

DEFERRED INDEFEASIBILITY REINSTATED IN THE MALAYSIAN TORRENS SYSTEM: THE END OF AN UNFORTUNATE SAGA*

*Tan Ying Hong v. Tan Sian San & Ors*¹

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I. INTRODUCTION

The earlier decision of the Malaysian Federal Court in *Adorna Properties Sdn. Bhd. v. Boonsom Boonyanit @ Sun Yok Eng*² had not only spawned academic articles³ on the subject of indefeasibility of title and interests under the *National Land Code 1965*⁴ (“the NLC”) but had, unfortunately, also left an unwanted trail of uncertainty and insecurity of title for landowners which the Torrens system of land registration embodied in the NLC seeks to avoid, not to mention the slew of conflicting decisions pronounced in its aftermath.

It is trite that the concept of indefeasibility of title and interests is central to any Torrens system of land registration.⁵ In essence, the Torrens system provides for, *inter alia*, the concept of indefeasibility wherein all registered title and interests are guaranteed by the State to be good against the whole world in the absence of fraud

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¹ [2010] 2 M.L.J. 1 (F.C.) [*Tan Ying Hong*].

² [2001] 1 M.L.J. 241 (F.C.) [*Adorna Properties*].

³ See e.g. Ahmad Moosdeen, “On the Proviso in Section 340(3) of the National Land Code 1965” [2002] 2 M.L.J. lxvi; Yang, “Immediate Indefeasibility or Deferred Indefeasibility?” (2001) 30 *Insaf* 85; P.K. Nathan, “Nightmare for Registered Owners of Landed Property” [2002] 4 C.L.J. xiii; and Teo Keang Sood, “Demise of Deferred Indefeasibility under the Malaysian Torrens System?” [2002] *Sing. J.L.S.* 403 which was cited with approval in *Tan Ying Hong*, *supra* note 1 at para. 39.

⁴ Act 56 (Malaysia) [NLC].

⁵ As to the origin of the Torrens system, see Moerlin Fox, “The Story Behind the Torrens System” (1950) 23 *Austl. L. J.* 489 and Douglas John Whalan, *The Torrens System in Australia* (Sydney: The Law Book Co. Ltd., 1982) Chapter 1.

or other vitiating circumstances statutorily specified or judicially laid down. The concept of indefeasibility is, however, not defined in the *NLC*.⁶ In *Frazer v. Walker*,⁷ a Privy Council case on appeal from New Zealand, Lord Wilberforce explained the concept to mean the immunity from attack by an adverse claim to the land or an interest in respect of which a registered proprietor enjoys. In other words, no adverse claim (except as specifically admitted by statute) may be brought against him.⁸

Case law developments following *Adorna Properties* have added their fair share of ambiguities to the concept of indefeasibility embodied in the *NLC*. It is well-known that the Torrens system of registration seeks to provide for, *inter alia*, certainty of title and interests.⁹ However, this objective was undermined by the Federal Court decision in *Adorna Properties* and the judicial interpretations following it which pay scant regard to the spirit and intent of the indefeasibility provision in the *NLC*, which we now turn to.

II. THE STATUTORY ANALYTICAL FRAMEWORK

Section 340 of the *NLC* provides for the concept of indefeasibility. This paper will focus principally on the vitiating circumstances of fraud and forgery which the cases deal with.

Given the language employed in section 340, the analytical framework of the provision is as follows: pursuant to section 340(1), the proprietor in whose favour registration has been effected will obtain an indefeasible title to or interest in the land. However, the title or interest so acquired is liable to be set aside under section 340(2) where it has been obtained by, *inter alia*, fraud or forgery. In the case of fraud, section 340(2)(a) provides for the title or interest obtained to be defeasible where the proprietor or his agent is a party to or privy to the fraud. In the case of forgery, section 340(2)(b) provides for the title or interest so acquired by the proprietor or transferee *immediately* to the forgery to be defeasible and liable to be set aside. This is so irrespective of whether the said proprietor or transferee acted in good faith in acquiring the title or interest. This is because there is no similar requirement, as in the case of fraud, that he must also be a party or privy to the forgery.¹⁰ Where the title or interest is subsequently transferred, section 340(3)(a) provides that the subsequent proprietor or transferee will similarly obtain a defeasible title or interest. Also, under section 340(3)(b), any interest subsequently granted out of a title which is defeasible under section 340(2)(a) and (b) will attract the same consequence. However, where the subsequent proprietor or transferee acts in good faith and gives valuable consideration for the title or interest in question, the section 340(3) proviso confers protection on such a *subsequent* proprietor or transferee such that his title

⁶ This is also the case in the other Torrens jurisdictions *e.g.* the Singapore *Land Titles Act* (Cap. 157, 2004 Rev. Ed. Sing.) [*Land Titles Act*], the New Zealand *Land Transfer Act 1952* (N.Z.), 1952/52 [*New Zealand Land Transfer Act 1952*] and the New South Wales *Real Property Act 1900* (N.S.W.) [*NSW Real Property Act 1900*].

⁷ [1967] 1 A.C. 569 (P.C.) [*Frazer v. Walker*].

⁸ *Ibid.* at 580-581.

⁹ See *e.g.* the Privy Council decision in *Oh Hiam & Ors v. Tham Kong* [1980] 2 M.L.J. 159 at 164.

¹⁰ This is also the position where registration is obtained under a void or insufficient instrument (see s. 340(2)(b) of the *NLC*). See, further, the discussion in Teo & Khaw, *Land Law in Malaysia—Cases and Commentary*, 2d ed. (Singapore: Butterworths Asia, 1995) 169-178.

or interest will be indefeasible. In effect, section 340 provides for what is called the concept of deferred indefeasibility.¹¹

At this juncture, it may be pertinent to note by way of comparison that under section 46(2)(a) of the Singapore *Land Titles Act*,¹² which provides for the concept of indefeasibility, the vitiating factor of forgery is placed side by side with fraud, wherein it must be established that either the proprietor or his agent was a party to or had colluded in the fraud or forgery before the title may be rendered defeasible. It can be seen then that the application of both exceptions leads to the same result. In this regard, the Singapore provision, in effect, embraces the concept of immediate indefeasibility.¹³ In section 340(2)(b) of the *NLC*, however, forgery is a distinct ground on its own, and given the different language employed in section 340(2)(a) and (b), the vitiating factor of forgery is sufficient in itself to render the registered title or interest defeasible notwithstanding that the *immediate* registered proprietor or transferee is innocent and has acted in good faith in addition to giving valuable consideration.

III. COMPETING THEORIES OF INDEFEASIBILITY

As noted above, there are two competing theories of indefeasibility—namely immediate and deferred indefeasibility.¹⁴

In the case of immediate indefeasibility, the registered title or interest of the proprietor or transferee immediately to the vitiating factors will be conferred statutory protection *i.e.* the quality of indefeasibility, the vitiating factors notwithstanding. Immediate indefeasibility will attach so long as the immediate proprietor or transferee acts in good faith and gives valuable consideration for the title or interest acquired.¹⁵

As for deferred indefeasibility, statutory protection is conferred on the *subsequent* transferee after, say, a forged transfer. In other words, the quality of indefeasibility is postponed in favour of a proprietor or transferee who *subsequently* acquires the title or interest. By way of illustration, take for instance a case where X forges the signature of A to whom the land belongs and transfers the land straight to B (*i.e.* the immediate proprietor or transferee to the forgery) who purchases it in good faith and for valuable consideration. Under the theory of deferred indefeasibility,

¹¹ See also *Mohammad bin Buyong v. Pemungut Hasil Tanah Gombak & Ors* [1982] 2 M.L.J. 53 at 54 (F.C.) and *M & J Frozen Food Sdn. Bhd. & Anor v. Siland Sdn. Bhd. & Anor* [1994] 1 M.L.J. 294 at 309 (Sup. Ct.), both referred to in *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 5 M.L.J. 136 at para. 12 (F.C.) [*Au Meng Nam*]. See further, David Wong, *Tenure and Land Dealings in the Malay States* (Singapore: Singapore University Press, 1975) 361; Judith Sihombing, *National Land Code—A Commentary*, 2d ed. (Kuala Lumpur: Malayan Law Journal Pte. Ltd., 1992) 817 and 819; and Teo & Khaw, *supra* note 10 at 168-169.

¹² *Supra* note 6.

¹³ See the recent Singapore Court of Appeal case of *United Overseas Bank Ltd. v. Bebe bte Mohammad* [2006] 4 S.L.R. 884.

¹⁴ For a discussion of the advantages and disadvantages of the two theories, see Robin Edwards & Jennifer O'Reilly, "The Duel between Immediate and Deferred Indefeasibility" [1999] Sing. J.L.S. 82 at 98-111. See also R. J. Smith, "Forgeries and Land Registration" (1985) 101 Law Q. Rev. 79 at 88-89 and Pamela O'Connor, "Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems" (2009) 13 Ed. L. Rev. 194.

¹⁵ This is the position in Australia and New Zealand. See also *Frazer v. Walker*, *supra* note 7 at 584 and *Breskvar v. Wall* (1971) 126 C.L.R. 376 at 386 (H.C.A.).

B will get only a defeasible title. If B subsequently transfers the land to C (*i.e.* the subsequent proprietor or transferee to the forgery), who acts in good faith and gives valuable consideration for it, the quality of indefeasibility will only then attach to the title to the land acquired by C.

IV. THE FEDERAL COURT DECISION IN *ADORNA PROPERTIES SDN. BHD. v. BOONSOM BOONYANIT*

Notwithstanding the clear language of section 340 of the *NLC* noted above, the highest court in Malaysia nevertheless construed the provision as embracing the concept of immediate indefeasibility. In the instant case, the respondent was the registered proprietor of the lands in question. She discovered that the lands had been transferred to and registered in the name of the appellant company. A person bearing her name, Boonsom Boonyanit, had forged her signature on the documents of transfer and sold the lands to the appellant company. It was established that the latter had no knowledge that the transfer documents were forged and had no reason to suspect that they were forged. It was not in dispute that the sale was an arm's length transaction with the parties represented by different solicitors. The respondent brought an action to, *inter alia*, restore her name as the registered owner on the register. The High Court found in favour of the appellant company.¹⁶ Vincent Ng J. held, *inter alia*, that there was sufficient evidence that the respondent was the registered owner of the lands prior to the transfer to the appellant company. However, the respondent failed to discharge the burden of proving that there was a forgery with respect to the transfer. In any event, even if the respondent had succeeded in establishing forgery, the appellant company was a *bona fide* purchaser for value and thus came within the proviso to section 340(3), with the result that they obtained a good title to the lands notwithstanding the forgery. The Court of Appeal, in reversing the decision of the High Court, reinstated the deferred indefeasibility concept in section 340.¹⁷ The Court of Appeal held that the appellant company's registered title was defeasible under section 340(2) and that the proviso to section 340(3) had no application.

In a brief judgment, the then Chief Justice Eusoff Chin, in delivering the judgment of the Federal Court, allowed the appeal of the appellant company. The then Chief Justice stated that the proper approach to take in dealing with the issue at hand was to interpret section 340 as a whole and from the language used, uninfluenced by any judicial or academic comment not based on its provisions.¹⁸ In deducing the intention of Parliament, the then Chief Justice was correct in stating that the title or interest of a registered proprietor appearing on the land register is *prima facie* indefeasible under section 340(1). This would encompass everyone who is currently registered as proprietor, irrespective of how he came onto the land register; be it that he purchased the property or acquired it by way of a gift or by way of transmission.¹⁹ The title or interest is, however, rendered defeasible under section 340(2) if it has been acquired in any of the circumstances set out therein, including by way of fraud or forgery. It would have been helpful, at this stage, for the then Chief Justice to

¹⁶ See [1995] 2 M.L.J. 863 (H.C.).

¹⁷ See [1997] 2 M.L.J. 62 (C.A.).

¹⁸ See [2001] 1 M.L.J. 241 at 244 (F.C.).

¹⁹ *Ibid.* at 245.

caution that the requirement to render a title or interest defeasible for fraud and forgery in section 340(2)(a) and (b) respectively is not the same. In the case of fraud, one (or one's agent) has to be a party or privy to it before a title or interest is rendered defeasible, but this is not a requirement in the case of forgery. It is equally important to highlight at this stage that the vitiating factors set out in section 340(2) render the title or interest of a registered proprietor *immediately* to, say, a forgery, defeasible. Except for fraud, this is the position notwithstanding that the immediate registered proprietor acted in good faith and gave valuable consideration. With these differences in mind, one would better appreciate the respective roles played by section 340(2) and section 340(3).

The then Chief Justice's explanation of the effect of section 340(3)(a) and (b) lacked clarity in one important respect. He should have gone further and clarified that section 340(3)(a) and (b) only apply to a *subsequent registered proprietor*, that is, a proprietor who subsequently acquires his title or interest from the proprietor immediately to the vitiating factors set out in section 340(2) and whose registered title or interest is rendered defeasible under the latter provision. The language of section 340(3) says as much, as can be seen in the expressions employed therein such as "...in the hands of any person or body to whom [the title or interest] may subsequently be transferred..." in paragraph (a) and "...any interest subsequently granted thereout..." in paragraph (b). Such title or interest of the subsequent registered proprietor is similarly rendered defeasible by section 340(3)(a) and (b). It is thus clear that there is no room for the application of section 340(3) unless section 340(2) first applies, namely, that there is a title or interest rendered defeasible by the latter provision which is subsequently acquired by or transferred to another proprietor. Accordingly, the question which arises is whether, given the facts in *Adorna Properties*, the appellant company's title came within section 340(3). The Federal Court thought so, which unfortunately cannot be correct. The person who forged the signature of the respondent did not transfer the title to herself first. In other words, the person who committed the forgery did not register the lands in her own name but sold them straight to the appellant company. As such, the appellant company was the immediate registered proprietor from the respondent, being a proprietor immediately to the forgery. The appellant company therefore came within section 340(2) and not, as the Federal Court held, section 340(3).

There were also a number of ambiguities in the explanation by the then Chief Justice of the proviso to section 340(3). For one, he did not have in mind the different categories of registered proprietors who come within section 340(2) and section 340(3), namely, immediate registered proprietors and subsequent registered proprietors respectively, as explained above. Accordingly, he did not limit the benefit of the proviso to section 340(3) to the latter category. He thought that the proviso applies also to immediate registered proprietors who come within section 340(2) so long as they acted in good faith and gave valuable consideration. As a result, in his opinion, this category of registered proprietors coming within section 340(2) obtain immediate indefeasibility by virtue of the proviso to section 340(3), notwithstanding that they obtained their titles under a forged document.²⁰

²⁰ The then Supreme Court in an earlier decision in *Chu Choon Moi v. Ngan Sew Tin* [1986] 1 M.L.J. 34 also committed the same error. Syed Agil Barakbah S.C.J. observed at 38 that the proviso to s. 340(3) also applied to a s. 340(2) situation. This observation was unnecessary since it had already been decided

Support for the view that the proviso to section 340(3) applies exclusively to situations covered by section 340(3) is further reinforced by the language used in the proviso itself. The expression “[p]rovided that nothing in *this* sub-section...” must clearly refer to subsection (3) of section 340. Read together with the reference therein to any title or interest acquired by any purchaser in good faith and for valuable consideration, this must similarly refer to a proprietor who comes within section 340(3) only, namely, a *subsequent* registered proprietor, and not just *any* proprietor who has acted in good faith and for value. The construction put forth by the Federal Court, if correct, will render section 340(2) redundant. In fact, to say that the benefit of the proviso applies also to immediate registered proprietors coming within section 340(2) is to do away with the concept of deferred indefeasibility entrenched in the *NLC* and goes against the clear intention of Parliament. This unsatisfactory state of the law left behind by the Federal Court could undermine confidence in land dealings in the country. It had in fact given rise to much concern and unhappiness among landowners and the legal fraternity.²¹

V. REVIEW OF SOME OF THE CASES DECIDED AFTER THE FEDERAL COURT DECISION IN *ADORNA PROPERTIES*

The concept of immediate indefeasibility laid down by the Federal Court in *Adorna Properties* had been adopted in a number of decisions by the High Court. In the subsequent High Court case of *Liew Yok Yin v. AGS Harta Sdn. Bhd.*,²² the effect of section 340 was similarly misconstrued. The High Court had correctly ruled that as the signature of the plaintiff, the original registered owner of the land, was forged on the sale documentation comprising, *inter alia*, the sale and purchase agreement and the instrument of transfer, it did not constitute a sufficient instrument to convey the title to the land to the defendant.²³ The defendant accordingly came within the ambit of section 340(2)(b). However, given the binding authority of the Federal Court in *Adorna Properties*, it was not surprising that the learned judge went on to adopt the reasoning in that case to consider whether the defendant was a purchaser in good faith and for value for the purpose of the proviso to section 340(3). The learned judge came to the conclusion on the evidence that the said proviso did not apply in favour of the defendant as they had not discharged the burden of showing that they were a purchaser in good faith, notwithstanding that they had given valuable consideration for the purchase. The plaintiff’s claim for, *inter alia*, rectification of the

in the case that the registration of the transfer was defeasible for fraud under s. 340(2)(a). See Teo & Khaw, *supra* note 10 at 168-169 and 191, cited with approval by the Court of Appeal in *OCBC Bank (M) Bhd. v. Pendaftar Hakmilik, Negeri Johor Darul Takzim* [1999] 2 M.L.J. 511 at 514, 517 and 524.

²¹ See Nathan, *supra* note 3; Lim Kean Chye, “Green Light for Forgers” and Tan Kok Liang, “Should Fingerprinting be Introduced in Property/Land Dealings?” (the latter two papers were presented at the 14th Malaysian Law Conference entitled “Property Rights Under the Malaysian Constitution” organised by the Bar Council of Malaysia on 29 October 2007, Kuala Lumpur, Malaysia).

²² [2006] 7 M.L.J. 49 (H.C.) [*Liew Yok Yin*].

²³ Relying on the Court of Appeal case of *State Tailor Sdn. Bhd. v. Nallapan* [2005] 2 C.L.J. 167. That forgery renders an instrument insufficient was not considered by the Federal Court in *Adorna Properties*, though it is submitted that having found that the appellant company was a *bona fide* purchaser would have made no difference to the result obtained in *Adorna Properties*, given the Federal Court’s interpretation of the s. 340(3) proviso.

register in her favour was accordingly allowed. With respect, *even if* the defendant were able to show that they were a *bona fide* purchaser for value, section 340(2)(b) would still apply to them as they were the *immediate* purchasers to the forgery, given the concept of deferred indefeasibility embodied in section 340. The proviso to section 340(3) would not have been applicable to them but only to a purchaser to whom the defendant may *subsequently* transfer the land to, provided this subsequent purchaser is one who acts in good faith and gives value. In short, on the facts in *Liew Yok Yin*, the defendant was still at the section 340(2)(b) stage and the benefit of the proviso to section 340(3) was not available to them in light of the concept of deferred indefeasibility.

Another High Court case, *Mok Yong Chuan v. Mok Yong Kong & Anor*,²⁴ dealt with the issue of indefeasibility but this time, on the vitiating factor of fraud which, as noted earlier in Part II of the paper, is on a different footing from that of the other vitiating factors set out in section 340(2)(b) such as forgery and insufficient instrument. On the evidence, the learned judge held that the plaintiff failed to prove his case based on fraud against the first and second defendants. The two-third share of the property in question was registered in the name of “Boh Yong Kwang”, which the first defendant claimed was a variant spelling of his name in the Hailanese dialect. The first defendant subsequently effected a rectification of the spelling of the said name on the documents of title to his name, “Mok Yong Kong”, and thereafter transferred the two-third share to the second defendant. As the plaintiff failed to discharge the burden of proving fraud against the defendants, the learned judge held that this was sufficient to dispose of the plaintiff’s claim to the said two-third share in the property. The learned judge, however, went on to discuss the issue of indefeasibility involving the position of the second defendant. He found that the second defendant, at the time of accepting the transfer of the two-third share, had absolutely no knowledge of any matter or dispute that might have transpired or arisen between the plaintiff and the first defendant. He took the view that as this fact was not disputed by the plaintiff who practically abandoned his allegation of fraud and conspiracy against the second defendant during trial, it followed that the latter had acquired an indefeasible title whatever the position may be between the plaintiff and the first defendant.²⁵ Reference was made by the learned judge to the Federal Court’s decision in *Adorna Properties* for the proposition that the concept of immediate indefeasibility applies in section 340. However, it should be made clear that as fraud was not established against the first defendant, his title was indefeasible under section 340(1) and the second defendant similarly acquired an indefeasible title under section 340(1).²⁶ If, however, the title of the first defendant was defeasible for fraud such that it came within section 340(2)(a), then the second defendant, being a *bona fide* purchaser for value, would acquire an indefeasible title within the proviso to section 340(3), with the defeasible title of the first defendant operating as the root of a good title in favour of the second defendant.

Interestingly, the learned judge was of the view that the same result would have been obtained in the case even if one were to apply the concept of deferred

²⁴ [2006] 7 M.L.J. 526 (H.C.) [*Mok Yong Chuan*].

²⁵ *Ibid.* at 534.

²⁶ The position would be different in the case of vitiating factors specified in s. 340(2)(b). See generally the discussion in the earlier part of the paper on *Adorna Properties* and in Part II above.

indefeasibility. In his opinion, as the transaction between the first and second defendants did not involve forgery and was subsequent to the allegation of fraud, the second defendant, being a purchaser in good faith and for value, could not be tainted by the allegation of fraud and, accordingly, obtained an indefeasible title (presumably pursuant to the proviso to section 340(3)).²⁷ This reasoning would withstand scrutiny if the first defendant was found guilty of fraud. However, since the learned judge found that the first defendant did not have fraud proved against him, the second defendant need not have come within the proviso to section 340(3) to acquire an indefeasible title. As noted in the immediately preceding paragraph, the second defendant would acquire an indefeasible title pursuant to section 340(1) given that the first defendant's title was itself indefeasible under section 340(1) too, as section 340(2) was not applicable to the latter's title, there being no fraud established against the first defendant in the first place. There was, accordingly, no room for the application of deferred indefeasibility in respect of the title of the second defendant on the facts of the case.

Attempts have been made, in particular, by the Court of Appeal not to follow the Federal Court decision in *Adorna Properties*, but this has met with little success so far. This can be seen in the latest Court of Appeal decision in *Au Meng Nam & Anor v. Ung Yak Chew & Ors*²⁸ where the judges of appeal were not unanimous in declining to uphold the authority of the Federal Court in *Adorna Properties*. While the judges of appeal were unanimous in holding, on the facts, that the first respondent did not obtain an indefeasible title to the property via an instrument of transfer that was forged as he had not discharged the burden of proving that he was a purchaser in good faith and for value, they took different approaches in dealing with the binding effect of the Federal Court decision in *Adorna Properties*.

Gopal Sri Ram J.C.A. had no hesitation in declaring that the Federal Court decision in *Adorna Properties* was not good law and should not be followed henceforth as it was decided *per incuriam* given that it had misconstrued section 340. Some of the reasons he convincingly articulated in *Au Meng Nam* for declining to follow *Adorna Properties* were an extension of the grounds he had earlier given in the Court of Appeal decision in *Subramaniam a/l NS Dhurai v. Sandrakasan a/l Retnasamy & Ors*.²⁹ Among others, it was pointed out in both the Court of Appeal decisions that the Federal Court in *Adorna Properties* failed to differentiate between the meaning of the words "proprietor"³⁰ and "purchaser"³¹ in section 340. The Federal Court had used the words to mean one and the same, without realising that they provided

²⁷ *Mok Yong Chuan*, *supra* note 24 at 534.

²⁸ *Au Meng Nam*, *supra* note 11.

²⁹ [2005] 6 M.L.J. 120 (C.A.) [*Subramaniam*]. The Court of Appeal in *Subramaniam* construed the principles laid down in *Young v. British Aeroplane Co. Ltd.* [1944] K.B. 718 at 729 (C.A.) as applying to decisions not only of the Court of Appeal, but also that of the Federal Court which were decided *per incuriam* (*ibid.* at para. 16). It is doubtful if the Court of Appeal's express disapproval can have the effect of "overruling" the decision of the Federal Court in *Adorna Properties* (*ibid.* at para. 22). It is, however, not clear from the decision in *Subramaniam* on what specific ground the transfer of the land therein was set aside. This would likely render the comments of the Court of Appeal on the Federal Court decision *obiter* at best if forgery is not similarly involved.

³⁰ Defined in s. 5 of the *NLC* to mean "any person or body for the time being registered as the proprietor of any alienated land".

³¹ Defined in s. 5 of the *NLC* to mean "a person or body who in good faith and for valuable consideration acquires title to, or any interest in land".

for distinct statutory concepts. One would have thought that the significance of the distinction is rendered somewhat less important where the purchaser is also the registered proprietor of the land. What is crucial is whether the person concerned as the holder of the title or interest, who acted in good faith and gave valuable consideration in acquiring title to or an interest in the land, is a subsequent transferee so as to avail himself of the benefit of the proviso to section 340(3). That the same requirements in the definition of “purchaser” appear in the proviso to section 340(3) itself suggests that the word “purchaser” is intended to play a significant role in the other provisions³² of the *NLC* where it appears, and not where the section 340(3) proviso is concerned.

Raus Sharif J.C.A. adopted a more cautious approach in *Au Meng Nam* when dealing with the Federal Court decision in *Adorna Properties*. He was not prepared to ignore or disregard the decision as to do so would be to go against the doctrine of *stare decisis*.³³ As noted earlier, he and the other judges of appeal did distinguish the case before them on the facts. Nevertheless, he did express the view that the Federal Court should review its decision in *Adorna Properties*.³⁴

VI. DEFERRED INDEFEASIBILITY REINSTATED—THE FINAL WORD

An attempt made in *Adorna Properties Sdn. Bhd. v. Kobchai Sosothikul*³⁵ to get the Federal Court to review its own decision in *Adorna Properties* met with no success. In that case, Boonsom Boonyanit’s personal representative applied to the Federal Court for a review of the court’s own decision in *Adorna Properties* in the interest of justice. In fact, an earlier application, which was dismissed, had been made by the same personal representative to the Federal Court to set aside the decision in *Adorna Properties* on the ground of *coram* failure as one of the judges who had presided had retired before the main judgment in *Adorna Properties* was delivered by the Federal Court. In dismissing the present application, the Federal Court was not convinced that the interpretation of section 340(3) given in *Adorna Properties* was patently wrong thereby resulting in grave injustice.³⁶

An opportunity for reconsideration of the Federal Court decision in *Adorna Properties* arose in *Tan Ying Hong*.³⁷ In its latest decision, the Malaysian Federal Court in *Tan Ying Hong* has now reiterated and reaffirmed, once and for all, the true legal position as set out in section 340 of the *NLC*, namely, that the concept of deferred indefeasibility has all along been embodied therein. The appellant, who was alienated and issued with the document of title to the land in question, had brought proceedings against, *inter alia*, the third respondent, a bank, to set aside two charges registered against the said land in favour of the latter. The charges were executed by the first respondent, the rogue, who had forged the appellant’s signature and created a power of attorney stating that he (the first respondent) was authorised to act on behalf of

³² For example, ss. 210 and 337.

³³ *Au Meng Nam*, *supra* note 11 at paras. 32 and 35.

³⁴ *Ibid.* at para. 34. Hasan bin Lah J.C.A., who did not deliver a separate judgment, concurred with the judgment of Raus Sharif J.C.A.

³⁵ [2005] 1 C.L.J. 565 (F.C.).

³⁶ *Ibid.* at 572.

³⁷ *Supra* note 1.

the appellant. At no time was the land in question transferred and registered in the name of the first respondent. The charges were executed to secure loans made by the bank in favour of the second respondent, a company. The first respondent had since absconded. The appellant only became aware of the forgery when he received a notice of demand from the bank seeking repayment of the loans. Both the High Court and the Court of Appeal,³⁸ following the decision of the Federal Court in *Adorna Properties*, ruled against the appellant, holding that the bank had acquired immediate indefeasibility of the charges registered in its favour.³⁹ Dissatisfied with the decision of the Court of Appeal, the appellant appealed to the Federal Court.

Chief Judge of Malaya Arifin Zakaria, who delivered the main judgment of the five-member bench of the Federal Court, held that the proviso to subsection (3) of section 340 of the *NLC* applies only to the particular subsection concerned and not to other provisions of section 340.⁴⁰ He noted that a proviso to a subsection would not apply to another subsection as a proviso carves out an exception to the provision immediately preceding it and to no other.⁴¹ In the instant case, this was confirmed by the language used in the proviso itself which expressly refers to and qualifies only subsection (3) and no other provisions in section 340.⁴² Thus, the effect of the proviso to section 340(3) is to protect subsequent transfers or interests in land subsequently granted, where the subsequent (not immediate) transferee has acted in good faith and for valuable consideration. Having alluded to the mistake made by the Federal Court in *Adorna Properties* in interpreting the effect of the proviso to section 340(3), the Federal Court in *Tan Ying Hong* concluded in its main judgment as follows:

This error needs to be remedied forthwith in the interest of all registered proprietors. It is, therefore, highly regrettable that it had taken some time, before this contentious issue is put to rest...

[W]e hold that the Federal Court in *Adorna Properties* had misconstrued s 340 (1), (2) and (3) of the *NLC* and came to the erroneous conclusion that the proviso appearing in sub-s (3) equally applies to sub-s (2). By so doing the Federal Court gave recognition to the concept of immediate indefeasibility under the *NLC* which we think is contrary to the provision of s 340 of the *NLC*.⁴³

The Chief Justice of Malaysia Zaki Tun Azmi, in concurring with the main judgment of the Federal Court of which he was a member, had, in a separate judgment, expressed the same sentiment:

I am legally obligated to restate the law since the error committed in *Adorna Properties* is so obvious and blatant. It is quite a well known fact that some unscrupulous people have been taking advantage of this error by falsely transferring titles to themselves. I hope that with this decision, the Land Authorities will be extra cautious when registering transfers.⁴⁴

³⁸ Both decisions are unreported.

³⁹ As ascertained from the main judgment of the Federal Court in *Tan Ying Hong*, *supra* note 1.

⁴⁰ *Ibid.* at para. 51.

⁴¹ *Ibid.* at para. 49, citing *Gajo Ram v. State of Bihar* AIR 1956 Pat 113 (Patna H.C.) and *Ram Narain Sons Ltd. v. Asst. Commr. of Sales—tax* AIR 1955 SC 765.

⁴² *Tan Ying Hong*, *supra* note 1 at para. 50.

⁴³ *Ibid.* at paras. 52 and 53.

⁴⁴ *Ibid.* at para. 11.

On the facts in *Tan Ying Hong*, the Federal Court had no difficulty in finding for the appellant and allowing the appeal. As the Federal Court explained in its main judgment:

[I]t is not in dispute that the two charges registered in favour of the 3rd respondent were based on void instruments as the relevant Forms 16A were not executed by the appellant. They were executed by the 1st respondent pursuant to a forged PA. Thus, the charge instruments (Form 16A) used in the present case were indisputably void instruments. It follows, therefore, that the two charges in this case are liable to be set aside under s 340 (2)(b) since they are based on void instruments.

The 3rd respondent is an immediate holder of these charges. That being the position, the 3rd respondent could not take advantage of the proviso to sub-s (3) of s 340.⁴⁵

There is no doubt that a void instrument would include one that is forged.⁴⁶ The Federal Court also made it clear in its main judgment that the manner in which the appellant got his name registered on the document of title was immaterial. The appellant had on his own admission stated that he did not apply for the land and that he was not aware that the land had been alienated to him by the Pahang state government and registered in his name until the third respondent issued a notice of demand on him. In the opinion of the Federal Court, this issue was of no concern to the court given that it was never challenged by any party, including the third respondent, that the appellant was the registered proprietor of the land. The only material issue was whether the charges registered in favour of the third respondent were defeasible under section 340(2)(b).⁴⁷

VII. CONCLUSION—IMPLICATIONS OF *TAN YING HONG*

In light of the decision of the Federal Court in *Tan Ying Hong*, there is no longer any doubt that the law on indefeasibility in the Malaysian Torrens System is now decisively settled. This decision of the five-member bench has effectively overruled the earlier decision of the three-member bench of the Federal Court in *Adorna Properties*. As was rightly observed by the Federal Court in its main judgment in *Tan Ying Hong*, it is trite law that the Federal Court may depart from its earlier decision if the former decision sought to be overruled is wrong, uncertain, unjust or outmoded or obsolete in light of modern conditions.⁴⁸ Future court decisions involving the issue of deferred indefeasibility must henceforth categorically follow the decision of the Federal Court in *Tan Ying Hong*.

The decision of the Federal Court in *Tan Ying Hong* makes it more difficult for rogues to fraudulently transfer land by means of forgery or void instruments. A party

⁴⁵ *Ibid.* at paras. 55 and 56. See also Roger Tan, "A Tighter Rein on Land Transfers", *The Star Online* (24 January 2010), online: Star Property <<http://www.starproperty.my/PropertyScene/TheStarOnlineHighlightBox/1868/0/0>>.

⁴⁶ See also Teo & Khaw, *supra* note 10 at 170.

⁴⁷ *Tan Ying Hong*, *supra* note 1 at para. 60.

⁴⁸ *Ibid.* at para. 41, citing *Dalip Bhagwan Singh v. PP* [1998] 1 M.L.J. 1 (F.C.). In the context of the application of the rule of judicial precedent in relation to the House of Lords, see *London Tramways v. London County Council* [1898] A.C. 375.

who is a prospective immediate transferee to such vitiating factors, given that he will only obtain a defeasible title under section 340(2) notwithstanding that he acted in good faith and gave valuable consideration, will act extra cautiously and with greater due diligence such that the transaction will not go through. However, the Federal Court's decision in *Tan Ying Hong* in no way eliminates the risk of a landowner losing his land in such circumstances. A fraudster could, for example, forge a transfer of the land to himself first. Thereafter, with his defeasible title, he could sell the land, or create an interest out of it (such as a charge), to a subsequent purchaser who acts in good faith and provides valuable consideration. As between the two innocent parties, that is, the original landowner and the subsequent purchaser, the former will lose out to the latter who will have the protection of the proviso to section 340(3). The fraudster, who was the immediate purchaser in the scenario, would have long absconded with his ill-gotten gains before the commencement of any proceedings pertaining to the transactions carried out in respect of the land. In this regard, to minimise such fraudulent transactions and short of making it mandatory for the transacting parties to be present in person at every crucial stage of the transaction, it behoves the Land Office or Registry to put in place adequate safeguards and to exercise extra caution when registering transfers or charges. Plans are also afoot to ensure that the onus to prevent fraudulent land transfers is not placed solely on the registering authority but also on persons, such as Commissioners of Oaths, attesting the relevant statutory declarations.⁴⁹ This is to avoid statutory declarations from being easily manipulated by scammers to cheat in land transaction dealings. Additionally, an assurance fund⁵⁰ to compensate persons who, without any fault of their own, have been deprived of their land may be considered.⁵¹

Given the clear legislative intent which the Malaysian Parliament has opted for in section 340 of the *NLC*, namely, favouring the concept of deferred indefeasibility, and which the Federal Court in *Tan Ying Hong* has now reaffirmed, the interests and rights of the original landowner accorded protection in the *NLC* must necessarily reign supreme and prevail over that of the immediate purchaser in the specified circumstances discussed above.

⁴⁹ Currently, Commissioners of Oaths are merely required to attest that the person who signed the statutory declaration is the same person who made it and nothing else. Verification of the identities of the deponents might not have been undertaken. To prevent rogues from forging the signatures of landowners and bringing the statutory declarations to be attested by Commissioners of Oaths, steps are being considered to make the latter liable for any statutory declaration they sign on by making it mandatory for them to read the content of the statutory declaration and only attest their signatures after being satisfied the content is not contentious. See also "Commissioners of Oaths must read the declarations they sign, says deputy minister", *The Star Online* (21 June 2010), online: The Star Online <<http://thestar.com.my/news/story.asp?file=/2010/6/21/nation/20100621111534&sec=nation>> and "Liew defends move to amend Statutory Declaration Act", *The Star Online* (28 June 2010), online: The Star Online <<http://thestar.com.my/news/story.asp?file=/2010/6/28/nation/20100628165924&sec=nation>>.

⁵⁰ See e.g. ss. 128-135 of the *NSW Real Property Act 1900*, *supra* note 6.; ss. 172-181 of the *New Zealand Land Transfer Act 1952* and ss. 151, 155-156 of the *Singapore Land Titles Act*, *supra* note 6.

⁵¹ Given that land is a state matter under the *Malaysian Federal Constitution 1957*, Ninth Schedule, List II (State List), Item 2 [*Federal Constitution*], any move to provide for an assurance fund in the *NLC* would have to be effected at the Federal level pursuant to art. 76(4) of the *Federal Constitution*. See also arts. 91(1) and (5) of the *Federal Constitution* which provide for any policy formulated by the National Land Council to be followed by the Federal Government and the respective State Authorities.