No 24NCVC-1122-08/2014 ("the OS") at the Kuala Lumpur High Court against the deceased to deprive her of her title to the land. The OS was filed by Chia Moy purportedly as attorney of one "Lim Moy" whom he claimed was the lawful and beneficial owner of the land.

[12] As to how the land came to be registered in the deceased's name if, as claimed by Chia Moy, it belonged to Lim Moy, the assertion by Chia Moy in the OS was that it was because Lim Moy wanted to use the land as collateral for a $30,000.00 (Thirty Thousand Dollars) loan that was granted to her by the deceased to part finance her purchase of the land from one Yeap Bok Seng. It was alleged that the agreement for the $30,000.00 loan was entered into between Lim Moy and the deceased on 18 February 1975 and that the last repayment of the loan was made by Lim Moy six years later on 10 May 1981. Chia Moy further alleged that despite having settled the loan amount in full to the deceased, Lim Moy had "forgotten" to re-register the land in her name, hence the need for him to file the OS.

[13] This narrative by Chia Moy even if true shows that the title to the land was never registered in Lim Moy's name. Being an unregistered interest in land, it could not defeat the deceased's title as she did not acquire the title by fraud. Therefore, the question of "re-registering" the land in Lim Moy's name did not arise. It defies the belief that after making the last repayment of the loan on 10 May 1981, it took Lim Moy over 30 years later on 4 August 2014 to suddenly wake up from her slumber and applied for the land to be "re-registered" in her name. There is no ring of truth in the story. It is a false narrative by Chia Moy and a figment of his imagination.

[14] In the respondents' affidavit in support of their application to set aside the JID, they averred that the land was never used as collateral for the alleged $30,000.00 loan but was in fact bought by the deceased from Yeap Bok Seng. This is confirmed by entries in the Form 14A which shows that the land was transferred by Yeap Bok Seng to the deceased on 19 February 1975 for a consideration of $55,000.00 (Fifty-Five Thousand Dollars). The fact that it was only registered in the deceased's name nine years later on 11 January 1984 is of no consequence as the title was not acquired by fraud. Her title to the land was therefore indefeasible under s 340(1). There is in the circumstances no basis for Chia Moy to claim that Lim Moy was the lawful and beneficial owner of the land.

[15] Lim Moy's remedy, if at all, lies in an action for specific performance but no such action was ever instituted by her within the limitation period which has long expired. In *Inter-Continental Mining Co Sdn Bhd v. Societe Des Etains De Bayas Tudjuh* [1974] 1 MLRA 324 it was held by the then Federal Court that while an agreement to deal in land is ineffective to vest title to or an interest in land, it is nevertheless still good as a contract and in appropriate cases, the remedy of specific performance or damages *in lieu* thereof may be obtained in respect of the agreement.

[16] The relevant paragraphs of the respondents' affidavit in support of their application to set aside the JID are reproduced below:

> "30. Merujuk kepada Perjanjian Pinjaman yang kononnya telah ditandatangani antara Lim Moy dan Responden Pertama pada 18 Februari 1975, (Eksibit P-3 Afidavit Sokongan Chia dirujuk) kami tidak percaya bahawa dokumen tersebut adalah sah. Mengikut Responden Pertama, **tanah tersebut telah dibeli oleh Responden Pertama dan bukan sebagai cagaran pinjaman. Pemohon diletakkan atas dasar bukti yang kukuh untuk membuktikannya**.
>
> 31. Orang yang salah: Berkenaan pembayaran balik wang, tanpa sebarang pengakuan tindakan Pemohon, kami menyatakan bahawa Perjanjian Pinjaman tersebut adalah di antara Responden Pertama dan Lim Moy. Pembayaran balik wang pinjaman telah dibuat kepada orang lain **yang tiada privity of contract** dalam perjanjian tersebut. Kami percaya isu ini akan dibicarakan oleh peguamcara kelak.

32. Orang tersebut dalam resit adalah dinamakan sebagai Mak Yet Chiew, iaitu suami Responden Pertama. Walaubagaimanapun, kami menyatakan bahawa beliau **tidak diberi kuasa oleh Responden Pertama** untuk menerima wang bayaran balik wang pinjaman tersebut (dinafikan).

33. Kami juga percaya bahawa **tandatangan dalam resit tersebut bukanlah tandatangan suami Responden Pertama**. Ini adalah nyata daripada sampel-sampel tandatangan contemporaneus suami Responden Pertama dalam tahun 1977 hingga 1981.

Sampel-sampel tandatangan dilampirkan di sini dan ditanda secara kolektif sebagai "AS-10".

34. Kami dinasihati oleh peguamcara Responden Pertama dan sesungguhnya percaya bahawa ini adalah isu pakar tandatangan yang harus dipanggil.

35. Kami sesungguhnya percaya bahawa **tandatangan Responden Pertama telah ditirukan untuk tujuan penukaran hakmilik**."

[Emphasis Added]

[17] These were positive assertions by the respondents on very material issues but were not rebutted by Chia Moy, in particular paras 30 and 33 which asserted (1) that the loan agreement was invalid, (2) that the land was never used as collateral by Lim Moy for the alleged $30,000.00 loan and (3) that the signature of the deceased's husband acknowledging receipt of the last loan payment was forged. In the absence of any rebuttal by Chia Moy, these positive assertions were not only deemed to be admitted but also deemed to be proved as they were not inherently implausible or incapable of belief.

[18] The Orders sought by Chia Moy in the OS to enable him to "re-register" the land in Lim Moy's name were the following, amongst others:

(a) A declaration that Lim Moy was the lawful and beneficial owner of the land;

(b) That the Land Office register Lim Moy as the registered owner of the land within 7 days from the date of the Order; and

(c) That the Land Office cancel the deceased's title and Chia Moy be allowed to apply for continuing title in Lim Moy's name as the lawful registered owner of the land.

[19] The orders sought for were as draconian as any order could be. It sought to extinguish the deceased's right to the land. Judgment in default ("JID") in terms of the OS was entered against the deceased on 30 September 2014 allegedly for her failure to attend court ("Responden Pertama telah gagal hadir"). The effect of the JID was that there existed a court order declaring Lim Moy to be the lawful and beneficial owner of the land, contradicting the Land Office record that the land was "for the time being" registered in the deceased's name and therefore vested in her by s 89 and indefeasible under s 340(1) of the Land Code.

[20] The JID was extracted by Chia Moy on 2 October 2014, two days after it was obtained by him. Armed with the JID, Chia Moy successfully obtained cancellation of the deceased's title and a replacement title was issued by the Land Office in Lim Moy's name as the original owner of the land under a new title number GM9410, Lot 2487, Mukim Batu, Kuala Lumpur. The fraudulent "transfer" of the deceased's title to Lim Moy was thus complete. In the Privy Council case of *Waimiha Sawmilling Co Ltd v. Waione Timber Co Ltd* [1926] AC 101 & 106 it was said that "if the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent".

[21] On 27 October 2014, ie less than a month after the JID was obtained, Chia Moy purportedly acting under Lim Moy's power of attorney entered into a sale and purchase agreement with Paragon Capacity Sdn Bhd ("Paragon") for the sale of the land to Paragon for RM15 million, allegedly in cash ("the Paragon Agreement").

[22] It should become clear by now that the fraudulent registration of the title in Lim Moy's name by Chia Moy was to facilitate the "sale" of the land to an "immediate purchaser", in this case to Paragon. Of pertinence to note is that at the time the Paragon Agreement was entered into by Chia Moy in his capacity as Lim Moy's attorney:

(a) Paragon was only incorporated on 15 August 2014, ie approximately 1 month before the JID was entered against the deceased on 30 September 2014 and just slightly more than 2 months before the agreement was entered into;

(b) Paragon only had a paid-up capital of RM400,000.00, yet the RM15 million purchase price was allegedly paid in cash to Lim Moy;

(c) Two previous directors of the company, namely Krishna a/l Kalianan and Fareez bin Roslan were aged 37 years and 26 years old respectively in 2014;

(d) Paragon's profit before tax as at 31 December 2015 was RM32,279.00 only, with a current asset of only RM494,236.00. The profit from the purported sale of the land to the appellant was not captured in Paragon's 2015 accounts;

(e) There was no loan or charges taken up by Paragon and the land was unencumbered.

[23] What this shows is that Paragon had no financial capacity to pay Lim Moy the cash price of RM15 million for the land. Less than 3 months after the purported signing of the Paragon Agreement, the transfer of the land to Paragon by Lim Moy took place on 21 January 2015. There is no evidence however:

(a) of any charge of the land by Paragon to any bank or financial institution for financing the RM15 million purchase price;

(b) that Paragon had the financial capability to pay the RM15 million in cash to Lim Moy;

(c) that the sum of RM15 million was paid by Paragon to Lim Moy or to Chia Moy;

(d) of any payment of Real Property Gains Tax made by Paragon to the relevant authority.

[24] It is clear that the fraudulent registration of the land in Lim Moy's name and the "sale" of the land to Paragon was a scheme orchestrated by Chia Moy acting alone or in collusion with others to set the stage for a s 340(3) situation. Not surprisingly, just slightly more than 3 months later on 8 May 2015 Paragon entered into a sale and purchase agreement with the appellant for the sale of the land at the purchase price of RM17 million, and this was followed slightly less than 3 months thereafter on 5 August 2015 by the registration of the land in the appellant's name.

[25] This completed the third and final phase of the fraud committed on the deceased's land, the first being the registration of the land in Lim Moy's name using a fraudulent JID, the second the sale of the land by Lim Moy to Paragon and the third the sale of the land by Paragon to the appellant, and Chia Moy in all probability had a hand in all three transactions in his capacity as attorney of Lim Moy. It will not be wrong to draw the inference that Chia Moy, Lim Moy and the directors and shareholders of Paragon had worked hands in glove to deprive the deceased of her land. Chia Moy's claim of being the attorney of Lim Moy in all the transactions involving the land, in particular the sale of the land to Paragon was never even verified as both he and Lim Moy were not called to give evidence. Those from Paragon who were involved in the sale of the land to the appellant were also not called to verify the veracity of the land transaction.

[26] At the point of transaction for the sale of the land by Paragon to the appellant, the appellant's solicitor who handled the sale and purchase agreement who in such capacity was acting as its agent, would have had in his possession the following documents:

(a) the Paragon Agreement for the cash purchase price of RM15 million;

(b) by cl 3(d) of the Paragon Agreement, within 14 days of the agreement, the appellant's solicitor would have come into possession of Paragon's Directors' and Members' Resolution approving the sale of the land, Paragon's Memorandum and Articles of Association, Form 24, 44 and 49;

(c) upon obtaining those documents, the appellant and/or its solicitor would have known that the paid-up capital of Paragon was RM400,000.00 only;

(d) the appellant was aware that the subject land was free from encumbrances and no loan was taken by Paragon to finance the purchase of the land at the purchase price of RM15 million.

[27] This part of the evidence implicated the appellant in material respects. Most significantly it shows that despite the suspicious circumstances surrounding the Paragon Agreement which the appellant had knowledge of, particularly Paragon's purported ability to pay RM15 million in cash to Lim Moy for the land despite having a paid-up capital of only RM400,000.00 (a shortfall of RM14.5 million), a pre-tax profit of only RM32,279.00 and no bank loan to finance the RM15 million purchase price, the appellant went ahead with the agreement. No explanation was proffered as to why the appellant was in such a hurry to pay the earnest deposit of RM340,000.00 to Paragon's property agent on 7 April 2015 even before conducting the land search on 9 April 2015.

[28] Perplexingly none of the agreement documents were produced by the appellant as evidence at the trial, denying the court of crucial evidence in ascertaining the true nature of the Paragon Agreement as well as the agreement between itself and Paragon. In any case, there was never in existence any letter of offer by Paragon for the sale of the land to the appellant, let alone at the price of RM17 million which was a prerequisite for the formation of a valid contract. There was also no resolution by the appellant for the purchase of the land from Paragon and at that price.

[29] On a successful application by the respondents, the JID that Chia Moy fraudulently obtained on 30 September 2014 and which he used to register the land in Lim Moy's name was set aside by the High Court on 14 November 2017, and a full hearing ordered for the OS. The effect of the setting aside order was to nullify the court order declaring Lim Moy to be the lawful and beneficial owner of the land. This destroyed the whole substratum of the basis for the cancellation of the deceased's title and the issuance of a replacement title in Lim Moy's name as it was based on the JID that the new title was issued in her name by the Land Office.

[30] At the hearing of the setting aside application, the Federal Counsel appeared for the Land Office but Chia Moy did not turn up, nor did he bother to oppose the application. No issue was raised that the cause papers were not served on Chia Moy. This is conclusive evidence that Chia Moy had indeed obtained the JID by fraud for otherwise he would have defended the default judgment. The respondents had relied on the following grounds in support of their application to set aside the JID:

(a) At all material times, the OS was never served on the deceased;

(b) The deceased, who was alive at the time the JID was entered against her, was not aware of the case at all;

(c) The Affidavit of Service that was filed by Chia Moy in the 2014 OS was defective as the intitulement for the certificate verifying exhibit was in relation to a different case, ie the case of *Lee Kim Meng v. Bintang Comel Sdn Bhd.* It had nothing to do with the deceased;

(d) The service of the OS was at the wrong address;

(e) Even though the Affidavit of Service filed by Chia Moy alleged that their solicitor had served the OS and the JID on the deceased, no A.R. card was exhibited in the Affidavit of Service;

(f) The court had fixed the first case management on 21 August 2014 and the last case management on 30 September 2014. However, Chia Moy and/or his solicitor failed to notify the deceased of the new date. No notification of the new date was exhibited by Chia Moy and/or his solicitor;

(g) There was no service of the JID on the deceased.

[31] On these uncontroverted facts, the High Court was right in setting aside the JID as the deceased was deviously denied of her right to appear and to be heard in defence of her right to the land, a clear breach of the rules of natural justice. The JID was therefore null and void and of no effect. It was a fraud perpetrated by Chia Moy not only against the deceased but against the court. It was a blatant abuse of the court process which on the face of it was a criminal act. I do not think it is open to argument that practicing deceit on the court using a fraudulent document is a crime under the Penal Code.

[32] The OS that was filed by Chia Moy on 4 August 2014 which he fraudulently used to obtain the JID on 30 September 2014 finally came up for hearing on 21 February 2018, more than three years later. Chia Moy did not turn up for the hearing to prosecute his claim as a consequence of which it was dismissed on the same date. The dismissal of the OS means that Chia Moy's claim that Lim Moy was the lawful and beneficial owner of the land and that it was used as collateral for the $30,000.00 loan granted to her by the deceased remained bare allegations totally bereft of evidence. By this time however the land had already been registered in the appellant's name on 5 August 2015, mission accomplished. This led to the learned trial judge at para [60] of his judgment to come to the following conclusion:

> "In fact, this Court is of the considered opinion that as the ownership transaction of the land was completed on 5 August 2015, not only the setting aside of the JID on 14 January 2017 was of no effect, but the Power of

> Attorney issued to her by the Plaintiffs dated 23 December 2015 had no effect, as by that time she was no longer the registered owner of the Land, but the 3rd defendant. The 1st plaintiff who is now the executor of the mother's estate also does not have any right or interest of the Land as the Land did not form part of the estate."

[33] It is obvious that the learned judge's focus was on the effect of registration rather than on indefeasibility of the title. The 3rd defendant referred to in the judgment is the appellant in the present appeal.

[34] Following the dismissal of the OS, the respondents on 7 August 2018 vide Kuala Lumpur High Court Originating Summons No WA-24NCvC-1574-08-2018 filed for discovery against Chia Moy, Paragon and the appellant. The application for discovery was resisted by the appellant which resulted in its dismissal for reasons which are not relevant for purposes of this appeal. Thus, the documents requested for by the respondents were not handed over to them by the appellant.

[35] On 31 May 2019, the respondents proceeded to file the High Court Suit against Chia Moy, Paragon and the appellant. The cause papers were served on Chia Moy by way of substituted service and were also served on Paragon. Both Chia Moy and Paragon did not enter appearance, nor did they defend the action. Only the appellant defended the suit.

[36] The respondents' claim against Chia Moy, Paragon and the appellant was founded on the following causes of action:

(a) The deceased was fraudulently deprived of her land by Chia Moy by way of a fraudulently obtained JID including the fact that the OS was never served on the deceased;

(b) The respondents relied on the Order setting aside the JID and that any purported sale and purchase and/or transfer of the land was null and *void ab initio*;

(c) Chia Moy, Paragon and the appellant were not owners of the land and did not possess any right to it;

(d) Chia Moy, Paragon and the appellant held the land as constructive trustees for the respondents.

[37] By not entering appearance to the suit, Chia Moy must be taken as admitting to the truth of the respondents' claim that he had defrauded the deceased of her land and that Lim Moy was never the lawful and beneficial owner of the land. Fraud had therefore been proven against Chia Moy, thus rendering Lim Moy's title to the land defeasible under s 340(2) and liable to be set aside in the hands of any subsequent purchaser under s 340(3) if the land was not purchased in good faith and for valuable consideration by the subsequent purchaser.

[38] As is invariably the case with fraudulent transactions of this ingenuity, the appellant's defence to the respondents' claim was that it was a *bona fide* purchaser for value without notice and had acquired indefeasible title to the land by virtue of the proviso to s 340(3) of the Land Code. The defence found favour with the learned trial judge and the respondents' claim was dismissed with costs of RM32,000.00.

[39] Aggrieved by the decision, the respondents appealed to the Court of Appeal against the whole of the decision. Chia Moy and Paragon did not oppose the appeal. Only the appellant did. On 29 August 2022, the respondents' appeal was unanimously allowed by the Court of Appeal with costs of RM70,000.00. The whole decision of the High Court was set aside.

[40] Essentially the Court of Appeal through Supang Lian JCA gave the following reasons for allowing the appeal:

(a) The setting aside of the JID rendered Lim Moy's replacement title *void ab initio*;

(b) There was insufficient judicial appreciation of the evidence by the learned trial judge;

(c) The learned trial judge misdirected himself on the correct application of the law;

(d) The titles held by Chia Moy, Paragon and the appellant were defeasible and ought to be set aside;

(e) The appellant failed to prove that it was a *bona fide* purchaser for value.

[41] Dissatisfied with the decision of the Court of Appeal, the appellant filed for leave to appeal to this court pursuant to s 96 of the Courts of Judicature Act 1964 and leave was granted for the determination of the following questions of law:

(1) In the absence of any allegation of fraud or collusion, whether the Court of Appeal was correct in law to hold that the purchaser should have done due diligence before purchasing the subject land and had therefore failed to discharge or prove that it is a *bona fide* purchaser for value;

(2) Whether apart from the undertaking of a proper search in the land registry to satisfy itself that the vendor is the registered proprietor of the subject land, whether an intended purchaser is obliged to investigate the history of the vendor's title to prove that as a purchaser it had not acted negligently and/or is a *bona fide* purchaser;

(3) Whether in determining if the 3rd defendant (appellant) is a *bona fide* purchaser for value under s 340(3) of the Land Code, the following are conclusive matters on which it could be held as the Court of Appeal did that a purchaser is not a *bona fide* purchaser, namely:

(a) the short period of ownership of the subject land by the person who sold the subject land to the 3rd defendant (appellant);

(b) not conducting a formal valuation prior to purchasing the subject land;

(c) the payment of earnest deposit by a purchaser prior to conducting a search of the subject land at the land registry; and

(d) the early settlement of the purchase price for the subject land by a purchaser to a sale and purchase agreement.

(4) Where a judgment in default is set aside but the successful party fails to apply for or obtain an order under O 42 r 7(2) of the Rules of Court 2012 that the order should take effect from an earlier date, whether it is justifiable to treat all steps taken during the intervening period (being 3 years in this case) in reliance on the default judgment is null and void or *void ab initio*.

[42] Except for leave question (4), the first three questions although crafted as questions of law are in reality questions of fact seeking to overturn the finding of fact by the Court of Appeal that the appellant failed to prove its defence of good faith and for valuable consideration. Clearly, the question of whether the appellant had proved the defence must depend on the facts and circumstances of the case and this includes the question whether the steps taken by the appellant were sufficient to discharge that burden.

[43] At the hearing before us, learned counsel for the appellant chose to argue on question (4) first as according to him it forms the central basis for the respondents to impeach the appellant's title to the land. It was submitted that the appeal may be allowed on this ground alone as it is the only ground on which the appellant's title is sought to be impeached on the pleadings. Learned counsel for the respondents reciprocated by submitting on question (4) first in his submissions in reply. I shall therefore deal with leave question (4) first before dealing with questions (1), (2) and (3).

[44] The main thrust of the appellant's argument in relation to leave question (4) is that the setting aside of the JID could not operate retrospectively as an order for its retrospective application must be specifically applied for because there is no "*ipso facto* antedating" of a court order. He added that good grounds must be shown if there is to be an antedating, citing *Borthwick v. Elderslie Steamship Company* [1905] 2 KB 516. The headnote to the case reads as follows:

> "Where a plaintiff fails in a Court of first instance on a claim for unliquidated damages, but on appeal an order is made that judgment should be entered in his favour for an amount of damages to be ascertained, the judgment does not, as a matter of course, take effect from the date of the trial of the action, so as to entitle the plaintiff to interest from that date upon the amount recovered, but it will only take effect from the date at which it was given in the Court of Appeal, unless an order is made under Order XLI, r 3, that the judgment shall be antedated."

[45] Order XLI r 3 of the English provision runs as follows:

> "Where any judgment is pronounced by the Court or a judge in Court, the entry of the judgment shall be dated as of the day on which such judgment was pronounced, unless the Court or judge shall otherwise order, and the judgment shall take effect from that date: provided that **by special leave of the Court or a judge** a judgment may be antedated or postdated."
>
> [Emphasis Added]

[46] Collins MR made the following observations in his judgment:

> "The judgment is not *ipso facto* antedated by reason that it is substituted for the judgment of the Court below. The power to antedate ought, in my opinion, only to be used on good ground shewn, and when I examine the facts of this case I can find no such ground... I think, therefore, that no cause has been shewn for antedating the judgment of this Court in order that the plaintiff may get interest for the time that elapsed between the trial and the judgment.

[47] On the strength of the authority, it was submitted that since the setting aside order could not operate retrospectively, it did not have the effect of nullifying the earlier court order which declared Lim Moy to be the lawful and beneficial owner of the land. In other words, the respondents' application to set aside the JID which the High Court granted on 14 November 2017 was an exercise in futility as the JID continued to be in force and Lim Moy continued to be the registered owner of the land. It was a situation where one wise judge once said, the operation was a complete success but the patient died.

[48] With due respect to learned counsel, I do not see how *Borthwick* supports the argument. The issue before the court in that case was when would interest start to run on a judgment, an entirely different issue which has no relevance to the issue before this court, which is when would the setting aside order start to take effect in the absence of an application for it to have retrospective effect. Besides, the English provision requires for special leave of the court or a judge to be obtained for the judgment to be antedated or postdated, which is not a requirement under O 42 r 7 of the Rules of Court 2012 ("the ROC").

[49] Order 42 r 7 of the ROC provides as follows:

> "Date from which judgment or order takes effect (O 42 r 7)
>
> 7.(1) A judgment or order of the Court takes effect from the day of its date.
>
> (2) Such judgment or order shall be dated as of the day on which it is pronounced, given or made, unless the Court orders it to be dated as of some other earlier or later day, in which case it shall be dated as of that other day."

[50] The decision of the Court of Appeal in *Perwira Affin Bank v. Sardar Mohd Roshan Khan & Another Appeal* [2009] 1 MLRA 540 was referred to where it was reiterated that the date of an order would determine if it is to apply prospectively or retrospectively. This is what the Court of Appeal said at paragraph [45]:

> "[45] Under O 42 r 7(1) and (2), the retrospective or prospective effect of an order of the court (such as the amendment order) is to be ascertained by reference to the material date specified therein: O 42 r 7(1). The general mandatory provision contained in O 42 r 7(1) is that the judgment order shall be dated as of the date on which it was pronounced, given or made. By way of exception, the court may order it to be dated earlier or later, in which case the order shall be dated as of that other day. Hence, the date of the order itself is of paramount importance, as such date would determine the retrospective or prospective effect thereof."

[51] It was brought to our attention however that the decision had been overruled by this court in *Sardar Mohd Roshan Khan v. Perwira Affin Bank Bhd* [2010] 1 MLRA 35. It was a case under s 105 of the Bankruptcy Act 1967 where it was held that the effect of the annulment of a bankruptcy was to wipe out the bankruptcy altogether, and put the bankrupt in the same position as if he was never a bankrupt. No antedating order was made by the court. It was a decision that was *ex facie* unfavourable to the appellant.

[52] Applying the ratio to the facts of the present case, the effect of the setting aside order was to wipe out the JID altogether and put the deceased in the same position as if her title to the land was never cancelled and registered in Lim Moy's name although no antedating order was made by the court. In other words the setting aside order worked retrospectively in favour of the respondents.

[53] Nothing therefore turns on the authority cited by the appellant. In any event, it does not support in any way the appellant's contention that in the absence of any retrospective order by the court, the setting aside of the JID did not have the effect of nullifying the earlier order of the court declaring Lim Moy to be the lawful and beneficial owner of the land.

[54] Without imputing any element of dishonesty on anyone and certainly not on learned counsel for the appellant whom I consider to be an advocate of unquestionable integrity, I am taking the liberty to remind lawyers to make sure that the cases that they cite in support of their arguments are not cases that have been overruled and which no longer represent the law or worse unfavourable to them. A serious miscarriage of justice may potentially be occasioned if the court were to unwittingly rely on the overruled cases in arriving at its decision on crucial aspects of the case. While it is true that the court must be vigilant, it is not expected to know every case that has been overruled.

[55] Learned counsel for the appellant stressed the point that the respondents knew by November 2017 when they made the application to set aside the JID that third parties, namely Paragon and the appellant, had obtained registration during the intervening period but did not implead them as parties for any valid retrospective order to be made. It was argued that the respondents should in the circumstances have invoked the court's power under O 42 r 7(2) of the ROC to antedate the setting aside order. Learned counsel however conceded that if the respondents had done that, the effect in law would be to nullify the registration of the title in Lim Moy's name.

[56] The contention was that it was manifestly unfair for the setting aside order to automatically operate retrospectively as the appellant's interest in the land was sought to be nullified without being heard. For this reason, it was submitted that the interest of justice demands that leave question (4) should be answered in the negative, which if acceded to by this court would mean that all fraudulent dealings in the land right from the registration of the land in Lim Moy's name up to its transfer and registration in the appellant's name would be validated.

[57] I am unable to accept the argument. First of all, the issue of breach of natural justice does not fall within the scope of the leave questions and nor was it an issue before the High Court and the Court of Appeal. In *Melawangi Sdn Bhd v. Tiow Weng Theong* [2020] 2 MLRA 391 this court had this to say on the matter:

> "As we said in the recent case of *Noor Azman Azemi v. Zahida Mohamed Rafik* [2019] 2 MLRA 259 **as a matter of broad general principle**, a party is not precluded from raising a new issue in an appeal because this court has the power to permit a party to argue a ground which falls outside the scope of the question regarding which leave to appeal had been granted in order to avoid a miscarriage of justice (see: *YB Menteri Sumber Manusia v. Association Of Bank Officers, Peninsular Malaysia* [1998] 1 MELR 30; [1998] 2 MLRA 376 and *Datuk Harris Mohd Salleh v. Datuk Yong Teck Lee & Anor* [2017] 6 MLRA 281; [2017] 2 SSLR 433. **We must add here that the discretion must, however, be exercised judiciously and sparingly, and only in very limited circumstances in order to achieve the ends of justice. It has to be performed with care after giving serious considerations to the interests of all parties concerned**."
>
> [Emphasis Added]

[58] I would add that the raising of new issues outside the scope of the leave questions must not be too generously allowed, lest it will metamorphose into the rule itself when it is meant to be an exception to the general rule. Be that as it may, I agree with learned counsel for the respondents that the respondents could not have applied for the setting aside order to be antedated as the appellant was not even a party to the setting aside application. The action was between the respondents and Chia Moy and did not involve the appellant. The whole purpose of the application was to set aside the JID which was fraudulently obtained by Chia Moy. It had nothing to do with the validity of the appellant's title to the land which at the time the setting aside application was made was already vested in the appellant by virtue of s 89 of the Land Code. It was no longer vested in the deceased.

[59] The question of the validity and indefeasibility of the appellant's title as a subsequent purchaser was a separate matter which was to be decided at the hearing of the suit filed by the respondents against Chia Moy, Paragon and the appellant. There was therefore no reason for the respondents to apply for the setting aside order to be antedated at the time of the application.

[60] Further, the question of whether the setting aside order had retrospective effect is a question that this court in the present appeal is called upon to determine which, if decided in the appellant's favour, would provide a complete remedy to its grievance that it was not heard at the setting aside proceeding. An appeal such as the one before us is a continuation of the hearing.

[61] In any case, learned counsel for the appellant accepted that if the setting aside order was to have retrospective effect, it would nullify the registration of the replacement title in Lim Moy's name. Therefore, since the setting aside order had retrospective effect for the reasons that I have given, the question of the appellant not being heard at the hearing of the setting aside application is for all practical purposes a question that has no bearing on the issue of whether the respondents should have applied for the setting aside order to be made retrospectively.

[62] A plain reading of O 42 r 7(2) of the ROC will show that what it requires is for the judgment or order to be dated on the date the judgment or order is pronounced but the court can, for good reasons, order it to take effect on an earlier or later date. In the present case the court did not make either of the two orders that was open for it to make. The setting aside order therefore took effect on the date it was pronounced, ie on 14 November 2017 as required by r 7(1) but operated retrospectively as it was specifically directed at an earlier order which is the JID and not at any present or future order.

[63] More importantly, there can be no confusion as to which order was ordered by the High Court to be set aside. It will be stretching the language of O 42 r 7(2) to breaking point to argue that an order that is not antedated has no retrospective effect simply because no application was made for the order to take effect retrospectively.

[64] The appellant then argued that the setting aside of the judgment in default on 14 November 2017 did not operate automatically in a retrospective manner to invalidate all transactions or events that took place during the intervening period when the default judgment was in force. In other words the setting aside order did not invalidate the replacement title issued to Lim Moy by a court order three years before. On this basis, it was submitted that the Court of Appeal was wrong in setting aside the transaction between Paragon and the appellant that occurred in the interim period between the entry of the JID on 30 September 2014 and the setting aside of the JID on 14 November 2017.

[65] There was a gap of three years between 2014 and 2017 before the respondents applied to set aside the default judgment obtained by Chia Moy. This according to the appellant should be held against the respondents as they were aware going back to 2014 that transfers of the land had taken place. It was therefore argued that the respondents had forfeited their right to challenge the validity of Lim Moy's replacement title by sleeping on their rights for three years.

[66] With due respect I do not see the relevance of the three-year gap between 30 September 2014 and 14 November 2017 to the question whether the replacement title in Lim Moy's name was rendered void by the setting aside order. In the first place the respondents only came to know about the JID after 10 December 2015 and they filed for setting aside of the JID sometime in April 2017 and it was not their fault that their application was only fixed for hearing by the court on 14 November 2017.

[67] The first transfer took place after the OS was filed by Chia Moy on 4 August 2014 but the OS was never served on the deceased. Therefore, the respondents could not have been aware of the move by Chia Moy to deprive the deceased of her land. In the meantime, they filed a police report after their application to lodge a caveat was rejected by the Land Office. Besides, they were waiting for the outcome of the police investigation. They even tried to enter a Registrar's caveat but obviously no Registrar would entertain the application as there was a JID in place at the time. It is therefore untrue to say that the respondents stood idle for three years before taking any action to recover the land.

[68] In my opinion, the knock-on effect of the setting aside order was to nullify and wipe out all transactions and dealings in the land, beginning with the fraudulent transfer of the land to Lim Moy, which rendered her replacement title *void ab initio*, ie void at inception. This had to be the effect of the setting aside order because with the setting aside of the JID, the position would be as if no court order had ever been issued declaring Lim Moy to be the lawful and beneficial owner of the land, which in turn means that there was never any legal basis for the Land Office to cancel the deceased's title and to issue the replacement title in Lim Moy's name.

[69] It must therefore be taken as a matter of fact and law that the deceased's title was never cancelled and replaced with the replacement title in Lim Moy's name (*Sardar Mohd Roshan Khan (supra)*) without having the replacement title cancelled by a court order as learned counsel for the appellant seems to be suggesting that there should be such an order. Lord Denning in *Director of Public Prosecutions v. Head* [1959] AC 83 (at p 111) said that if an order was void, it would in law be a nullity and there would be no need for an order to quash it as it would be automatically null and void without more ado. He came to the same decision seven years later in *Regina v. Paddington Valuation Officer and Anor Ex parte Peachey Property Corporation Ltd (No 2)* [1966] 1 QB 380 at p 402.

[70] Section 89 which provides for conclusiveness of title upon registration does not assist the appellant as both Lim Moy's and Paragon's titles and for that matter the appellant's title are all subject to the provisions of s 340 of the Land Code. With the setting aside order, the land reverted to its pre-cancellation status and both Lim Moy and Paragon could not derive any benefit from Lim Moy's replacement title as it had been extinguished by the setting aside order.

[71] Since Paragon could not derive any right or benefit from the void replacement title, it follows that it could not pass the same non-existent right or benefit to the appellant, *nemo dat quod non habet* (no one can give what he does not have). Respecting this centuries-old tenet is to support fairness by preventing illegitimate transfers of other people's property. That in my view is the policy consideration behind s 340(2) which renders defeasible any title that is acquired by means of any of the vitiating elements specified in the subsection, even if it is acquired in good faith and for valuable consideration. As the saying goes, a poisonous tree produces poisonous fruits.

[72] In *Ranjit Singh Jarnail Singh v. Malayan Banking Berhad* [2015] 1 MLRA 463 it was decided by this court that the effect of a void instrument or transaction is that the subsequent acts or dealings emanating therefrom are null and void. For context, it is necessary to quote paras [19] and [20] in full. This is what the court said:

> "[19] We are inclined to agree with the position taken by learned counsel for the chargee Bank. In this case, it is an undisputed fact that the property could not be transferred and registered to the 3rd defendant due to the private caveat entered by the daughter of the chargor about two months prior to the 3rd defendant having paid the full purchase price. Although a certificate of sale was issued to the 3rd defendant by the court, the sale could not be completed. There was a change of circumstances. Since the certificate of sale could not be registered due to the existence of the caveat and would never be capable of being registered until the end, the title or interest of the property still remained with the chargor. **Thus the 3rd defendant could not become the registered proprietor of the property not because the chargee bank had breached the terms of the judicial contract, but because the order for sale was set aside some nine years later**. Arguably, there was no breach of contract caused by either party (chargee bank and 3rd defendant bidder) to the condition of sale. **In this regard we agree with the respondent that since the order for sale**

> **was set aside, the judicial contract dated 12 September 1990 became null and void, ie, no contract was struck between the respondent and the 3rd defendant, and the 3rd defendant had been put back in his original position, which means his position before the judicial contract took place**.
>
> "[20] It is our judgment that since there was no breach of contract on the part of the chargee bank, the issue of monetary compensation as claimed by the 3rd Defendant does not arise. As stated earlier, the order for sale was declared nine years later to be void by the High Court and affirmed by the Court of Appeal on the ground of noncompliance of the provisions of NLC and O 83 of the Rules of the High Court by the chargee bank. **As rightly pointed out by learned counsel for the respondent, when the order for sale was declared void all that followed in its wake was equally void**."
>
> [Emphasis Added]

[73] In *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 1 MLRA 183 the court in commenting on an invalid judgment said at p 187:

> "... Since the judgment under s 66 was invalid, it followed that the order of sale of the land to satisfy the said judgment must equally fall to the ground, apart from being in violation of the violation imposed by s 13 of the Enactment."

[74] In *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 2 MLRA 432, the issue was dealt with more pointedly when this court in answering leave question 1 that was posed for the court's determination held as follows:

> "[44] Accordingly, in relation to leave question 1, which should read as "What was the effect of the judgment in default, which set aside the (order of distribution of) the estate of the deceased, to the transfers (by the 1st to 4th plaintiffs) to the 5th and 6th plaintiffs?, **we would answer that the defeasible title of the 1st to 4th plaintiffs was set aside by the default judgment, and that on the instant facts, the defeasible title of the 5th and 6th plaintiffs was swept aside along with that of the 1st to 4th plaintiffs**."
>
> [Emphasis Added]

[75] By parity of reasoning, the defeasible title of Lim Moy was set aside by the setting aside order and the defeasible title of Paragon which was acquired from Lim Moy's defeasible title was swept aside along with that of Lim Moy. There was therefore no title that Paragon could pass to the appellant.

[76] Does the *nemo dat* rule apply to the factual matrix of the present case? For reasons that I have given, my view is that it does because as I said both Lim Moy and Paragon had no title to pass to the appellant after the JID was set aside and in any event after the OS was dismissed and the respondents' claim against Chia Moy and Paragon established by their failure to enter appearance. It is as if Lim Moy's and Paragon's names never appeared in the register documents of title as proprietors of the land.

[77] Even if the *nemo dat* rule does not apply and that Paragon could pass the void and defeasible title to the appellant, the appellant was still caught by s 340(3) of the Land Code which in some way is an exception to the common law rule as it recognises and validates the transfer of a void and defeasible title provided it is acquired in good faith and for valuable consideration by the subsequent purchaser, meaning to say acquired without any element of fraud, deceit or dishonesty: see *Datuk Jagindar Singh & Ors v. Tara Rajaratnam* [1983] 1 MLRA 391. Unlike s 340(2) which vitiates the title irrespective of whether it was acquired in good faith or otherwise, s 340(3) confers on the title the shield of indefeasibility if it was acquired in good faith and for valuable consideration.

[78] In the present case, it must be remembered that by operation of s 89 the appellant's title to the land was already vested in it upon registration on 5 August 2015. In fact, that is the position taken by the appellant in the present appeal. Therefore, the question is not whether the previous proprietor had title to pass to the appellant, but whether the appellant as the "subsequent purchaser" (as claimed by the appellant) had acquired the title in good faith and for valuable consideration.

[79] What makes title to land indefeasible under s 340(3) is not registration of the title but the *bona fide* of the purchase. As to why this is so, it is because the title that is transferred to the subsequent purchaser under s 340(3) is a title that has become defeasible by reason of any of the circumstances specified in s 340(2), one of which is fraud. The only way to restore the indefeasibility of the title is for the subsequent purchaser to purchase the land in good faith and for valuable consideration under s 340(3) and not by fraud, deceit or dishonesty. The title would otherwise remain defeasible and liable to be set aside in the hands of the subsequent purchaser.

[80] It is therefore wrong to say that indefeasibility of title under s 340(3) arises solely by registration. The four cases cited by the appellant, namely *PJTV Denson (M) Sdn Bhd (supra)*; *Ong Chat Pang & Anor v. Valliapa Chettiar* [1971] 1 MLRA 828; *Teh Bee v. K Maruthamuthu* [1977] 1 MLRA 110; and *Bresknar v. Wall* [1972] ALJR 68 do not support such proposition as they are not compatible with the facts of the present case. In any case they are not authorities on the interplay between subsections (1), (2) and (3) of s 340.

[81] The appellant was right however to say that the Torrens system allows the prospective purchaser to rely on the register document of title to conclude that the person whose name appears in the register document of title as proprietor has good and indefeasible title to the land. But he does so at his own peril because under s 340(3) the title is defeasible and liable to be set aside in his hands as the subsequent purchaser unless he purchases the land in good faith and for valuable consideration.

[82] In the present case, the appellant's title was clearly a title that had become defeasible under s 340(2) as it was the subject of a fraud by Chia Moy. The latent defeasibility of the title would only be clothed with the shield of

indefeasibility by s 340(3) if the appellant had purchased the land in good faith and for valuable consideration.

[83] That brings me to leave questions (1), (2) and (3). The contention by the appellant was that its title to the land was indefeasible as it was acquired in good faith and for valuable consideration, on account of the following factors:

(1) All that the law required it to do was to conduct an official land search, which it had done and which disclosed that Paragon was the registered proprietor of the land and that it was free from encumbrances;

(2) Its solicitors had taken the precaution of enquiring from Paragon's solicitors as to when and how their client acquired the land as well as requesting for a copy of the sale and purchase agreement by which Paragon acquired the land;

(3) It had paid the full purchase price to Paragon;

[84] It was submitted that the Court of Appeal fell into error in failing to consider and to give effect to s 89 and that the imposition of an "added duty" on a subsequent purchaser to carry out due diligence or proper investigation beyond the title was wholly inconsistent with the "conclusive evidence" declaration by s 89. The basis for the contention was that under the Torrens system the register is everything and no investigation beyond it is needed.

[85] Obviously the suggestion is that since registration under s 89 vested title in the appellant, the title was not only conclusive evidence of ownership of the land by the appellant but was also indefeasible under s 340(3) and for that reason there was no requirement for the appellant to go behind the register document of title to ascertain its validity. It was submitted that the appellant had done all that the law required of it to do, which was to conduct a land search to ensure that Paragon was the registered proprietor of the land and that the land was free from encumbrances.

[86] In support of the argument, we were referred to the decision of this court in *Pushpaleela R Selvarajah & Anor v. Rajamani Meyappa Chettiar & Other Appeals* [2019] 2 MLRA 591 where Azahar Mohamed FCJ (later CJM) delivering the unanimous decision of the remaining three members of the five member panel (Md Raus Sharif CJ and Zulkefli Ahmad Makinudin PCA had by then retired) explained that being "conclusive evidence of ownership", the register document of title is "everything" under the Torrens system. This is what the learned judge said:

> "[123] Now, once the scheme of the provisions of s 89 is seen, it is apparent that **since the register document of title is conclusive evidence of ownership** and in the present instance since the register document of title bears the name of the 1st defendant as the registered proprietor, it follows and becomes conclusive evidence that the 1st defendant is the registered proprietor unless

defeasible pursuant to s 340 of the NLC. **What appears on the registered document of title is conclusive as the register is everything under the Torrens System**. In *Gibbs v. Messr & Co* [1891] AC 248 Lord Watson said:

> The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. The end is accomplished by providing that everyone who purchases, **in *bona fide* and for value**, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of the author's title."

[Emphasis Added]

[87] The emphasis was on ownership of the title upon registration under s 89 and not on indefeasibility of the title, which the court ruled to be conclusive evidence that the subsequent purchaser, Eng Beng Development Sdn Bhd, was the "registered proprietor" of the land "unless defeasible pursuant to s 340 of the NLC". The learned judge went on to say at para [124]:

> "[124] In the case of *Teh Bee v. K Maruthamuthu* [1977] 1 MLRA 110, it was held that 'the fact that the register document of title was in the name of the appellant was conclusive evidence that the title to the land was vested in the appellant'. **The concept of indefeasibility of title under s 89 of the NLC applies to the person whose name currently appears as the proprietor on the register document of title and not to a former registered proprietor (see *Yap Ham Seow*)**."

[Emphasis Added]

[88] The words highlighted in bold in the above passage appear to support the appellant's contention that it acquired indefeasibility of title under s 340(3) solely by registration under s 89. As to the question whether the subsequent purchaser's title was *void ab initio*, it was the court's finding in *Pushpaleela* that it was not so because the land office was duped into registering the title and that the title would only be *void ab initio* if the land registry, in blatant breach of its duty under the Land Code, had wrongly registered the land in the register document of title and issued the replacement title in the name of the third party.

[89] The second part of the reasoning is in line with the decisions of the High Court in *Uptown Properties Sdn Bhd v. Pentadbir Tanah Wilayah Persekutuan & Ors* [2012] 2 MLRH 270; *Shayo (M) Sdn Bhd v. Nurlieda Sidek & Ors* [2012] MLRHU 1208; and *Overseas Realty Sdn Bhd v. Wong Yau Choy & Ors; Tetuan Tay Ibrahim & Partners (Third Party)* [2014] 4 MLRH 683. The land office in *Pushpaleela* was however not totally cleared of blame as it was ordered to pay damages to the defrauded landowner to be assessed by the trial judge.

[90] Applied to the facts of the present case, what the decision in *Pushpaleela* means is that since the Land Office was duped by Chia Moy into cancelling the deceased's title and issuing a replacement title in Lim Moy's name, the title that was fraudulently registered in Lim Moy's name was not *void ab initio* and would only have that effect if the Land Office, in blatant breach of its duty under the Land Code, had wrongly issued the replacement title in Lim Moy's name.

[91] With the greatest of respect I have difficulty accepting the proposition as the focus was on the fault of the land office instead of the fraudulent act of the fraudster or the dishonesty of the subsequent purchaser in purchasing the land. It clashes with s 340(3) where the title becomes defeasible not because of any blatant breach of duty by the land office but because it is vitiated by any of the circumstances specified in s 340(2).

[92] The judgment of Azahar Mohamed FCJ in *Pushpaleela* was supported by Richard Malanjum CJ (Sabah and Sarawak) (later CJ) who held in a separate judgment that under the Torrens system, the register is conclusive evidence of the "description of the land" and that a third party conducting an enquiry into the land need not go beyond the register to ensure that the land he or she is about to purchase is not fraught with encumbrances, citing *Gibbs v. Messer & Co* [1891] AC 248 which Azahar Mohamed FCJ also cited in his judgment.

[93] It is rather unfortunate that due to the retirements of Md Raus Sharif CJ and Zulkefli Ahmad Makinudin PCA before the judgment was delivered, we have no way of knowing which way they would have decided and the reasons given if they had not gone on retirement, not that it would have made any difference to the judgment of the court as the remaining three members of the panel constituted the majority.

[94] As for myself, my respectful understanding of the explanation given by Azahar Mohamed FCJ in paras [123] and [124] of the passages quoted in paras [86] and [87] above is that it was merely to reaffirm the legal position under s 89 that registration is conclusive evidence of ownership "unless defeasible pursuant to s 340 of the NLC". The words in parenthesis qualify the explanation and nothing more should be read into it.

[95] Dato' Cyrus Das for the appellant acknowledged that this court in *Pushpaleela* relied heavily on s 89 in coming to its decision. To recapitulate, the section provides that title to the land is for the time being "vested" in the person or body whose name appears in the register document of title as proprietor and such entry in the register document of title is "conclusive evidence" of that fact or, as Richard Malanjum CJ (Sabah and Sarawak) put it, rightly in my view, "conclusive evidence of the description of the land". This begs the question whether s 89 vests both ownership of title and indefeasibility of title upon registration.

[96] The word "vested" used in s 89 is not defined by the Land Code but *Black's Law Dictionary* (Deluxe Ninth Edition) defines the verb "vest" to mean: "1.To confer ownership (of property) upon a person". Therefore, to vest title in the person or body whose name appears in the register document of title as proprietor is to confer ownership of title upon that person or body. But to confer ownership of title upon that person or body is not to confer indefeasibility of title upon them. Indefeasibility of title is conferred by s 340(1) and not by s 89, which deals with registration of title.

[97] Section 340(1) however caveats that the indefeasibility of the title registered under s 89 is subject to the provisions of subsections (2) and (3). What this means is that the title loses its indefeasibility and becomes defeasible if it is vitiated by any of the circumstances specified in subsection (2) but the indefeasibility of the title will be restored under subsection (3) if the land is purchased in good faith and for valuable consideration by a subsequent purchaser but not otherwise.

[98] I am mindful of what the learned authors of *Land Law in Malaysia Cases and Commentary (supra)* said at p 183 that the Torrens system is not a system of registration or recordation of title which does not vest or divest any title or interest. In *Frazer v. Walker* (*supra* at para [3]), Lord Wilberforce said at p 580:

> "It is in fact the registration and not it's antecedents which vests and divests title."

[99] The Torrens system is indeed a system that vests or divests title or interest in land except that the vesting of title under s 89 must not be conflated with the indefeasibility of title under s 340. What is vested and divested by registration under s 89 is the title and not indefeasibility of the title. The two are in large part separate and should remain so.

[100] There is a good reason why s 89 provides for "conclusiveness" of title, and that is to give notice to the whole world that the title to the land belongs to and is owned by the person or body whose name appears in the register document of title as proprietor and by no others. This is to save the prospective purchaser from the trouble and expense of going behind the register to investigate who the owner of the land is and the conditions and restrictions the land is subject to just by looking at the register document of title. This is what this court meant when it said in *Bayangan Sepadu Sdn Bhd v. Jabatan Pengairan Dan Saliran Negeri Selangor & Ors* [2022] 2 MLRA 1 that the Torrens system "dispenses with the need to look beyond the register" when referring to the curtain and mirror principles.

[101] But where there is a challenge to the title acquired by a subsequent purchaser under s 340(3), the indefeasibility of the title must in all cases be decided based on the facts and circumstances of each case and not by registration alone as the mirror and curtain principles have no role in determining indefeasibility of title. The vesting of title under s 89 is only conclusive evidence of ownership of the title. It is not conclusive evidence

of indefeasibility of the title. There is nothing in s 89 that gives rise to such interpretation. Paragraph (a) merely provides for vesting of title and para (b) for matters specified therein, none of which has anything to do with indefeasibility of title. Therefore, in a dispute involving title acquired by a subsequent purchaser, it is s 340(3) and not s 89 that determines indefeasibility of the title.

[102] In determining indefeasibility of title under s 340(3), it is crucially important not to commingle ownership of title with indefeasibility of title. To "own" property is to have legal title to the property (*Black's Law Dictionary (supra)*) whereas to have indefeasibility of title to the property is to be accorded with the shield of immunity from attack by adverse claim to the title. They are two different kettles of fish altogether.

[103] The distinction is important as views have been expressed giving the impression that under the Torrens system the register is everything and no investigation beyond it is needed to establish good faith and for valuable consideration for the reason that registration vests both ownership and indefeasibility of title. That is a total misconception because indefeasibility of title under s 340(3) is only acquired upon proof that the land had been purchased in good faith and for valuable consideration and not by "conclusive evidence" that the title is owned by the person or body whose name appears in the register document of title under s 89.

[104] That part of the judgment of Lord Watson in *Messer & Co* relied on by Azahar Mohamed FCJ in *Pushpaleela* which I highlighted in bold in paragraph [86] above makes the position clear that registration alone does not confer indefeasibility of title under s 340(3). What Lord Watson meant to say in his judgment was that purchasers who relied solely and entirely on the register document of title in dealing with the registered owners would acquire indefeasibility of title despite the "infirmity" of the title provided they had purchased the land in good faith and for valuable consideration. That according to the learned judge was how the object of saving purchasers from the trouble and expense of going behind the register was accomplished. The learned judge did not say that indefeasibility of title is acquired by mere registration of the title. What he said was, as a compromise for saving the purchasers from the trouble and expense of going behind the title, they must acquire the land in good faith and for valuable consideration.

[105] That is the reason why where the proviso to s 340(3) of the Land Code is invoked as a defence by the subsequent purchaser in a challenge to his title, he must prove that he had purchased the land in good faith and for valuable consideration although by operation of s 89 the registration of the title in his name is "conclusive evidence" that he is the owner of the land. For what it seeks to accomplish, s 340(3) of the Land Code serves as a safe haven for *bona fide* purchasers for valuable consideration but an albatross around the neck of dishonest subsequent purchasers.

[106] In proving good faith and for valuable consideration under s 340(3), obviously it cannot be done just by looking at the register document of title as suggested by the appellant. That of course would be sufficient for the purpose of ascertaining who the registered owner of the land is as the register document of title accurately reflects (mirrors) all vital details with regard to the land's registered owner and the conditions, restrictions *et cetera* that the land is subject to. It must be appreciated that the intention behind the proviso to s 340(3) is to conciliate and strike a balance between the rights and interests of the innocent subsequent purchaser and the rights and interests of the unfortunate original land owner who had been dispossessed of his land by fraud.

[107] To reiterate, where it involves the purchase of land by a subsequent purchaser, it is only where the title to the land had been acquired in good faith and for valuable consideration that the shield of indefeasibility is accorded to the title. Otherwise the default position under s 340(3) remains that the title is defeasible and liable to be set aside in the hands of the subsequent purchaser.

[108] The quantum of proof required of the subsequent purchaser to discharge his burden of proving good faith and for valuable consideration in the purchase of the land is proof on the balance of probabilities (as opposed to the heavier burden of proving a case beyond reasonable doubt). Lord Denning in the oft-cited quote in *Miller v. Minister of Pensions* [1947] 2 All ER 372 explained the requirement in the following terms:

> "If the evidence is such that the tribunal can say 'we think it is more probable than not' the burden is discharged **but if the probabilities are equal, it is not**."
>
> [Emphasis Added]

[109] Therefore, in order to succeed in discharging the burden of proof under s 340(3), the subsequent purchaser must tip the scales in his favour by at least 51%. As for the nature of proof that is required to establish good faith and for valuable consideration, no hard and fast rule can be laid down but it is certainly not limited to those factors that the appellant set out in leave question (3). It must depend on the facts and circumstances of each case. The fact that the appellant in the present case had paid RM17 million for the land is neither here nor there as valuable consideration is only one of two requirements for acquiring indefeasibility of title under s 340(3), the other being the *bona fide* of the purchase. It is here with due respect that learned counsel was not entirely correct to say that the "conclusive evidence" declaration by s 89 dispenses with the need to carry out due diligence or proper investigation beyond the register document of title.

[110] The proposition is untenable and at odds with the doctrine of deferred indefeasibility as it suggests that registration is all that is required for the subsequent purchaser to acquire indefeasibility of title under s 340(3). The flaw in the argument is that it ignores the fact that the title is a title that is tainted

by reason of any of the circumstances specified in s 340(2) and can only be conferred with indefeasibility if it had been acquired in good faith and for valuable consideration by the subsequent purchaser.

[111] Section 340(3) read in conjunction with the proviso to the section makes it clear that such defeasible title is liable to be set aside at the instance of the original owner, which is well-nigh impossible if registration alone confers indefeasibility of title to the subsequent purchaser. That will effectively shut all doors to any claim for recovery by the original owner who had been defrauded of his land, which cannot be what s 89 has in contemplation.

[112] Other than the issue of the *bona fide* of the purchase which leave question (1) is concerned with, the question also speaks of the respondents' failure to plead fraud. As pointed out by learned counsel for the respondents, the question is phrased in such a manner as to convey the message that there was an "absence of any allegation of fraud or collusion" by the respondents. His response to the assertion was to cite *Letchumanan Chettiar Alagappan @ L Allagapan & Anor v. Secure Plantation Sdn Bhd* [2017] 3 MLRA 501 where this court made the following observations:

> "[18]... Fraud in the contemplation of a Civil Court of Justice, may be said to include properly all acts, omissions, and concealments which involve a breach of a legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another (Story, Eq Jur 187). All surprise, trick, cunning, disassembling and other unfair way that is used to cheat any one is considered fraud (Finch 439). Fraud in all cases implies a wilful act on the part of any one, whereby another is sought to be deprived, by illegal or inequitable means, of what he is entitled to (*Green v. Nixon* [1857] 23 Beav 530 at p 535) (*Ker on Fraud and Mistake* (7th Ed) at p 1). 'The concept of fraud is notoriously difficult to define' (*Cavell USA Inc and another v. Seaton Insurance Company and another* [2009] EWCA Civ 1363 per Longmore LJ, Mummery and Toulson LJJ in agreement). We would not hazard to define 'fraud'. We would just say that 'fraud' is a generic term which also covers all manner of cheat, deceit and dishonesty. Given its wide meaning, 'an action in fraud will usually include a number of distinct causes of action... 'and 'claims to trace assets in equity or, perhaps, at common law' (*Bullen & Leake & Jacobs Precedents and pleadings* (18th Ed Vol 2) at 57-01).
>
> [30] **The time has surely come to make a stand. We entirely agree with the reasoning in *Davy v. Garrett*, *Armitage v. Nurse and others*, and Three Rivers that it is not always necessary to plead the word 'fraud' if the facts which make the conduct fraudulent are pleaded**."
>
> [Emphasis Added]

[113] I agree with learned counsel for the respondents that although the word "fraud" was not used and not pleaded against the appellant (it was pleaded against Chia Moy who did not defend the suit), all particulars of the fraudulent and deceitful acts were properly pleaded and disclosed in the respondents' Statement of Claim in their suit against Chia Moy, Paragon and the appellant.

The narrative in para 8 to 28 of the Statement of Claim carried the particulars of how the respondents discovered the unlawful change of address, the forgery of the deceased's signature, how unbeknownst to them the land was transferred to a third party, and then there was the intentional omission to serve the OS on the deceased which resulted in the JID being entered against the deceased and which Chia Moy fraudulently used to obtain Lim Moy's replacement title, which was then used to transfer the land to Paragon and finally to the appellant. There can be no doubt whatsoever that the designed object of all these acts and omissions, as pleaded, was to unlawfully deprive the deceased of her land or to cheat her of her existing right over the land (*Waimiha Sawmilling Co Ltd (supra)*).

[114] In any event, there was no necessity for the respondents to plead fraud against the appellant as they were not alleging fraud against it. Their allegation of fraud was against Chia Moy which on the evidence had been proved, which rendered the appellant's title defeasible under s 340(2) and liable to be set aside under s 340(3). Neither was it the respondents' duty as attorneys of the deceased to prove in the negative that the appellant had not purchased the land in good faith and for valuable consideration. It was for the appellant as the subsequent purchaser to prove in the affirmative that it had purchased the land in good faith and for valuable consideration: see *Tan Ying Hong v. Tan Sian San & Ors* [2010] 1 MLRA 1; *Ong Chat Pang (supra)*; *Kheng Chwee Lian v. Wong Tak Thong* [1983] 1 MLRA 502; [1983] 1 MLRA 66; *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 1 MLRA 657.

[115] After all it was the appellant's pleaded defence that it had purchased the land in good faith and for valuable consideration, which means it was seeking to benefit from the proviso to s 340(3). Therefore, by virtue of s 101 of the Evidence Act 1950 the onus was on the appellant to prove that it had purchased the land in good faith and for valuable consideration. "Good faith" is ordinarily used to denote "the absence of fraud, deceit or dishonesty" (*Ong Ban Chai & Ors v. Seah Siang Mong* [1998] 1 MLRA 393).

[116] There was no burden on the respondents to prove in the reverse that the appellant had purchased the land by fraud, deceit or dishonesty. As against Chia Moy, their burden was to prove that he had fraudulently deprived their late mother of her land. As against Paragon and the appellant, their burden was to show that the titles held by these two entities had become defeasible by reason of any of the circumstances specified in s 340(2). They lost the case in the High Court not because they failed to discharge their burden of proof but because the learned trial judge accepted the appellant's defence that it had purchased the land in good faith and for valuable consideration.

[117] As alluded to earlier, the Court of Appeal unanimously decided otherwise by finding that the appellant failed to prove its defence of *bona fide* purchaser for value. On the totality of the evidence and the probabilities of the case, I am not prepared to say with conviction that the three learned judges of the Court of Appeal were plainly wrong in coming to that conclusion. It was not a finding that no reasonable tribunal properly appraised of the facts and the law

would have arrived at. The principle is that the court is only concerned with the probabilities of the case and not with fanciful possibilities to deflect the course of justice. Nor must the court allow itself to be distracted by trivialities and in the process missing the wood for the trees, ie too focused on the micro details that it fails to see the larger picture.

[118] The haste in which the transfers were carried out from the time the title was registered in Lim Moy's name to the time the land was sold by Lim Moy to Paragon in cash for RM15 million which the appellant had every reason to suspect Paragon had no financial capacity to pay the RM15 million cash to Lim Moy is compelling evidence that there was bad faith on the part of all those involved in the fraudulent scheme to deprive the deceased of her land. Despite the substantial price it was paying for the land, the appellant did not even bother to obtain a valuation report to ascertain the market value of the land before proceeding with the purchase.

[119] It is obvious that the appellant had taken advantage of the "conclusiveness" of title under s 89 and using it as a convenient excuse to turn a blind eye on the suspicious circumstances surrounding the status of the land. In *T Sivam Tharamalingam v. Public Bank Berhad* [2018] 4 MLRA 583, this court held the view that the element of carelessness and negligence negates good faith. In *Liputan Simfoni Sdn Bhd v. Pembangunan Orkid Desa Sdn Bhd* [2018] MLRAU 484, another decision of this court, it was decided that in order to discharge the burden of showing that it is a purchaser in good faith and for valuable consideration, the purchaser must not only show the absence of fraud, deceit or dishonesty but also that it had taken the ordinary precautions that a reasonably prudent purchaser would have taken in the circumstances.

[120] It was further held that the purchaser's conduct until registration is material for the purpose of ascertaining his *bona fides* and that cognisance must be taken of his acts and omissions over a period prior to the entry into the sale and purchase transaction of the land, up to the point in time when the purchaser is registered as proprietor of the title.

[121] This is not to burden the subsequent purchaser with the trouble and expense of going behind the history of the title to satisfy himself of its validity. It is to give effect to the proviso to s 340(3) which requires the land to be purchased in good faith and for valuable consideration and not by fraud, deceit or dishonesty. This can only be done by providing proof of that fact and not by mere registration of the title under s 89.

[122] The case of *Pushpaleela (supra)* relied on by the appellant can be distinguished. In that case the subsequent purchaser, namely Eng Beng Development Sdn Bhd, was found by the High Court and affirmed by this court to have purchased the land in good faith and for valuable consideration. There is therefore no basis for this court in the present appeal to interfere with the finding of fact by the Court of Appeal that the appellant had not purchased the land in good faith and for valuable consideration.

[123] I shall now deal with the other issue raised by the parties, which is whether the appellant was an immediate or subsequent purchaser of the land. This is equally important in determining whether the appellant's title to the land was indefeasible by virtue of the proviso to s 340(3), which is reproduced again below for ease of reference:

> "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."

[124] There is sufficient authority pre and post *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2000] 1 MLRA 869, in particular the decision of this court in *Tan Ying Hong (supra)*, to say that the proviso provides a shield of indefeasibility to subsequent purchasers and not to immediate purchasers, in consonance with the principle of deferred indefeasibility inherent in the Torrens system which ensures that the land registry accurately reflects all vital details with regard to the land's registered owner.

[125] As mentioned earlier, the protection given by the proviso does not extend to a registered proprietor whose immediate title has been rendered defeasible by one or more of the vitiating elements specified in s 340(2). Lim Moy, if at all this shady character existed, falls under this category of proprietors as her title to the land was acquired by fraud, and forgery affects the immediate purchaser even if he or she is an innocent purchaser for value: see *Chiew Lip Seng v. Perwira Habib Bank Malaysia Bhd* [1998] 3 MLRH 722.

[126] In determining whether the purchaser is an immediate or a subsequent purchaser for purposes of the proviso to s 340(3), what needs to be determined first of all is whether there was any purchase of the land at all and if so by whom. Simple logic dictates that there must first be a purchase of the land before one speaks of a purchase by an immediate or a subsequent purchaser.

[127] An immediate purchaser is the first person or body to purchase the land since its wrongful transfer by means of any of the circumstances specified in s 340(2), and the word "purchaser" is defined by s 5 of the Land Code as "a person or body who in good faith and for valuable consideration acquires title to, or interest in land".

[128] Therefore, in order for the purchase to be a valid purchase of the land, it must be a purchase that is made in good faith and for valuable consideration for otherwise the purchaser is not even a purchaser by definition. A fraudulent purchase by a fraudster can never be a purchase in good faith for value and whether or not the purchase is made in good faith and for valuable consideration is primarily a question of fact.

[129] The case for the appellant is that it was a subsequent purchaser and not an immediate purchaser as it purchased the land from Paragon whom it contended was the immediate purchaser. The respondents on the other hand contended

that the appellant was an immediate purchaser and not a subsequent purchaser and therefore its title is defeasible and liable to be set aside under s 340(2).

[130] Was there purchase of the land by Paragon to make it an immediate purchaser and the appellant the subsequent purchaser? In the course of argument, I enquired from learned counsel for the appellant if there is evidence of purchase of the land by Paragon and he referred to the Paragon Agreement as evidence that the land was purchased by Paragon from Lim Moy for a cash price of RM15 million.

[131] Having regard to Chia Moy's role in the fraudulent registration of the land in Lim Moy's name, his role in the transfer of the land from Lim Moy to Paragon, and his role in the execution of the Paragon Agreement, it is clear that the purported purchase of the land by Paragon from Lim Moy was not a purchase that was made in good faith and for valuable consideration. It could not possibly have been made in good faith as Chia Moy knew when he entered into the agreement to sell the land to Paragon that he was dealing with property that was obtained by fraud as he himself was the fraudster. There was therefore no purchase of the land by Paragon, the so-called immediate purchaser.

[132] In all probability, Lim Moy either knowingly or unknowingly had been made use of by Chia Moy to carry out his mischievous design to sidestep s 340(2) and to take advantage of the proviso to s 340(3). Chia Moy knew that when Paragon passed the title to a "subsequent purchaser", the subsequent purchaser would acquire indefeasibility of title to the land. It does appear that Chia Moy had some knowledge of the law on how s 340(3) works which fraudsters like him are taking advantage of to the grave detriment of unsuspecting landowners.

[133] As for the element of valuable consideration which must be present in order to constitute a valid purchase of the land, there is no proof that the purchase price of RM15 million had been paid by Paragon to Lim Moy. The truth is Paragon did not have the RM15 million cash to pay for the land as stipulated in the Paragon Agreement. Clearly therefore, the purported purchase of the land by Paragon was not only lacking in good faith but also lacking in valuable consideration. Both elements must be present to constitute a valid purchase of the land.

[134] All these shenanigans unwaveringly point to the fact that Paragon was not the purchaser of the land within the meaning of s 5 of the Land Code. The only reasonable inference that will account for all the known facts is that it was the appellant who was the immediate purchaser of the land. Taking Paragon out of the picture, there was no other person or body who had purchased the land other than the appellant, in whose name the title to the land was for the time being vested, and it is an undisputed fact that it paid Paragon RM17 million for the land.

[135] It is true as pointed out by learned counsel for the appellant that there was a concurrent finding of fact by the courts below that the appellant was a subsequent purchaser of the land, but where the finding is plainly wrong, this court is seized with jurisdiction to reach a different finding. It has never been the law that where a wrong finding of fact was made by the court appealed from, the whole of the decision is liable to be set aside, unless the error is so fundamental and going to the root of the matter that it vitiates the whole decision.

[136] In the present case the error by the courts below was in fact an error that was favourable to the appellant in that both courts failed to direct their minds to the statutory definition of "purchaser" given by s 5 of the Land Code. If they had not fallen into this error, they would have found that the appellant was not the subsequent purchaser of the land as Paragon from whom it purportedly purchased the land was not the immediate purchaser. It was an error that could not have the effect of vitiating the Court of Appeal's finding of fact that the appellant failed to prove its defence of good faith and for valuable consideration.

[137] Since it was the appellant and not Paragon who was the immediate purchaser of the land, the appellant's title to the land was consequently defeasible and liable to be set aside under s 340(2) irrespective of whether it had purchased the land in good faith and for valuable consideration or otherwise. Even assuming for a moment that this is not a case under s 340(2), the appellant is still caught by s 340(3) as the purchase of the land was not made in good faith and for valuable consideration as correctly found by the Court of Appeal. The appellant's title was therefore defeasible as it was not protected by the shield of indefeasibility by the proviso to s 340(3).

[138] Paragon was nothing more than a vehicle of fraud used by Chia Moy to circumvent s 340(3) (a) and (b) of the Land Code which rendered the title defeasible and liable to be set aside. It comes as no surprise that he chose not to oppose the application by the respondents to set aside the JID that he fraudulently obtained, not to pursue the OS that he himself filed against the respondents, not to enter appearance in the suit filed by the respondents against him, Paragon and the appellant, and not to oppose the appeal by the respondents to the Court of Appeal against the decision of the High Court which favoured him, Paragon and the appellant. Indeed, he had everything to hide. Further, if it is true that Lim Moy was the lawful and beneficial owner of the land, no explanation was proffered as to why there was the need for him to act as her attorney in all the transactions involving the land.

[139] There can be no doubt that Chia Moy was the brain behind the plot to deprive the deceased of her land. This court in *He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal* [2020] 5 MLRA 98 *inter alia* held that any dealing with a rogue will necessarily vitiate the transaction rendering the title defeasible although it is duly registered.

[140] Having regard to the totality of the evidence, the surrounding circumstances and the probabilities of the case, it will be naive to think that the appellant did not have the slightest suspicion that the land it purportedly purchased from Paragon was the subject of a fraud or impropriety. Good faith demands more from the appellant than merely to conduct a land search and enquiring from Paragon's solicitors when and how they acquired the land and requesting for a copy of the Paragon Agreement.

[141] To allow a subsequent purchaser in circumstances such as in the present case to rely solely on the register document of title to establish good faith is to defeat the object behind the proviso to s 340(3) rather than to put its object into effect. The series of events leading to the transfer of the land to the appellant within such short period of time showed a pattern which cannot possibly be pure coincidence. The designed object was to cheat the deceased of her existing right to the land.

[142] Given that the legal burden was on the appellant to prove on the balance of probabilities that it had purchased the land in good faith and for valuable consideration and not by fraud, deceit or dishonesty, its failure to call the directors and shareholders of Paragon and the solicitor who handled the sale and purchase agreement had left a gaping hole in its defence. In the absence of their evidence, it was not possible for the court to come to a finding that it was more probable than not that the appellant had purchased the land in good faith and for valuable consideration by relying solely on the evidence of the sole witness it called, namely Dato' Kuan Ah Hock (DW1). In cross examination DW1 washed his hands clean of any dishonesty in the purchase of the land by pushing all responsibility to his lawyer, one Mr Winston who handled the transaction, but the lawyer was not called to give evidence.

[143] It needs to be said again in concluding that the Paragon Agreement was a scam conjured up by Chia Moy acting alone or in collusion with others to pave the way for a purchaser like the appellant to purchase the land as "subsequent purchaser" with only one objective in mind, and that was to cleanse the title of the stain that had rendered it defeasible under s 340(2) of the Land Code. Once registered in the so-called subsequent purchaser's name, Chia Moy knew or so he thought that the tainted title would be wiped clean as a whistle, thus clearing the path for him to laugh his way to the bank.

[144] This, it appears, has become the standard operating procedure or *Modus operandi* by fraudsters to deprive unsuspecting land owners of their land as can be seen from the numerous cases that come before this court. It has made a total mockery of the law.

[145] For all the reasons given, my answer to leave question (4) is in the affirmative. As for questions (1), (2) and (3), I do not find any need to answer them as the answers to the questions would depend on the peculiar facts and circumstances of each case. In the upshot, the appeal is dismissed with costs. The decision of the Court of Appeal is affirmed.

[146] My learned brother Justice Abdul Karim Abdul Jalil FCJ and my learned sister Justice Hanipah Farikullah FCJ have seen this judgment in draft and have agreed with it. They have also agreed that this judgment shall be the majority judgment of the court. My learned sister Justice Nallini Pathmanathan FCJ and my learned brother Justice Harmindar Singh Dhaliwal FCJ are dissenting.

Nallini Pathmanathan FCJ (Dissenting):

Introduction

[147] This appeal raises unique issues in the evolving case-law relating to the interpretation of the National Land Code which encapsulates the Torrens system of land law. The issues which emerge for our consideration are as follows:

(a) Whether the setting aside of a judgment in default, in relation to title to land which was in effect for a period of three years, has the effect of automatically annulling or invalidating subsequently acquired titles in land registered under the National Land Code, during the pendency of the judgment in default?;

(b) Put another way, whether the setting aside of a judgment in default renders all transactions effected during the pendency of that judgment, prior to it being set aside, null and *void ab initio*?;

(c) Whether, in the absence of any plea of fraud or particulars of fraud, is the submission of fraud raised in this Court as the primary basis for the plaintiffs' claim tenable in light of the manner in which the claim was dealt with in the Courts below as well as in the absence of either an express plea or particulars of fraud or conclusive evidence to that effect?; and

(d) The scope of the duty imposed upon a subsequent purchaser by virtue of the words "in good faith and for valuable consideration" in the proviso to s 340(3) of the National Land Code.

The Salient Facts

[148] The facts relating to this appeal as set out below are all contained in, and taken from the appeal records, more particularly the core bundles. I am constrained to set out the full facts, dating back some years, in order to ascertain the basis for the claim of 'fraud' relied upon by the respondents, notwithstanding any absence of a plea to that effect, to ascertain whether the factual matrix was sufficient to give rise to an inference or basis for the submission of fraud relied upon by them. The issue of fraud was raised for the first time in this Court.

[149] In this context, it is a fundamental aspect of adjudication to read the cause papers and the documentary evidence fully in order to comprehend the

factual basis for a claim. A failure to do so or to give cognizance to relevant facts contained in the cause papers would render the filing of an appeal record nugatory. Oral submissions by counsel are complementary to the written submissions, and more importantly the appeal records. Counsel often do not go through the laborious process of setting out the entirety of the facts in their submissions, while the appeal records bear out the full facts and documentary evidence underlying the dispute to be determined by the Court. Significantly, the documents in the appeal records comprise a record of the documents relied upon by the parties at the first instance as well as on appeal.

[150] Accordingly, the chronology of events as set out below is borne out by the exhibits in various affidavits filed by both parties, namely the Appellant (who was the 3rd defendant in the High Court) and the Respondents (who were the plaintiffs in the High Court) and comprises a part of the appeal record available to the Court for reference. Neither the 1st nor 2nd defendant appeared in the proceedings below.

[151] A consideration of the documentary evidence in the cause papers as well as from the submissions of the parties discloses as follows:

1. The Loan Agreement between Wong Soo and Lim Moy

   (a) On or around 18 February 1975 an agreement for a loan of monies was entered into between one Wong Soo @ Wong Har, the lender ('Wong Soo') and one Lim Moy as the borrower ('Lim Moy') in the sum of RM RM30,000.00 (Ringgit Thirty thousand) to part-finance the purchase by Lim Moy of a property known as GM9410 (EMR 5267 at the time), Lot 2487, Mukim Batu, Kuala Lumpur ('the land');

   (b) At the time the registered owner of the land was one Yeap Bok Seng. He was selling it to the borrower, Lim Moy, for a total sum of RM55,000.00 (Ringgit Fifty-Five Thousand). Lim Moy paid RM25,000.00 (Ringgit Twenty-Five Thousand) in cash and borrowed the balance sum of RM30,000.00 (Ringgit Thirty Thousand) from Wong Soo;

   (c) It is pertinent that Wong Soo was not the "original owner" of the land. The land was collateral or security for the repayment of the loan given by her to Lim Moy. The terms of the loan agreement specifically provide that in consideration of the loan, the land would be registered in the name of Wong Soo "until and subject to the repayment of the said sum by the Borrower to the Lender either in installments or in one lump sum repayment" (see cl 2 of the Agreement dated 18 February 1975 between Wong Soo as Lender and Lim Moy as Borrower);

(d) Lim Moy, the borrower, assigned all her rights and interest in the said Land to Wong Soo until the repayment of the sum by herself to Wong Soo. It further provided that upon full repayment of the said sum by Lim Moy to Wong Soo, Wong Soo undertook and agreed to "immediately reassign and or to transfer the said land to the Borrower" ie to Lim Moy (see cl 4 of the abovesaid Agreement). Pursuant to this Agreement, a Form 14A was executed whereby Yeap, the registered owner of the land transferred it to Wong Soo. However from the records before us, there was no registration of the title in Wong Soo's name as of 19 February 1975. There are no records of the registered document of title as of that date reflecting Wong Soo as the registered owner. Registration of title in Wong Soo's name was only effected some nine years later in 1984. In any event what is clear is that, for the purposes of security for the loan, a Form 14A was executed and left in Wong Soo's possession, allowing for the transfer to her name in the event the loan was not repaid. In these circumstances it cannot be decisively determined that Wong Soo was the original registered owner of the land, if in fact the land was security for a loan to Lim Moy; and

(e) There is no evidence proffered by the plaintiffs in the Court below to show that the agreement is a fabrication save for bare averments to that effect. Even then, the plaintiffs plead an alternative, namely that if the loan agreement is accepted as being authentic by the Court, then Lim Moy was caught by limitation and therefore could not make any claim to the land.

2. The Evidence in Relation to the Repayment of the Loan

(a) Between 1976 and1981 there are payment vouchers evidencing repayment of a loan to one Mak Yet Chiew by Lim Moy for a sum in excess of RM30,000.00. Mak Yet Chiew is the husband of Wong Soo and the father of the plaintiffs. Lim Moy, through her attorney Chia Moy King, explained in her affidavit in support of the application to have the land transferred back to her name, that these were repayments in full for the loan;

(b) The Respondents, who were the plaintiffs in the Court below, and will be referred to as the plaintiffs, maintain that this is not true or valid, because Mak Yet Chiew is their father and not their mother, and the loan monies were repayable to their mother. Therefore they maintain in their pleadings, that there was no privity of contract between Lim Moy and Mak Yet Chiew. Alternatively, they plead limitation to the re-claim of the land;

(c) On a balance of probabilities, given that there is no evidence to prove either fabrication or forgery of the loan agreement or the receipts, the reasonable inference to be drawn from the documentary evidence, namely the loan agreement and the receipts issued by Wong Soo's husband, is that the monies were repaid;

(d) These facts are set out not for the purpose of adjudication on the merits of the competing claims by Wong Soo and Lim Moy. These facts are set out to show the background to the claim by Lim Moy in 2014 seeking a transfer of the land to her name. Given these background facts can such an application for re-transfer be conclusively determined to amount to fraud? The answer must be no;

(e) Further it serves to establish that the facts in the instant appeal do not comprise the regrettably not uncommon instance of an original registered owner of land, being deprived of title to land by reason of fraud and forgery. The usual *modus operandi* is the fraudulent obtaining of a duplicate issue copy of title from the Land Registry, which is then utilized to transfer the subject property to a third parties, while the registered documents of title remain with the original owner, often resident on that land;

(f) This is a case where the land was registered in Wong Soo's name as security for a loan which, on the balance of probabilities, given the documentary evidence before the Court, might well have been repaid in full. On this basis, an application was made to Court for re-transfer. While it may have been caught by limitation (a matter which was never fully litigated), it remains the case that it would be difficult to construe such a situation as amounting to a fraud upon Wong Soo or her privies, the plaintiffs. The failure to re-transfer the land upon repayment of the loan, which is not implausible, throws considerable doubt on whether the application for a transfer to Lim Moy's name can be conclusively determined to be 'fraudulent'. Moreover, an application was made to Court and a regular and valid Court order obtained. It would be difficult in the context of this fact scenario to conclusively categorize these facts as amounting to a fraud upon the Court;

(g) An application was made to Court in September 2014 for the transfer of the land to Lim Moy, supported by an affidavit with exhibits setting out the basis for such a claim. In the affidavit, all the documents evidencing the loan agreement and the repayment receipts were set out. The basis for the

application for a re-transfer was fully set out, as explained above. This application was served on Wong Soo, after a search conducted to ascertain her address from the National Registration Department. An affidavit of service establishes that it was served at the address disclosed at the National Registration Department;

(h) Wong Soo did not put in an appearance. The High Court having perused the papers allowed the application which had the effect of ordering the transfer of the land to Lim Moy through her lawful attorney, Chia King Moy ('attorney'). The order was handed down on 30 September 2014;

(i) The only reasonable inference to be drawn from the exhibits annexed to the application for the transfer to Lim Moy in 2014 is that it is not possible to conclude on a balance of probabilities, that fraud was perpetrated by Lim Moy or Chia Moy vide the application for a transfer of the land;

(j) This is further supported by the fact that neither fraud nor forgery were pleaded by the plaintiffs against Lim Moy or her attorney or even Paragon Capacity Sdn Bhd ('Paragon'). Far less that Lim Moy's attorney and Paragon were in point of fact "one entity" set up with a view to defraud the plaintiffs of the title to the land;

(k) The plaintiffs' pleaded claim at all times was premised on the basis that upon the setting aside by the plaintiffs in 2017, of the judgment in default obtained by Lim Moy dated September 2014, all other transactions involving the land during the pendency of the judgment namely the sale to Paragon, and subsequently Setiakon in 2015, were automatically invalidated as a consequence of the setting aside of the judgment in 2017;

(l) This is an entirely different proposition of law as compared to a plea of fraud. It is not apparent from the evidence in the cause papers precisely who perpetrated the fraud and how this was done. It may be said that the transactions raised suspicion, but that is insufficient to prove or infer fraud. In short, the fact that there is no plea of fraud and no particulars of such fraud either, militates against a finding of fraud on the basis of the evidence before the Court.

The Plaintiffs

[152] Reverting back to the chronology of events, and prior to the application by Lim Moy to the High Court through her attorney for the re-transfer of the land to her name, the 1st plaintiff Mak Yan Tai, on 15 January 2014, lodged a

police report stating that the land belonged to her mother, and that there had been a change of address effected by an unknown party. She further stated that she believed her mother's signature had been forged.

[153] The 1st plaintiff had gone to the Kuala Lumpur City Hall to change the mailing address for payment of assessment purposes, but found that the mailing address had been changed to an unknown address, namely C-52-1 Jalan Danau Lumayan, off Jalan Tasik Permaisuri 1, Bandar Tun Razak Cheras 56000, Wilayah Persekutuan. The 1st plaintiff then changed the address for correspondence to her own address in Mont Kiara.

[154] The plaintiffs then left matters to the police to investigate. Subsequently they attempted to enter a private caveat on 10 December 2015, but it was rejected by the Pejabat Pengarah Tanah dan Galian Kuala Lumpur.

Lim Moy's Application For A Declaration That She Was The Rightful Owner Of The Land

[155] On 4 August 2014, some 7 months after the plaintiffs made a complaint about the change of address, the application to Court was made by Lim Moy through her attorney, for a declaration that Lim Moy was the rightful owner of the land and consequently, the re-transfer of the land from Wong Soo to Lim Moy.

[156] An irrevocable power of attorney dated 24 June 2014 executed by Lim Moy is exhibited in the cause papers supporting the application for the transfer of the land from Wong Soo to Chia Moy King on behalf of Lim Moy. The power of attorney is attested by an advocate and solicitor. In short it is *prima facie* valid. There is no evidence to suggest that this power of attorney is fabricated and no such evidence was adduced at trial or even suggested by way of pleading or evidence.

[157] In her affidavit in support of the application for the retransfer of the land from Wong Soo to herself on behalf of Lim Moy, the attorney avers that:

(i) She is the relative of Lim Moy and the executor under Lim Moy's will on her death. The attorney was authorised to bring the suit for re-transfer of the land on Lim Moy's behalf *vide* the power of attorney of 24 June 2014, which is exhibited;

(ii) The attorney set out the details of the loan transaction by exhibiting the loan agreement, and accompanying documents including the Form 14A dated 19 February 1975 executed in conjunction with the loan agreement;

(iii) The attorney further exhibited the repayment of the said loan vide the receipts signed by Mak Yet Chiew, Wong Soo's husband. The documents disclose that between 1976 and 1981 a total amount of RM36,500.00 was repaid. The interest as computed on the basis of the loan sum is 21.67 per cent;

(iv) That Lim Moy forgot to re-transfer the land back to herself upon repayment of the loan in full;

(v) Despite this, the attorney further averred that Lim Moy had paid the quit rent. The exhibit evidencing such payment is dated 2013 and bears the registered owner's name as Wong Soo and the address of C-521 Jalan Danau Lumayan, off Jalan Tasik Permaisuri 1, Bandar Tun Razak Cheras 56000 Wilayah Persektuan. This is the same address that the plaintiff complained had been altered in January 2014. There is no evidence to suggest that this alteration in address was effected by the attorney or Lim Moy;

(vi) The attorney averred that Lim Moy told her that she had forgotten to effect the re-transfer of the land after payment in full of the loan, and wanted the land to be registered in her name. The attorney then states that she tried to contact Wong Soo but failed to do so;

(vii) Accordingly with her solicitor's assistance, a search was conducted at the National Registration Department by Lim Moy's lawyers, which discloses Wong Soo's address as: No 4, Jalan SS15/5F, 47400 Subang Jaya, Selangor, and status of the owner as 'active';

(viii) The application was then served on Wong Soo at that address, namely No 4, Jalan SS15/5F, 47400 Subang Jaya, Selangor. This is evidenced by an affidavit of service by one Noor Hafizah Binti Mohd Shariff dated 14 August 2014; and

(ix) Given this evidence of service on Wong Soo at the address stipulated in her National Registration Identity Card records, it follows that service on Wong Soo was in fact undertaken. It further establishes in law that the judgment in default obtained by the attorney was a regular judgment. It was not an irregularly obtained judgment procured by Lim Moy or her attorney with an intent to avoid service on Wong Soo, and thereby liable to be set aside *ex debito justitiae*. There is no basis to infer any discernible intent to preclude Wong Soo from appearing at the hearing of this originating summons. At all material times Lim Moy through her attorney Chia Moy King was represented by Messrs. S Mathews & Associates.

[158] Wong Soo did not file an appearance in response to the originating summons. On 30 September 2014, the High Court, having perused the cause papers setting out the full chronology of events, granted a declaration that Lim Moy was the lawful and beneficial owner of the land. The Pentadbir Tanah Wilayah Persekutuan was ordered to register Lim Moy as the legal owner of the land, and cancel the title held in the name of Wong Soo. The Court also authorised Lim Moy to apply for a replacement title in the name of Lim Moy. The land was accordingly registered in the name of Chia Moy King on behalf of Lim Moy during the period of September to October 2014.

[159] What transpires from a consideration of the documentary evidence set out above is that despite the loan agreement being entered into in 1975, and repayments having been paid in full by May 1981, the land was finally registered in the lender Wong Soo's name, almost three years after repayment, on 11 January 1984. As stated earlier on in the chronology, while a Form 14A was executed in favour of Wong Soo in 1975, the land itself was not registered in her name until 11 January 1984.

[160] Put another way, the land was registered in Wong Soo's name after the loan had been repaid, as evidenced by the documentary receipts. If it was no longer security for the loan, and there had been no default warranting a transfer into Wong Soo's name at that juncture, it brings to the fore the fact that there was no reasonable or justifiable basis for Wong Soo or her privies, to register the land in Wong Soo's name in January 1984.

[161] The plaintiffs maintain that the receipts were not signed by their father, Mak Yet Chiew, yet did not make any further attempt to establish that either the loan agreement or the receipts issued were fraudulent. The averment of fraud or forgery cannot in itself eradicate or render those receipts fraudulent given their existence, the fact that they are issued by the plaintiffs' father and Wong Soo's husband, over a period of time. There was no attempt to establish that the receipts were manufactured or forged.

[162] The plaintiffs maintained instead that as of 1975 the land belonged to their mother. In light of the existence of the loan agreement by way of documentary evidence, coupled with the registration of the land in Wong Soo's name only in 1984, this statement is not conclusive of Wong Soo's ownership of the land from inception in 1975.

The 2nd defendant − Paragon Capacity Sdn Bhd ('Paragon')

[163] For context, on 15 August 2014 prior to the obtaining of the declaration by Lim Moy, Paragon Capacity Sdn Bhd ('Paragon') was incorporated. There is no other evidence establishing a nexus between Paragon and Lim Moy or Chia Moy King save for the purchase of the land after the initial order transferring the land to Lim Moy.

Sale Of The Land By Chia Moy King To Paragon

[164] On 27 October 2014, about a month after obtaining the order transferring the land to Lim Moy through her attorney, a sale and purchase agreement was entered into between Lim Moy and Paragon for the sale of the land at a purchase price of RM15 million. On 21 or 22 January 2015 the land was registered in the name of Paragon.

[165] In March or early April 2015, the 3rd defendant, Setiakon Engineering Sdn Bhd ('Setiakon') the appellant in this appeal learnt that the land was for sale through a property agent GS Realty Sdn Bhd Setiakon inspected the site

and paid an earnest deposit of RM340,000.00 to the property agent for the purchase of the land.

[166] On 9 April 2015 Setiakon conducted a land search. No details were recorded regarding any express conditions or restrictions in interest. On 6 May 2015 Setiakon paid RM850,000.00 to Paragon.

[167] On 8 May 2015 Paragon sold the land to Setiakon for RM17 million vide a sale and purchase agreement. On 9 June 2015 the Form 14A for the transfer of the land to Setiakon was executed and an assessment of the stamp duty a*d valorem* was then made by the Collector of Stamp Duty. The following day, on 10 June 2015 Setiakon remitted the sum of RM510,000.00 to the Inland Revenue for real property gains tax. Setiakon took a loan for the purchase of the land from United Overseas Bank ('UOB') in the sum of RM12.75 million on 31 July 2015.

[168] On 5 August 2015 the land was registered in Setiakon's name and a charge was registered on the land in favour of UOB as security for the loan. Again a land search was conducted. Pursuant to this, on 7 August 2015, the balance purchase price of RM12.75 million was released to Paragon's solicitor's clients' account.

The Plaintiffs' Proceedings

[169] On 10 December 2015, the plaintiffs conducted an official land search and attempted to enter a private caveat but it was rejected. The 1st plaintiff then made a police report that the land had been transferred to a third party premised on the fact that quit rent had been paid by the third party.

[170] Wong Soo appointed the plaintiffs her attorneys vide a power of attorney dated 23 December 2015.

[171] The plaintiffs investigated Paragon and found that it was incorporated a short time before the judgment in default was obtained; that it had a paid up capital of RM400,000.00 and that its profit before tax was low and its current assets were wroth RM494,236. The point being, how could Paragon purchase land for RM15 million?

[172] On 19 July 2017 the plaintiffs applied to set aside the judgment in default obtained by Lim Moy on 30 September 2014. In their affidavit in support of their application they averred that Wong Soo had not been served with Lim Moy's application for a transfer of the land to her. The plaintiffs denied the loan agreement but went on to state that if it was accepted as being authentic then Lim Moy's claim to the land was barred by limitation. They further denied (as stated above) the repayment of the loan, contending that the payments were effectively paid to the wrong party, their father, as it was their mother who had given the loan and there was no privity of contract between Lim Moy and their father.

[173] It is pertinent that prior to making this application the plaintiffs conducted a search of the register and found that the land had been transferred and registered in the names of firstly, Paragon and subsequently Setiakon. Notwithstanding this, they were not notified of the proceedings.

[174] On 16 August 2017 Wong Soo passed away.

[175] On 14 November 2017 the High Court allowed the plaintiffs' application to set aside the judgment in default obtained by Lim Moy. The application was not contested as neither Chia Moy King nor Lim Moy were present. The order of court setting aside the judgment in default obtained by Lim Moy through her attorney is dated 14 November 2017 and states only that the judgment is set aside, and that execution and all efforts to enforce the judgment in default were to be temporarily stayed until the hearing of the originating summons in full. Wong Soo was accorded the opportunity to file affidavits in response to the originating summons.

[176] The originating summons filed by Lim Moy through her attorney was then heard on 21 February 2018 and in the absence of Lim Moy was dismissed with costs. No other ancillary orders were made, with respect to the third party interests that had been acquired in the interim period between 30 September 2014 and 14 November 2017.

[177] On 21 February 2018 the High Court dismissed the originating summons filed by Lim Moy in the absence of Chia Moy King and Lim Moy. This meant that the declaration granted to Lim Moy no longer subsisted. The registration in her favour was effectively invalidated or annulled. Therefore as of this date, the land was effectively held by the Court to belong to Wong Soo.

[178] On 7 August 2018 the plaintiffs commenced discovery proceedings for the transaction documents between Lim Moy, Paragon and Setiakon. These proceedings were dismissed on 29 March 2019. No grounds are available and no appeal was filed.

[179] In May 2019 the plaintiffs commenced the present suit against Lim Moy, Paragon and Setiakon. Neither Lim Moy nor Paragon defended the suit. Only Setiakon did. The High Court dismissed the plaintiffs' claim finding that Setiakon was a subsequent purchaser under s 340(3) of the National Land Code.

[180] The Court of Appeal reversed the decision of the High Court, maintaining *inter alia* that:

(a) The effect of the order setting aside the judgment as of 14 November 2017 had the effect of rendering all dealings in the land from 2014 until that date null and *void ab initio*; and

(b) While the Court of Appeal like the High Court accepted that Setiakon was a subsequent purchaser, the Court of Appeal concluded that Setiakon did not discharge the onus of establishing that it was a *bona fide* purchaser for value without notice, as it ought to have taken further steps to investigate the sale and purchase transaction between Lim Moy and Paragon for RM15 million. In this context the Court of Appeal held that it was incumbent upon Setiakon to have done its due diligence before purchasing the subject land and investigated the history of the vendor's title.

This Appeal

[181] Setiakon appealed against this decision of the Court of Appeal giving rise to the following core issues as specified at the outset:

(a) Whether the setting aside of a judgment in default, in relation to title to land which was in effect for a period of three years, has the effect of automatically annulling or invalidating subsequent titles in land registered under the National Land Code, during the pendency of the judgment in default?;

(b) Put another way, whether the setting aside of a judgment in default renders all transactions effected during the pendency of that judgment, prior to it being set aside, null and *void ab initio*?;

(c) Whether, in the absence of any plea of fraud or particulars of fraud, is the submission of fraud raised in this Court as the primary basis for the plaintiffs' claim tenable in light of the manner in which the claim was dealt with in the Courts below as well as in the absence of either an express plea or particulars of fraud or conclusive evidence to that effect? and

(d) The scope of the duty imposed upon a subsequent purchaser by virtue of the words "in good faith and for valuable consideration" in the proviso to s 340(3) of the National Land Code.

The Questions Of Law

[182] The questions of law put forward by the Appellant are:

Question 1:

In the absence of any allegation of fraud or collusion, whether the Court of Appeal was correct in law to hold that the purchaser should have done due diligence before purchasing the subject land and had therefore failed to discharge or prove that it is a *bona fide* purchaser for value?

Question 2:

> Whether apart from the undertaking of a proper search in the land registry to satisfy itself that the vendor is the registered proprietor of the subject land, whether an intended purchaser is obliged to investigate the history of the vendor's title to prove that as a purchaser it had not acted negligently and/or is a *bona fide* purchaser?

Question 3:

> Whether in determining if the Applicant is a *bona fide* purchaser for value under s 340(3) of the National Land Code 1965, the following are conclusive matters on which it could be held as the Court of Appeal did that a purchaser is not a *bona fide* purchaser, namely:
>
> (a) the short period of ownership of the subject land by the person who sold the subject land to the Applicant;
>
> (b) not conducting a formal valuation prior to purchasing the subject land;
>
> (c) the payment of Earnest Deposit by a purchaser prior to conducting a search of the subject land at the land registry; and
>
> (d) the early settlement of the purchase price for the subject land by a purchaser pursuant to a sale and purchase agreement.

Question 4:

> Where a judgment in default is set aside but the successful party fails to apply for or obtain an order under O 42 r 7(2) of the Rules of Court 2012 that the order should take effect from an earlier date, whether it is justifiable to treat all steps taken during the intervening period (being 3 years in this case) in reliance on the default judgment as null and void or *void ab initio*?

The Parties' Submissions

[183] Setiakon submitted that the plaintiffs' case hinges on their contention of a retrospective effect of the setting aside of a judgment in default, which Setiakon opposes.

[184] The plaintiffs submitted that the judgment in default was a nullity that had been set aside *ex debito justitiae*. They contended that when the judgment in default dated 30 September 2014 was set aside, all transactions in the intermediate period from September 2014 to November 2017 ie when the

judgment in default was in force were automatically invalidated, and this would mean that the issuance of the replacement title in Lim Moy's name was invalidated. Thus, the property was passed on to Paragon by a void instrument and by a domino effect, the transfer between Paragon and Setiakon also fell.

[185] Setiakon relied on the case of *Borthwick v. Elderslie Steamship Company* [1905] 2 KB 516 and submitted that there is no *ipso facto* antedating of a court order and parties must specifically apply for a court order to apply retrospectively. Setiakon submitted that since in the setting aside the parties did not ask for a cancellation of the title if it had been transferred to third parties, the court did not grant such an order, and this was correct as the third parties were not before the court.

[186] Setiakon also relied on O 42 r 7 of the Rules of Court 2012 as applied by the Court of Appeal in the case of *Perwira Affin Bank Bhd v. Sardar Mohd Roshan Khan & Another Appeal* [2009] 1 MLRA 540 and contented that a court order would not apply retrospectively unless the court specifically ordered so. This provision states as follows:

> Date from which judgment or order takes effect
>
> 7.(1) A judgment or order of the Court takes effect from the day of its date.
>
> (2) Such a judgment or order shall be dated as of the day on which it is pronounced, given or made, unless the Court orders it to be dated as of some other earlier or later day, in which case it shall be dated as of that other day.

[187] Setiakon submitted that the plaintiffs knew of the registration of the land in the names of third parties during the intervening period but did not include those third parties for any order to be made against them. The third parties were not heard. Thus, it would be unfair and a breach of natural justice for the setting aside order to operate retrospectively to invalidate third party interests.

[188] Setiakon also highlighted the fact that there was no attempt to enter a registrar's caveat on the land as provided for by s 320 of the National Land Code. In answer, the plaintiffs say that there was such an attempt but no registrar would enter a registrar's caveat on the land when there was a court order which had not been set aside, therefore they lodged private caveats on the land (which was rejected). The plaintiffs denied any delay in doing so because they were waiting for the police to investigate their reports before taking further action.

[189] Besides their submissions above on the effect of the setting aside of the judgment in default, the plaintiffs also submitted that there was fraud, pointing to the youth of the directors of Paragon and its low paid up capital, in addition to the date of incorporation of Paragon just prior to the purchase of the land from Lim Moy. The plaintiffs contended that the sale of the land to

Paragon was a sham transaction and that it was an illusion that Setiakon was a subsequent purchaser under s 340(3) of the National Land Code. The plaintiffs considered Chia Moy King and Paragon as one integrated entity comprising the fraudster. In actuality, Setiakon was an immediate purchaser, therefore its title is defeasible. Alternatively, the plaintiffs denied that Setiakon was a *bona fide* subsequent purchaser for value as required under the proviso to s 340(3) of the National Land Code in the Federal Court case of *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 2 MLRA 432.

[190] Setiakon's submission in relation to the plaintiffs' contention of fraud was that this was never pleaded nor canvassed before the High Court or Court of Appeal. Fraud is raised for the first time in the Federal Court but it is trite that fraud must be pleaded specifically with full particulars of the fraud. It is not for the Federal Court to now make a finding of fraud.

[191] The plaintiffs relied on the case of *Jalani Mohamed & Anor v. Shahrom Abdullah & Anor* [2024] 2 MLRA 933 which held that in the absence of consideration for the transfer of the land, the statement that the defendants had acknowledged receipt of the consideration sum on the instrument of transfer in Form 14A would be untrue, so contrary to that statement, the absence of consideration rendered the transfer instrument flawed and defective. The plaintiffs thus submitted that as there was no proof of payment by Paragon for the land, it is to be presumed that there was no consideration for the sale. Setiakon submitted that it was given a copy of the sale and purchase agreement by Paragon's solicitors and that although it did not have proof of Paragon's payment for the purchase of the land, the burden of proof was not on them to provide evidence of actual payment of RM15 million.

[192] In reply, the plaintiffs say that pleading facts which go to show fraud are sufficient. They rely on the case of *Letchumanan Chettiar Alagappan @ L Allagapan & Anor v. Secure Plantation Sdn Bhd* [2017] 3 MLRA 501 which held that it is not always necessary to plead the word 'fraud' if the facts which make the conduct fraudulent are pleaded.

[193] Setiakon submitted that all the questions upon which leave was granted ought to be answered in the negative while the plaintiffs submitted that all four questions are not relevant to the appeal and that the appeal ought to be dismissed with costs. For the sake of completion, the plaintiffs submitted that the first three questions ought to be answered in the affirmative.

Analysis

[194] We turn first to the issues of law as outlined:

Issue (a): Whether The Setting Aside Of A Judgment In Default Between Two Parties In Relation To Title To Land Has The Consequence Of Nullifying Or Invalidating Third Party Titles In Land Registered Under The National Land Code; And

Issue (b): Whether The Setting Aside Of A Judgment In Default Renders All Transactions Effected During The Pendency Of That Judgment, Prior To It Being Set Aside, Null And *Void Ab Initio*?

[195] From the factual sequence of events set out above, the key issue for determination is whether the order of court dated 14 November 2017 had the effect of nullifying or invalidating the registered title of Paragon and Setiakon, when it set aside the default judgment against Lim Moy. The net effect of the latter was to remove Lim Moy's name from the register and replace it with that of Wong Soo. But between 2014 and 2017 the two land transactions which reflected the sale and purchase of the land to third parties precluded any such registration in Wong Soo's name.

[196] As the Statement of Claim filed by the plaintiffs is founded on the legal premise that the order of 14 November 2017 had the effect of nullifying all transactions "*ab initio*" it would appear that the Court of Appeal purported to set aside transactions that occurred in the interim period between 30 September 2014 and before 14 November 2017 when Lim Moy's attorney held title by registration. The question is whether that is a tenable proposition given that:

(a) The order of Court of 14 November is not stipulated to have any retrospective effect;

(b) It stays any enforcement of the earlier default judgment, but again does not stipulate that it does so retrospectively; Accordingly it would follow applying the normal rules of court that an order takes effect from the date it is pronounced. Order 42 r 7 of the Rules of Court 2012;

(c) As Paragon and Setiakon were not aware of these proceedings and were not notified of the same, can their titles by registration, particularly that of Setiakon be set aside automatically as of right, in their absence? This would amount to a breach of natural justice; and

(d) Can an order of Court setting aside a judgment in default have the effect of rendering defeasible registration of titles in the absence of parties such as Setiakon, who enjoy such a vested right, particularly when there is no plea of fraud or evidence of the use of a void instrument at the time when the land was transferred to them? Again this cannot be the case because at the material time the order transferring the property to Lim Moy was not set aside and remained valid. The surrounding circumstances relating to

such transfer which was effected pursuant to a Court order cannot be conclusively stated to be premised on fraud, for the reasons we have set out above.

[197] Put another way – is Setiakon as a third party then bound by the decision of the High Court such that its title becomes defeasible or even invalidated, by reason of the setting aside of the judgment in default, and subsequent dismissal of the originating summons filed by Lim Moy?

[198] The starting point in answering this question must be the meaning to be accorded to the terms "judgment" and "order" in relation to the earlier and subsequent orders issued by the High Court in relation to the land. This issue has been comprehensively dealt with by this Court in the case of *Ang Game Hong & Anor v. Tee Kim Tiam & Ors* [2019] 6 MLRA 477 ('*Ang*'):

> The terms "judgment" and "order" in the widest sense may be said to include any decision given by a court on a question or questions at issue between the parties to a proceeding properly before the court [see **para 501 of *Halsbury's Laws of England* (4th edn) vol 26 at p 237**]. And at **p 550**, the following passages appear:
>
> > "Subject to appeal and to being amended or set aside, **a judgment is conclusive as between the parties and their privies and is conclusive evidence against all the world of its existence, date and legal consequences**."
>
> [Emphasis Added]

[199] This Court went on to hold in Ang's case that the order could not purport to affect the registered title, share and interest of third-party intervenors in the land when they had not been made parties or given a full opportunity of taking part in the proceedings in the court. Those intervenors ought to have been accorded notice and joined in any proceedings seeking to vitiate their interests.

[200] In like manner in the present case, the plaintiffs were fully aware of the land having been sold to Paragon, and then Setiakon, pursuant to the order of Court dated 30 September 2014. In point of fact, they had even taken out discovery proceedings to obtain further information relating to such transfers in 2018 which failed. However neither Paragon nor Setiakon were made parties to the setting aside application or served with the cause papers which would have enabled them to attend and be heard.

[201] As both Paragon and Setiakon were not before the High Court in the course of the setting aside and the subsequent hearing of the originating summons between Lim Moy and Wong Soo, they are not bound by the order of court either setting aside the judgment in default or the subsequent order dismissing Lim Moy's claim to have the property transferred to her.

[202] Any conclusion that such order could bind Paragon and Setiakon, would amount to a breach of natural justice, given that their rights in the land were indefeasible, save and unless fraud, forgery, or a void instrument as envisaged under the National Land Code in s 340(2) are established and done so in their presence. This is the trite and well-recognised position in law, by reason of s 89 of the National Land Code.

[203] Any such construction of the law, namely that the order of 14 November 2017 has the effect of rendering Paragon and Setiakon's titles null and *void ab initio* would have the effect of depriving Paragon and Setiakon of their titles without their being heard. This would amount to a breach of natural justice, which would enable the decision to be set aside under the principles in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 1 MLRA 183.

[204] This is apparent from *Ang*'s case (above) where this Court held that the breach of natural justice occasioned by depriving a party of compensation paid pursuant to an enquiry for land acquisition made in breach of natural justice, was wholly irregular, null and void and had no effect on that particular party.

[205] In like manner any order rendering the titles of Paragon or Setiakon defeasible in their absence, without according them an opportunity of defending the same, would amount to a breach of natural justice rendering any such order irregular, null and void.

[206] For that reason, it follows that the order obtained by the plaintiffs dated 14 November 2017, setting aside the order for transfer obtained by Lim Moy dated 30 September 2014 and the subsequent order refusing to grant the declaration sought by Lim Moy under the originating summons, does not have the effect of annulling or invalidating the third party vested rights and title acquired by Paragon and subsequently Setiakon in respect of the land, under the National Land Code during the interim period prior to the order of 30 September 2014 being invalidated. Put another way − the order of 14 November 2017 does not have the effect of rendering the title of the purchasers, Paragon and Setiakon *void ab initio* in relation to the titles acquired by Paragon and Setiakon. There was no finding by the Court of fraud, forgery or the use of a void instrument expressly. The Court set aside the order of transfer of Lim Moy effectively depriving her of registered ownership. But that order did not have the effect of depriving Paragon and Setiakon of title.

[207] However, that was the effect of decision of the Court of Appeal which held that the judgment and orders made pursuant to the September 2014 judgment in default transferring the land to Lim Moy became *void ab initio* when it was set aside in November 2017. It purports to set aside all transactions made in the interim period between 2014 and 2017 to Paragon and Setiakon on the grounds that these transactions were carried utilising a void instrument.

[208] For the reasons set out earlier, it follows that the titles of Paragon and Setiakon remained intact until the present suit was initiated with a view to vitiating both Paragon and Setiakon's title to the land. The suit allowed for them to ventilate the full facts and allowed the Court to apply the provisions of the National Land Code in full. Any order of Court subsequently obtained as a consequence of the adjudication of the suit would affect their titles. In this instance the High Court set aside Paragon's title and declared Setiakon as the subsequent purchaser to be a *bona fide* purchaser for valuable consideration.

[209] Therefore at all material times the 2017 order obtained by the plaintiffs setting aside the transfer to Lim Moy did not have the effect of sweeping away or automatically invalidating the subsequent successors' titles to the land. The Court of Appeal erred in concluding that the effect of the 2017 order was to render all transactions on the land *void ab initio* when:

(a) The 2014 order remained valid until it was set aside in 2017, as the 2017 order had no effect retrospectively;

(b) The title acquired by registration by Setiakon, the appellant could not be nullified by the 2017 order, as it was never accorded an opportunity of being heard. Any such invalidation of title only occurred upon adjudication by the Court of Appeal that it was NOT a *bona fide* purchaser for valuable consideration, the condition required to retain title in respect of land which title was found to be defeasible for one of the reasons set out in s 340(2) National Land Code;

(c) As the instrument of transfer from Lim Moy to Paragon and then to Setiakon was valid as of the time of transfer to Setiakon in 2015 it follows that the transfer to Setiakon was valid. It would require a plea of fraud, forgery or the use of a void instrument to warrant invoking s 340(2), (3) and the proviso to s 340(3) in aid of invalidating the transfer to Setiakon; and

(d) In the absence of such plea and in the face of a clear and express plea premised solely on the effect of the 14 November 2017 order, namely that it operates retrospectively to nullify all succeeding transfers, there is insufficient basis to set aside Setiakon's transfer under s 340 or to invoke s 340 National Land Code.

This brings us to Question 4 as put forward by the Appellant:

Does the Setting Aside of a Default Judgment Operate Retrospectively?

[210] It is the accepted position in law that a judgment operates from the date it is pronounced, unless the Court specifically orders it to be of retrospective effect (see the Rules of Court 2012). It is reiterated that the setting aside by Wong Soo in November 2017 was not specified nor ordered by the Court to take effect retrospectively. Even if the Court order had ordered that the setting

aside operate retrospectively, it could not dispose of or invalidate third party rights for the reason that any such order would amount to a fundamental breach of natural justice. Any such order would have been open to be set aside for failure to accord the succeeding registered proprietors the right to be heard, before depriving them of title to the land.

[211] Perhaps more significantly, the effect of allowing the setting aside of a judgment or order which would have the effect of divesting third parties of their registered title to land, would be to allow litigants to circumvent the operation and effects of the National Land Code, particularly ss 89 and 340, which recognizes title primarily by registration and specifies when and how such titles become defeasible as well as the remedies available in such an instance.

[212] It would enable a litigant to seek to set aside the registration of title by use of a court order, notwithstanding that third party rights in rem are affected. That would be compounded as is the case here, where the third parties were not accorded an opportunity to be heard.

[213] As such it follows that an order setting aside a judgment relating to ownership of land between two parties ought not to have the effect of divesting third parties of their rights in rem or title to the land unless they are party to any such adjudication and divestment of title.

The Torrens System − Title By Virtue Of Registration

[214] The basis and objective of the National Land Code which statutorily encapsulates the Torrens system is the doctrine of an indefeasible title arising solely by registration (see Raja Azlan Shah CJ (Malaya) in *PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd* [1980] 1 MLRA 562, FC; *Ong Chat Pang & Anor v. Valliapa Chettiar* [1971] 1 MLRA 828 at 231; and *Teh Bee v. K Maruthamuthu* [1977] 1 MLRA 110).

[215] As stated in *Bresknar v. Wall* [1972] ALJR 68, 70:

> "The Torrens system of registered title of which the Act is a form is not a system of registration of title but a system of title by registration. "

[216] Section 89 of the National Land Code provides for this by providing that every register document of title duly registered under the National Land Code is:

> "...conclusive evidence
>
> (a) that title to the land described therein is vested in the person or body for the time being named therein as proprietor; and
>
> (b) of the conditions, restrictions in interest and other provisions subject to which the land is for the time being held by that person or body, so far as the same are required by any provision of this Act to be specified or referred to in that document. "

[217] As such it follows that the document of title registered in the names firstly of Paragon and then Setiakon, amounts to conclusive evidence of the ownership of the land at the material time, unless and until it is found to be defeasible.

[218] It is also trite that such conclusive evidence of title may be attacked as being defeasible under s 340 of the National Land Code. This requires, *inter alia*, proof of transfer *vide* a void instrument under s 340(2)(b) or, more pertinently in the instant appeal, proof of fraud on the original owner sufficient to vitiate the title to land of the immediate purchaser and all purchasers ensuing save and unless the subsequent purchaser (the entity or person who purchases from the immediate purchaser) is a *bona fide* purchaser for valuable consideration as stipulated under the proviso to s 340(3) National Land Code.

[It is also relevant to note that the relevant time at which to determine whether a purchaser is indeed a purchaser for good faith and valuable consideration would be upon registration as title is only acquired at that point (see *Mohammad Buyong v. Pemungut Hasil Tanah Gombak & Ors* [1981] 1 MLRH 848 and *Liputan Simfoni Sdn Bhd v. Pembangunan Orkid Desa Sdn Bhd* [2017] MLRAU 268).]

[219] In the instant case there is no plea of fraud nor particulars of fraud specified anywhere in the statement of claim. As pointed out by the Appellant, the entire case for the plaintiffs is premised on the basis that upon the setting aside of the judgment in default by Wong Soo in November 2017, all other transactions undertaken in the interim period when the default judgment was in force, were also automatically and retrospectively invalidated. As we have pointed out above and for the reasons set out there, this is not a tenable proposition.

[220] In support of its contention the plaintiffs point to the case of *Ranjit Singh Jarnail Singh v. Malayan Banking Berhad* [2015] 1 MLRA 463 ('*Jarnail*') which, in summary is authority for the proposition that a judgment setting aside a judicial order for sale pursuant to a foreclosure action as stipulated under s 256 of the National Land Code renders transactions reliant on the now void judicial sale agreement *void ab initio*. However, that case is distinguishable from the situation in the present appeal. This is because *Jarnail* only impacted transactions between the two immediate parties to the judicial sale, namely the bank-chargee and the purchaser of the property, with no impact on any third parties. There were no third parties to the sale.

[221] The facts were that the Appellant was the purchaser of the subject property and the bank/chargee was selling the property vide a judicial sale pursuant to a foreclosure action. An order for sale was granted, but the chargor/borrower sought to set aside the order for sale at the auction because the notice of the adjourned hearing for the order for sale was not served on the chargor. The High Court set aside the order for sale some nine years later on the grounds of non-compliance by the chargee Bank, holding that there had been a failure to comply with the statutory provisions of the National Land Code as well as the

Rules of Court 2012 in the form of O 83, which prescribes the procedure to be adhered to. It was held that acts done pursuant to the order for sale which was found to be void for non-adherence to the National Land Code, were also *void ab initio* and therefore no contract for sale existed and no damages became payable to the Appellant purchaser other than a refund of the purchase price.

[222] It is immediately apparent that this case is wholly distinct from the present circumstances where:

(a) This is not a judicial sale pursuant to a foreclosure action, which is governed by statute. Here the setting aside of the default judgment relates to whether there were merits in the defence relating to who the rightful owner of the land was, given the complex factual matrix preceding the transfer of title to Lim Moy and the subsequent setting aside;

(b) There were no third-party rights affected by the order setting aside the judicial sale in Jarnail, unlike the present case where Paragon, and now Setiakon, are directly affected;

(c) There was never any vesting of rights in the property in any third party by way of registration of title in Jarnail, unlike the present case.

[223] In conclusion it follows that the order of November 2017 setting aside the judgment in default obtained by Lim Moy on 30 September 2014:

(a) Does not have retrospective effect as it takes effect from the date of its pronouncement;

(b) Does not have the effect of setting aside or rendering *void ab initio* the transfer of the land to Paragon and subsequently Setiakon. The latter acquired title by registration and therefore remained the registered owner of the land on and after 30 November 2017 until the date of the order of the Court of Appeal, and which is the subject matter of dispute in this appeal;

(c) As fraud was neither pleaded nor proved expressly or impliedly in the course of the trial of this case, there is no basis to consider defeasibility of title under s 340(3) of the National Land Code on the basis of fraud or forgery;

(d) As for s 340(2), namely that registration was effected using a void instrument, the instrument of transfer was not void as of 2015, when the property was transferred to Setiakon as there is insufficient evidence to establish that such instrument of transfer was vitiated by fraud, forgery or that Lim Moy or Paragon had no title to pass. Put another way the factual matrix showing that the land was held by Wong Soo for many years prior to registration in

her name in 1984 as security for a loan throws doubt as to whether it can be concluded that there was fraud or that the transfers to Paragon and Setiakon were effected utilizing a void instrument, thereby rendering all transactions between 2014 and 2017 *void ab initio*; and

(e) It is not in dispute that the Statement of Claim makes no plea of fraud or forgery resulting in a transfer pursuant to a void instrument. There are instead allegations and averments suggesting but not proving fraud or forgery.

Issue (c): Whether, In The Absence Of Any Plea Of Fraud Or Particulars Of Fraud, Is The Submission Of Fraud Raised In This Court As The Primary Basis For The Plaintiffs' Claim Tenable In Light Of The Manner In Which The Claim Was Dealt With In The Courts Below As Well As In The Absence Of Either An Express Plea Or Particulars Of Fraud Or Conclusive Evidence To That Effect?

[224] The plaintiffs here claim that their mother was the original owner of the property. As such both the burden and the onus of proof lie on them to so establish this. Therefore the burden is on the plaintiffs to establish that their mother, Wong Soo, was the original registered proprietor of the land and that the transfer of the property from Wong Soo to Lim Moy was a fraud or a forgery or effected *vide* a void instrument. The initial onus of proof in the present suit also lies on them to establish this.

[225] However, as we have seen, the transfer from Wong Soo to Lim Moy was effected vide an order of Court dated 30 September 2014. A perusal of the cause papers and the exhibits as well as service on Wong Soo at her last known address pursuant to an NRIC search, establishes that the documents filed in Court prove that Lim Moy executed a Form 14A agreeing to register the land in Wong Soo's name as security for a loan.

[226] The exhibits further show receipts of repayment of the loan, which were not proved to be fabricated. If true, it follows that upon repayment Wong Soo became a bare trustee holding the land on trust for Lim Moy as of 1981 (see *Temenggong Securities Ltd & Anor v. Registrar Of Titles Johore & Ors* [1974] 1 MLRA 163). The land was registered in Wong Soo's name in 1984. These documents detract from a conclusive finding of ownership on the part of Wong Soo. More importantly, fraud on the part of Lim Moy cannot be inferred on a balance of probabilities.

[227] The plaintiffs' explanation in rebuttal of the these documents (which evidence a series of events over the years) is that firstly, these documents are not genuine. This is a bare averment. Alternatively the plaintiffs' maintain that Lim Moy's claim is caught by limitation. The existence of the alternative defence of limitation in itself throws doubt on the averment that the documents are not genuine. There is no other evidence produced to rebut these claims

[228] The point however is that neither fraud nor forgery is established, nor may be inferred by reason of the inconclusiveness of the allegations or bare averments made by the defendants. It also explains why no clear plea of fraud, nor events establishing such fraud or forgery were pleaded in support of the claim. In such circumstances it is untenable for this Court to now conclude that fraud has been proven.

[229] Parties are bound by their pleadings and not allowed to adduce facts or present submissions, particularly for the first time at the appellate level, on matters which they have not pleaded, unless evidence has been led without objection at trial. In the instant appeal, the evidence led (as explained above) is insufficient to establish fraud or forgery, which was not pleaded (see *Letchumanan Chettiar Alagappan @ L Allagapan & Anor v. Secure Plantation Sdn Bhd* [2017] 3 MLRA 501 (for the proposition that actual fraud must be proven; see *Iftikar Ahmed Khan v. Perwira Affin Bank Berhad* [2018] 1 MLRA 202, *Lee Ah Chor v. Southern Bank Bhd* [1990] 2 MLRA 6; [1991] 3 MTC 191 per Jemuri Jarjan SCJ, and *The Chartered Bank v. Yong Chan* [1974] 1 MLRA 176 per Raja Azlan Shah (FJ then) on the importance of pleadings; and *Instantcolor System Sdn Bhd v. Inkmaker Asia Pacific Sdn Bhd* [2017] 3 MLRA 333 which emphasized the importance of clearly pleading a case so as to bring the case within the appropriate statutory provisions.)

[230] In the instant appeal the primary plea on which the plaintiffs' case is premised, is that the setting aside of the judgment in default by Lim Moy would nullify all other subsequent transactions rendering them *void ab initio*. The plaintiffs' case was run on that premise in the courts below, with fraud surfacing as the new basis to render all subsequent titles defeasible, only at the final appellate level. That is a wholly different plea from fraud or forgery under s 340 of the National Land Code, rendering the subsequent registered transferees' titles defeasible.

[231] It is trite law that while the words 'fraud' or 'forgery' need not necessarily be expressly specified in a pleading, there must be sufficient material facts set out to justify a plea of fraud or forgery being inferred. The mere use of these words without sufficient material particulars is insufficient to prove fraud. Conversely too, insufficient evidence to meet the threshold of establishing fraud on a balance of probabilities does not give life to a plea of fraud, no matter how often the term is repeated.

[232] When applied to the factual matrix here, there is no adequate explanation for the documentary evidence produced in Lim Moy's application supporting her version of the events. These documents throw doubt on the veracity of the statement that Wong Soo was the registered owner of the land. The fact that the order of 14 September 2014 was set aside is not conclusive evidence of fraud because there was no express finding of fraud or order to that effect.

[233] Taken in totality, the chronology of events may be said to give rise to suspicion, at best. But it is not tenable to maintain that fraud or forgery were established on a balance of probabilities.

[234] No witnesses were called by the plaintiffs to establish fraud, nor were forgery experts called to establish that these documents were forged. Instead the bedrock of the plaintiffs' claim is that by reason of the setting aside of the order of Court dated 14 November 2017, some three years later, all transactions in the interim were inundated. But there was no finding of fraud or forgery which could have the effect of nullifying or rendering all third party transactions in rem as having been rendered null and *void ab initio*, ie from the date of the initial judgment. And this is particularly so when the application was not served on the purchasers Paragon or Setiakon.

Proof Of Fraud

[235] The threshold for actual fraud is that there must be a deliberate and dishonest attempt to deprive the unregistered claimant of his claim or interest in the land (see *Waimiha Sawmilling Co (in liquidation) v. Waione Timber Co Ltd* [1923] NZLR 1137 and *Assets Co Ltd v. Mere Roihi* [1905] AC 1176).

[236] It is, in my view difficult to establish on a balance of probabilities, a deliberate and dishonest attempt to deprive Wong Soo of her title given the possibility that Wong Soo's title was obtained as security for a loan which was possibly repaid.

[237] The fact remains that as pleaded, the claim by the plaintiffs was premised on the effect of the order of 17 September 2017 being set aside and having the effect of rendering all transfers thereafter null and *void ab initio*. While this may have been determined between the primary parties, Lim Moy and Wong Soo, the crux of this appeal turns on whether the Court of Appeal was correct in determining that the effect of the 2017 order was to render all subsequent transfers of the property during the pendency of the 2014 order invalid.

[238] In the absence of evidence of forgery, fraud or a void instrument under s 340 of the National Land Code, it is not tenable to so conclude. The instrument of transfer to Setiakon was not a void instrument at the point when the land was transferred to it in 2015. This in turn means that the stringent requirements of s 340(2) and (3) of the National Land Code do not come into play, or are triggered.

[239] As s 340 of the National Land Code does not come into play, particularly as there is no basis for invoking it premised on the Statement of Claim, the setting aside order obtained by Wong Soo in November 2017 does not have the effect of vitiating third party title to the land nor rendering the title of Setiakon *void ab initio*. It then follows that the title to the land which is registered in the name of Setiakon remains indefeasible. The Court of Appeal erred in concluding that the effect of the setting aside order on 14 November 2017 had

the effect of nullifying and invalidating the titles of both Paragon and Setiakon as of right. This is borne out by the erroneous use of the words '*void ab initio*'. In these circumstances it would follow that as the title of Setiakon remained indefeasible, the appeal should be allowed.

[240] I therefore answer issues (a), (b) and (c) as well as Questions 1 and 4 in this appeal in the negative.

The Position In Law If Section 340 Of The National Land Code Is Invoked

Is Setiakon An Immediate Or Subsequent Purchaser?

[241] This aspect of the judgment is in the alternative, and separate from the conclusion drawn above that the setting aside did not affect the transfers to third parties.

[242] Even if it is concluded that the instrument of transfer was void, bringing into play s 340(2) and (3) of the National Land Code as well as the proviso to sub-section (3), an examination of the register of titles discloses that Paragon was the purchaser that acquired title from Lim Moy's attorney first, and Setiakon became the purchaser that acquired title from Paragon.

[243] It would follow that Paragon is the immediate purchaser and Setiakon the subsequent purchaser. This is consonant with the findings of the courts below, namely that Paragon is the immediate purchaser and Setiakon the subsequent purchaser.

[244] Counsel for the Respondents sought to suggest, again for the first time at apex level, that Paragon was in fact a vehicle of fraud utilised by Lim Moy's attorney to achieve a 'sale' when in point of fact they both operated effectively as one 'entity'. Accordingly the submission was that if Lim Moy through her attorney, and Paragon were 'one entity' then Paragon could not be the immediate purchaser, as any agreement would be a sham. Accordingly it was submitted that Setiakon was in fact the immediate purchaser whose title was therefore defeasible under s 340(3) of the National Land Code in keeping with the principle of deferred indefeasibility.

[245] The evidential basis on which this entire submission rests are the following facts:

(i) The date of incorporation of Paragon which was 15 August 2014;

(ii) The paid up capital of Paragon was RM432,000;

(iii) The directors of Paragon were young; and

(iv) Therefore Paragon could not have paid the purchase sum of RM15 million in cash.

[246] Accordingly it is submitted that Paragon was the vehicle of fraud utilized by Lim Moy's attorney to effect the first 'defeasible' title in its name.

[247] There is no plea of any nexus whatsoever between Lim Moy's attorney and Paragon. There is no plea of any fraud or collusion between Lim Moy's attorney and Paragon.

[248] Notwithstanding this, at appellate level, the Court is invited to infer on the facts stipulated above that:

(i) Lim Moy's attorney is the fraudster who created a scheme;

(ii) Paragon was the corporate vehicle utilized by Lim Moy's attorney to effect the first 'sale' which is a sham;

(iii) Therefore Paragon and Lim Moy's attorney are part of a scheme calculated to deprive the plaintiffs of the land;

(iv) Accordingly Paragon cannot be the immediate purchaser; and

(v) And therefore Setiakon is the immediate purchaser whose title is defeasible in favour of the plaintiffs.

[249] I find this to be an untenable proposition for the following reasons:

(i) The paucity of evidence available to substantiate such a conclusion;

(ii) Such a conclusion would require evidence of fraud and collusion between Lim Moy's attorney and Paragon or evidence of the setting up of Paragon by Lim Moy or her attorney − there is no such evidence;

(iii) The fact that Paragon's paid up capital is small and that its directors are young does not in itself mean that it does not exist or that it is a vehicle of fraud for Lim Moy or her attorney;

(iv) The fact that the sum of RM15 million was paid in cash for the land in 2015 raises suspicion but is insufficient, without further evidence, to prove that Paragon is Lim Moy's attorney's brain child for use as a corporate vehicle of fraud created to obtain title to the land;

(v) The fact that the documents underpinning the application to Court for the transfer of title to Lim Moy's name are not fraudulent and may well reflect the genuine nature of the original loan arrangement between Wong Soo and Lim Moy does not lend weight to a scheme to defraud the owners of the land. These matters distinguish this case from the normal cases of fraudsters acquiring title through illegitimate means;

(vi) The complete lack of pleadings or evidence adduced at trial to establish such a proposition further weighs against this proposition; and

(vii) The threshold for proof of fraud is not easily satisfied, as stated earlier. It must be proved that the party whose title is sought to be defeated was party or privy to the fraud, and that there was an intention to cheat. On the facts before the Court as contained in the appeal records it is not plausible to conclude that there was fraud on the part of Lim Moy's attorney coupled with Paragon as there is insufficient evidence to do so. It must be remembered that the basis for Lim Moy's title was an order of Court that contains exhibits which cannot be dismissed outright as being fraudulent.

[250] In these circumstances it is not reasonable to conclude on a balance of probabilities that Paragon was a corporate vehicle used by Lim Moy's attorney to procure title to the land fraudulently. Accordingly the findings of the Courts below, namely that Paragon is the immediate purchaser and Setiakon the subsequent purchaser are affirmed.

Issue (d): The Scope Of The Duty Imposed Upon A Subsequent Purchaser By Virtue Of The Words "In Good Faith And For Valuable Consideration" In The Proviso To Section 340(3) Of The National Land Code

[251] The Court of Appeal concluded that Setiakon as the subsequent purchaser who has the duty to prove that it is a *bona fide* purchaser for good consideration failed to discharge this onus of proof by reason of:

"(i) The time line from the granting of the Judgment in default and the replacement title to Lim Moy to D3's registration as the proprietor of the land took less than a year;

(ii) D3 acted hastily in purchasing the land from D2 and did not carry out the necessary due diligence;

(iii) The earnest deposit had already been paid on 7 April 2012 before the land search was conducted on 9 April 2015;

(iv) Despite the huge transaction sum of RM17 million there was no offer to purchase by D2 to D3. Nor was there any Board of directors' resolution for the purchase of the land. There was also no valuation report to determine the value of the land before the purchase;

(v) From the time D2 was registered as a proprietor of the land to the 2nd SPA the time gap was only a little more than 3 months;

(vi) D3 ought to have acted on the suspicious circumstances surrounding the sale of the land and carried out proper investigations before the purchase."

[252] This finding and issue is of considerable importance as it affects the scope of the duty imposed upon a subsequent purchaser seeking to purchase land under the National Land Code which operates under the Torrens system.

[253] Regrettably, the Court of Appeal failed to specify or categorize what 'further investigations' had to be undertaken by Setiakon in order to discharge the onus of proof on it to establish that it was a *bona fide* purchaser for valuable consideration. Otherwise subsequent purchasers will be left without guidance or direction as to the steps the Court of Appeal felt were necessary.

[254] Of immediate concern however is the issue of whether the Court of Appeal was correct in its interpretation of the scope of the duty imposed upon a subsequent purchaser by virtue of the proviso to sub-section (3) of s 340 of the National Land Code.

The Position In Law

[255] I accept the position in law as submitted by learned counsel for the Appellant in this context. The starting point for a consideration of this issue must be s 89 of the National Land Code which provides that:

> "Every register document of title duly registered under this Chapter shall, subject to the provisions of this Act, be **conclusive evidence**:
>
> (a) **That title to the land described therein is vested in the person or body for the time being named therein as proprietor**; and
>
> (b) Of the conditions restrictions in interest and other provisions subject to which the land is for the time being held by that person or body; so far as the same are required by any provision of this Act to be specified or referred to in that document."
>
> [Emphasis Added]

[256] As stated in *Bayangan Sepadu Sdn Bhd v. Jabatan Pengairan Dan Saliran Negeri Selangor & Ors* [2022] 2 MLRA 1, this Court held that the Torrens system 'dispenses with the need to look beyond the register'. It was explained per Zawawi Salleh FJ as follows (at [27]):

> "[27]...There are two fundamental principles of the Torrens System, namely the mirror principle and the curtain principle. The mirror principle portrays a concept in which the land title mirrors all relevant and material details that a prospective purchaser, lessee and chargee ought to know. This means that a person can obtain all such material information of the land, based on what is endorsed on the register document of title and issue document of title. On the other hand, the curtain principle is a concept that dispenses with the need to look beyond the register – as the land itself provides all relevant information reflecting the validity of the same. Ostensibly the 'curtain' is where the principle took its name from."

[257] The system therefore allows for a prospective purchaser such as Setiakon to rely on the register document of title to conclude that the person whose name is registered there has good and indefeasible title to the land. That is the cornerstone of the Torrens system. Any attempt to encroach onto that principle by adding on requirements should be discouraged as this undermines the very basis of the Torrens system.

What Checks Or Investigation Did Setiakon Undertake?

[258] It must be borne in mind that there is no allegation of fraud or conspiracy to defraud the plaintiffs made against Setiakon, which if proven, would preclude any claim to a *bona fide* purchase of the land. On the contrary the plaintiffs accept that Setiakon is a purchaser that paid a sum of no less than RM17 million for the land, and took out a loan with a charge on the land as security to make such payment. Under the law this is a very strong factor to indicate the status of a *bona fide* purchaser for value.

[259] In the instant case, it is apparent that Setiakon had no knowledge about the earlier party Paragon or Lim Moy's attorney or the plaintiffs. The facts disclose that prior to entering into the agreement to purchase the land from Paragon, Setiakon conducted an official land search which confirmed that Paragon was the registered proprietor of the land which was free from all other encumbrances.

[260] Setiakon's solicitors, noting that Paragon had recently acquired the land, took the extra precaution of enquiring from Paragon's solicitors when and how their client acquired the land as well as requesting a copy of the sale and purchase agreement pursuant to which Paragon acquired the land. This was duly supplied.

[261] What other steps was Setiakon obliged to take? It would appear from the decision of the Court of Appeal that Setiakon was supposed to infer from the short time during which the transaction was conducted between Lim Moy's attorney and Paragon that there was fraud or some form of impropriety to be gleaned. However, that is not a tenable or reasonable conclusion. This is because Setiakon's lawyers actually asked for the document evidencing the sale transaction which resulted in the registration in Paragon's name.

[262] This should be more than sufficient to address the need for Setiakon to act *bona fide*, so as to fall within the purview of the proviso.

[263] If it is sought to suggest that Setiakon is under a duty to go on to ask for proof of payment and other details from Paragon's solicitors or Paragon itself, that would amount to extending the ambit of the duty imposed upon prospective purchasers seeking to invest in land. It would mean, in effect, that a prospective purchaser seeking to purchase land would be required to investigate and obtain proof of the payment of the purchase price by the vendor. This is an unacceptably high burden to place on a prospective purchaser within the National Land Code which operates on the Torrens system.

[264] More importantly it would also derogate from the very purpose of the Torrens system which is meant to move away from a system of investigation of title which requires the prospective purchaser to undertake an intensive and comprehensive review of the entirety of the dealings between the previous purchaser and vendor.

[265] In my view, the steps undertaken by Setiakon are more than sufficient to enable it to fall within the ambit of a *bona fide* purchaser for valuable consideration. This is so particularly in the absence of any plea of notice of fraud on the part of Setiakon and most importantly on the payment of the not inconsiderable sum of RM17 million for the land.

[266] The payment of this sum of money which weighs very much in Setiakon's favour does not appear to have been given any or sufficient consideration by the Court of Appeal, with respect. The consequence of the Court of Appeal decision is that a *bona fide* prospective purchaser who paid RM17.5 million (on the basis of a bank loan with a charge), is precluded from the proviso because of a finding that there was insufficient investigation and the failure to be 'warned' by the quick transaction undertaken immediately prior to Setiakon's purchase. These matters of fact are vague and insufficient, with respect, on the facts of this appeal to taint Setiakon with a lack of *bona fides*.

[267] This is borne out by the case of *Pushpaleela R Selvarajah & Anor v. Rajamani Meyappa Chettiar & Other Appeals* [2019] 2 MLRA 591 where this Court held that registration on the title was sufficient to confer indefeasible title on a *bona fide* purchaser, which is what Setiakon is.

[268] In these circumstances the appeal should be and is hereby allowed.

[269] My learned brother Justice Harmindar Singh Dhaliwal FCJ has read my dissenting judgment and agrees with it.