

## DEMISE OF DEFERRED INDEFEASIBILITY UNDER THE MALAYSIAN TORRENS SYSTEM?

*Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng*<sup>1</sup>

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### I. INTRODUCTION

The highest court in Malaysia, the Federal Court, has ruled in favour of immediate indefeasibility for the Malaysian Torrens system on the issue of forgery in *Adorna Properties*. There has been no previous decision of the Federal Court on the subject-matter of indefeasibility involving forgery. The pertinent question which arises is whether this decision is correct in light of the legislative framework laid down in section 340 of the Malaysian National Land Code 1965. If so, it would certainly bring about the demise of the doctrine of deferred indefeasibility under the Malaysian Torrens system.

Some jurisdictions (such as Australia and New Zealand) provide for immediate indefeasibility, while others (such as Malaysia) provide for deferred indefeasibility by way of statute. In the case of immediate indefeasibility,<sup>2</sup> in the absence of fraud, registration of a forged or void instrument confers an indefeasible title or interest (see *Frazer v Walker*<sup>3</sup> and *Breskvar v Wall*<sup>4</sup>). On the other hand, for deferred indefeasibility, even in the absence of fraud, registration of a forged or void instrument will not confer indefeasibility.

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<sup>1</sup> [2001] 1 MLJ 241 (“*Adorna Properties*”).

<sup>2</sup> For the advantages of immediate indefeasibility, see generally Edwards and O’Reilly, “The Duel between Immediate and Deferred Indefeasibility” [1999] SJLS 82 and Smith, “Forgeries and Land Registration” (1985) 101 LQR 79.

<sup>3</sup> [1967] 1 AC 569, at 584.

<sup>4</sup> (1971) 126 CLR 376, at 386.

## II. THE LEGISLATIVE FRAMEWORK

The Malaysian National Land Code 1965 provides in section 340 for deferred indefeasibility. Except for fraud to which the person or body who has obtained registration must be a party or privy so as to defeat the registered title or interest, the other vitiating circumstances (including forgery) which will render a registered title or interest defeasible thereunder apply notwithstanding that the registered proprietor is a purchaser in good faith and for value. The relevant provisions of section 340, in so far as fraud and forgery are concerned, read as follows:

- (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,...
  - (c) ...
- (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-s (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 sub-section 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.

- (4) ...

## III. THE FACTUAL MATRIX AND DECISIONS

In *Adorna Properties*, the respondent was the registered proprietor of the lands in question. Another person bearing her name, Boonsom Boonyanit, had forged her signature on the documents of transfer and sold the lands to the appellant, Adorna Properties Sdn Bhd. The appellant had no knowledge that the transfer documents were forged and had no reason to suspect that

they were forged. It was not disputed that the sale was an arm's length transaction with the parties represented by different solicitors. The respondent brought an action for, inter alia, an order that she be restored as the registered owner of the lands. The High Court<sup>5</sup> gave judgment in favour of the appellant, being a purchaser in good faith and for value, and thus coming within the proviso to section 340(3). The Court of Appeal<sup>6</sup>, in reversing the order of the High Court, held that the appellant's registered title was defeasible under section 340(2) and that the proviso to section 340(3) had no application. On appeal to the Federal Court, their Lordships agreed with the decision of the High Court on the issue of indefeasibility, holding that the proviso to section 340(3) conferred on the appellant an indefeasible title on the facts of the case.

#### IV. REASONING OF THE FEDERAL COURT

In a short four-page judgment, Eusoff Chin CJ (as he then was), in delivering the judgment of the Federal Court, ruled in favour of immediate indefeasibility. He elaborated on the approach adopted by their Lordships in dealing with the issue of indefeasibility:

We are aware that any sovereign country may adopt and apply the Torrens system, but in adopting the system, it may modify the system to suit its own needs. Our Parliament did not slavishly follow the wordings of ss 62, 182 and 183 of the Land Transfer Act 1952 of New Zealand, nor the wordings of s 42 of the [then] Federated Malay States Land Code. Therefore, to follow the arguments in earlier decisions not based on s 340 of the NLC would only lead to utter confusion. We would therefore proceed to interpret s 340 NLC as it stands, and find what the real intention of Parliament was when enacting it, for the object of interpretation is to discover the intention of Parliament, and the intention of Parliament must be deduced from the language used.<sup>7</sup>

Unfortunately, in deducing the intention of Parliament, their Lordships, it is respectfully submitted, lacked clarity in their reasoning when construing the provisions contained in section 340 of the National Land Code. In fact, the proviso to section 340(3) was misconstrued. Their Lordships dealt with section 340 in the following manner. The effect of section 340(1) is to confer on a registered proprietor an indefeasible title or interest so long as his name is on the land register unless the title or interest was obtained in the circumstances set out in sub-sections (2) and (3) to section 340. One of the circumstances in section 340(2) which renders the title or interest of a

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<sup>5</sup> [1995] 2 MLJ 863.

<sup>6</sup> [1997] 2 MLJ 62.

<sup>7</sup> *Supra*, note 1, at 244.

registered proprietor defeasible is where the registration has been obtained by forgery. Such a defeasible title or interest if acquired by and transferred to a subsequent registered proprietor is liable to be set aside as provided in section 340(3). However, there is a proviso to sub-section (3). Their Lordships explained the effect of the proviso as follows:

The proviso says that any purchaser in good faith and for valuable consideration or any person or body claiming through or under him are excluded from the application of the substantive provision of sub-s (3). For this category of registered proprietors, they obtained immediate indefeasibility notwithstanding that they acquired their titles under a forged document.<sup>8</sup>

In the result, their Lordships held that the appellant, a purchaser in good faith and for value, obtained an indefeasible title to the lands in question notwithstanding that the instruments of transfer were forged. Their Lordships, in effect, ruled that, on the facts of the case, the appellant came within section 340(3) and was saved by the proviso thereto.

#### V. ANALYSIS AND CRITIQUE

There is no quarrel with their Lordships' interpretation of section 340(1). However, they were less than clear in their explanation of section 340(2). Having said that the sub-section has the effect of rendering a registered title or interest defeasible in the circumstances specified therein, including where registration has been obtained by forgery with which they were concerned with, their Lordship should have further stated that, in the case of forgery, the registered title or interest acquired will remain defeasible notwithstanding that the registered proprietor was not a party or privy to the forgery. In other words, even if the registered proprietor acted in good faith and provided value for the title or interest and was not a party to the forgery, his title or interest will remain defeasible. This is the material difference between the vitiating factor of fraud and the other vitiating factors spelt out in section 340(2) which render a registered title or interest defeasible. For fraud, the registered proprietor or his agent must be a party or privy thereto before the registered title or interest is rendered defeasible. This is not the case for the other vitiating circumstances (including forgery) provided in section 340(2). This explains the different position obtained under the New Zealand Land Transfer Act 1952 and the Australian Torrens legislation (such as the Queensland Real Property Act 1861 and the New South Wales Real Property Act 1900) which provide for immediate indefeasibility on the one hand, and under the Malaysian National Land Code 1965 which provides for deferred indefeasibility on the other.

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<sup>8</sup> *Ibid*, at 246.

Given that the person who committed the forgery did not register the lands in her own name but sold them straight to the appellant, the latter was the immediate purchaser from the respondent. In other words, the appellant was a purchaser immediately to the forgery. That being the case, the appellant came within section 340(2)(b) and its title was rendered defeasible thereunder as the title was obtained by forgery. As noted above, it matters not that the appellant was a purchaser in good faith and for value. The appellant, accordingly, did not come within section 340(3).

It is important to note that section 340(3) does not apply until and unless a registered title or interest is found to be defeasible under section 340(2). Even then, it will apply only to a purchaser (in the context of a sale and purchase transaction) who subsequently buys from a registered proprietor whose title or interest is already rendered defeasible under section 340(2). As provided in section 340(3), the registered title of such a subsequent purchaser, and any interest subsequently granted thereout, such as a lease or mortgage, is liable to be set aside unless such a purchaser or any person or body claiming through or under him, comes within the proviso to section 340(3). It can, thus, be seen that the title rendered defeasible under section 340(2) can operate as the root of a good title in favour of a subsequent purchaser who comes within the proviso to section 340(3). On the facts in *Adorna Properties*, there was no room for section 340(3) to operate as there was no such subsequent purchaser involved, the appellant coming within section 340(2) instead.

As for the proviso to section 340(3), the first thing to note is that it qualifies only section 340(3), and not sub-section (2) as well. This is made abundantly clear by the opening words in the proviso itself which read: "Provided that nothing in *this* sub-section...", the sub-section referred to being sub-section (3) to section 340.<sup>9</sup> Similarly, the words "any purchaser" in the proviso must refer to a purchaser coming within section 340(3) *ie*, a subsequent purchaser, and not one coming within sub-section (2) as well. This is consistent with the language of the proviso. Accordingly, a purchaser in good faith and for value who falls within section 340(3) (but not one who is caught by section 340(2)) will obtain an indefeasible title or interest pursuant to the proviso thereto. In other words, statutory protection is granted by the proviso to this category of purchasers. Thus, it is not just any purchaser in good faith and for value who will obtain the benefit of indefeasibility conferred under the proviso mentioned. To construe otherwise would bring about the demise of the concept of deferred

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<sup>9</sup> Cf *Chu Choon Moi v Ngan Sew Tin* [1986] 1 MLJ 34 at 38; *Ali bin Ibrahim & Ors v TML Mohd Ibrahim* [1988] 1 CLJ 294 and *Lai Soon Cheong v Kien Loong Housing Development Sdn Bhd* [1993] 2 CLJ 199. See also Teo and Khaw, *Land Law in Malaysia*, 2nd ed (Butterworths, 1995), at 168-169 and 191, cited with approval by the Malaysian Court of Appeal in *OCBC Bank (M) Bhd v Pendaftar Hakmilik, Negeri Johor Darul Takzim* [1999] 2 MLJ 511 at 514, 517 and 524.

indefeasibility provided for in the Malaysian National Land Code and which is against the intention of Parliament.

Their Lordships' statement, noted above, that the proviso to section 340(3) confers immediate indefeasibility on registered proprietors who act in good faith and for value notwithstanding that registration was obtained by forgery, is erroneous and misconceived. As explained above, the legislative framework in section 340 provides for the concept of deferred indefeasibility. While the quality of indefeasibility does not attach to the title or interest acquired by a purchaser immediately to a forgery notwithstanding that he acted in good faith and gave valuable consideration, statutory protection is, nevertheless, granted to those who subsequently acquire, in good faith and for value, the title or interest from the immediate purchaser. Seen in this manner, the proviso to section 340(3) is part of the legislative framework which gives effect to the concept of deferred, and not immediate, indefeasibility under the Malaysian Torrens system.

Having misconstrued the legislative intent as embodied in section 340, the case of *Adorna Properties* is clearly wrongly decided on the issue of indefeasibility involving forgery and should not be followed. Whatever may be the advantages of immediate indefeasibility, it is for Parliament to change the law, and until that is done, it is for the courts to interpret correctly the law as it stands.