

THE UPDATE



The Quarterly Law Bulletin of TAY & HELEN WONG Law Practice

Special Issue 1-2010

PP16300/03/2010(023735)

PRELUDE TO SPECIAL ISSUE 1 OF 2010

We bring to you this Special Issue 1 of 2010 the very important decision of *Tan Ying Hong v Tan Sian Sang & 2 Others* which was delivered by the highest court of the land, the Federal Court on 21 January 2010. It restated the law under Section 340(2) and (3) of the National Land Code 1965, which was unfortunately and erroneously made by another bench of the apex court almost a decade ago in the infamous case of *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng*. It restored the concept of deferred indefeasibility (as opposed to immediate indefeasibility) to the crux of the Torrens system of land registration in Malaysia.

HAPPY READING !

ADORNA PROPERTIES NO LONGER GOOD LAW, NO IMMEDIATE INDEFEASIBILITY

It has to happen and it did happen on 21 January 2010, after what a law report editor described as '20 heart-rending years to justice'ⁱ. Yes, the much controversial and heavily criticized apex court's decision in *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng*ⁱⁱ (*Adorna Properties*) was finally laid to rest by the five-member bench of the Federal Court in *Tan Ying Hong v Tan Sian Sian & 2 Others*ⁱⁱⁱ (*Tan Ying Hong*). For the benefit of our readers who may not be aware of the background leading to these two major decisions, the issue actually pertains to the proper construction of a provision in the National Land Code (NLC), namely s.340(2) and (3), which has a far reaching impact on land dealings and transactions in Malaysia.

Now, our country adopts the **Torrens** title or the system of registration of titles. One of the features under such system is that title or interest in land vests and divests only upon registration. The party in whose favour the registration has been effected will, upon such registration, obtain an indefeasible title or interest in the land --- a title or an interest which is free of all adverse claims or encumbrances not noted on the register.^{iv} Persons dealing with the registered proprietor of the land need not be concerned to ascertain the validity of the information relating to the land as indicated on the register and the circumstances under which such proprietor came to be registered.

The register of titles is thus generally, subject to certain exceptions, conclusive as regards matters appearing therein^v. Section 340 of NLC is the provision that codifies this feature and spells out the exceptions --- the vitiating circumstances --- under which a seemingly indefeasible title or interest of the registered can be rendered defeasible. The principal issue in *Adorna Properties* and *Tan Ying Hong* is whether s.340 of NLC confers upon the registered proprietor or any person having registered interest in the land an **immediate or deferred indefeasibility**.

“ 340. **Registration to confer indefeasible title or interest, except in certain circumstances**

- (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 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 sub-section (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 a purchaser.”

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In *Adorna Properties*, Madam Boonsom Boonyanit (Madam Boonyanit) was the registered proprietor of two pieces of land in Penang. In 1989, she discovered that the property had been fraudulently transacted on, sold and transferred to Adorna Properties Sdn Bhd (Adorna). It appeared that the transfer was effected through a forged instrument of transfer and that Adorna paid RM1.8 million (in good faith and without any knowledge of such fraud) for the property to a rogue vendor who posed herself as Madam Boonyanit and perpetrated the fraud. Madam Boonyanit sued Adorna for the return of her property and relied upon s.340 of NLC. Whilst the High Court (Vincent Ng J) ruled against Madam Boonyanit, the Court of Appeal (comprising Gopal Sri Ram, Siti Norma Yaakob and Ahmad Fairuz JJCA) reversed the decision and held that s.340(3) of NLC only granted Adorna mere deferred indefeasibility and not immediate indefeasibility. Indefeasibility was postponed until the time when a subsequent purchaser acquired the title in good faith and for valuable consideration from Adorna. Unfortunately for Madam Boonyanit, on Adorna's final appeal to the Federal Court (comprising Eusoff Chin CJ, Wan Adnan Ismail CJM and Abu Mansor Ali FCJ), the Federal Court ruled that s.340(3) conferred an immediate indefeasibility. Adorna, as a *bona fide* purchaser with value, was excluded from the application of the substantive provision of s.340(3), by virtue of the proviso to s.340(3). Consequently, despite the instrument of transfer by which Adorna came to be registered as proprietor was forged, Adorna was held to have obtained an (immediate) indefeasible title.

Prior to *Adorna Properties*, the prevailing view (established by many Federal Court and Supreme Court decisions) was that s.340 of NLC conferred deferred indefeasibility as opposed to immediate indefeasibility. As explained in *Tan Ying Hong*, immediate indefeasibility means that the immediate registered title or interest of the proprietor or transferee immediately to the vitiating circumstances will be conferred statutory protection, despite the existence of the vitiating circumstances. In the case of deferred indefeasibility, the indefeasibility only comes to be attached to the title or interest upon a subsequent transfer.

It is not unfair to state that *Adorna Properties* had opened up a spectrum of 'opportunities' for fraudsters to unscrupulously carry out deceits to divest genuine landowners of their property. Numerous such frauds in fact took place in

the post-*Adorna Properties* era, and law could not be come to the rescue of the real landowners who through no fault of them and unknowingly lost their invaluable property.

The rectification of the legal position is therefore long overdue. The Federal Court (comprising Zaki Tun Azmi CJ, Alauddin Mohd Sheriff PCA, Arifin Zakaria CJM, Zukefli Makinudin and James Foong FCJJ) in *Tan Ying Hong* in no uncertain terms ruled that ***Adorna Properties* was obviously and blatantly erroneous**. The error committed in *Adorna Properties* was to read the proviso to s.340(3) as being proviso to s.340(2) as well. In the words of Zaki Tun Azmi CJ, '(T)he error is very obvious because the proviso expressly refers to "this subsection" which must in the context of that subsection be read as proviso to subsection (3) only'. If the proviso in s.340(3) is inapplicable to s.340(2), then the title of Adorna Properties despite being a *purchaser in good faith and for valuable consideration* will not be regarded indefeasible, because its registration had been obtained by forgery [one of the vitiating circumstances under s.340(2)(b) of NLC]. In the words of Arifin Zakaria CJM, '...a person or body in the position of *Adorna Properties* could not take advantage of the proviso to the sub-s.(3) to avoid its title or interest from being impeached. It is our view that the proviso which expressly stated to be applicable solely to sub-s.(3) ought not to be extended as was done by the Court in *Adorna Properties*, to apply to sub-s.(2)(b). By doing so the Court had clearly gone against the clear intention of Parliament.'

In *Tan Ying Hong*, the plaintiff was the registered owner of a piece of land. The 1st defendant purporting to act under a power of attorney (PA) executed two charges over the property in favour of the 3rd defendant to secure the loans granted to the 2nd defendant. The PA was forged. Indeed, the initial registration of the plaintiff in the issue document of title of the property in the first place was also obtained by fraud or forgery and the plaintiff came to know of his 'ownership' of the property only when he received a notice of demand from the 3rd defendant due to defaults in the loan.

It was not disputed that the 3rd defendant was an immediate holder of the interest (the charges) on the property. If the law in *Adorna Properties* is correct, then the 3rd defendant's charges will be indefeasible although such charges were void instruments, being executed pursuant to a

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forged PA. However, our apex court finally corrected the error made almost a decade ago and ruled that the law laid down in *Adorna Properties* is wrong. The correct proposition of law is that **an acquirer of a registered charge or other interest or title under NLC by means of a forged instrument DOES NOT acquire an immediate indefeasible interest or title**. Therefore, since the 3rd defendant was an immediate holder of the two charges which were obtained through a void instrument, the 3rd defendant could not take advantage of the proviso to s.340(3).

It is interesting to note that the plaintiff in *Tan Ying Hong* ended up owning the property which he had not applied for or owned in the very first place. However, the Federal Court took the position that that was not an issue at all because the fact that the plaintiff was the registered proprietor of the property was never challenged by any party in the proceedings. Likewise, the Federal Court pointed out that the fact that the 3rd defendant had acquired

the interest in question (charges) in good faith for value was not in issue. Once the court was satisfied that the charges arose from void instruments, it automatically followed that they were liable to be asset aside at the instance of the registered proprietor, namely the plaintiff. The appeal was therefore allowed, the two charges were declared as void *ab initio* and to be expunged from the title and the 3rd defendant was ordered to deliver up to the plaintiff the issue document of title to the property.

ⁱ Wan Sharif bin Wan Ahmad, Current Law Journal Special Edition 2010.

ⁱⁱ [2001] 1 MLJ 241

ⁱⁱⁱ Federal Court Civil Appeal No: 02(f)-19-2009(C)

^{iv} Teo & Khaw, Land Law in Malaysia Cases and Commentary.

^v See s.89 NLC, s.340 NLC.

THE UPDATE is a quarterly law bulletin of TAY & HELEN WONG Law Practice which aims to highlight to the firm's clientele, business partners and friends contemporaneous development in law (particularly in principal areas of the firm's law practice) which might have an impact on their business dealings, operations or trade. The bulletin focuses primarily on case law development in the jurisdiction of Malaysia.

The Publisher of the UPDATE is TAY & HELEN WONG LAW PRACTICE of Suite 703 Block F Phileo Damansara I No. 9 Jalan 16/11 46350 Petaling Jaya Selangor Darul Ehsan Malaysia Tel (603) 79601863 Fax (603) 79601873 email: lawpractice@thw.com.my website: www.thw.com.my

Printed in Malaysia by TAY & HELEN WONG

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