A

HEVEAPLAST MARKETING SDN BHD v. SEE LEONG CHYE & ORS AND OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH JCA
UMI KALTHUM ABDUL MAJID JCA
B ZAMANI A RAHIM JCA
[CIVIL APPEALS NO: B-01-489-12-2014, B-02-2129-12-2014, B-01-33-01-2015 & B-02-173-01-2015]
26 FEBRUARY 2016

C ***LAND LAW:*** *Indefeasibility of title and interest – Fraud – Sale and purchase of land – Denial by original owners of sale of land – Whether title obtained by fraud – Whether immediate purchaser protected against claim by original owner – Whether purchaser's title to land defeasible – National Land Code, s. 340*

D ***LAND LAW:*** *Indefeasibility of title and interest – Transfer – Title to land obtained by fraud – Land sold to subsequent purchaser – Undertaking by vendor to refund in event of failure to effect transfer – Whether complete lack of consideration – Whether refund ought to be ordered*

LAND LAW: *Charge – Indefeasibility of interest – Title to land obtained by fraud*
E *– Whether charge of land tainted by fraud – Whether chargee was subsequent purchaser – Whether chargee was purchaser for good consideration and without notice – Whether protected by deferred indefeasibility under s. 340 of National Land Code*

Heveaplast Marketing Sdn Bhd ('Heveaplast') purchased a land, the subject
F matter of the dispute, from See Leong Chye and See Ewe Lin ('See brothers'), who had in their possession the original manual issue document of title ('IDT'). Heveaplast obtained a loan from the United Overseas Bank ('UOB') and pursuant to the agreement, Heveaplast became the registered owner whilst UOB the registered chargee of the land. One
G Zainudin, a lawyer practising at Messrs Zainudin Wan Nadzim Chua & Maslinda ('Messrs Zainudin') was instrumental in preparing the agreement for the purchase of the land by Heveaplast. Subsequently, Heveaplast sold the land to one Kum Hoi Engineering Industries Sdn Bhd ('Kum Hoi') who obtained a loan from Public Bank. A sum of RM3,255,211.58 was paid to
H the UOB as the redemption sum to satisfy the UOB charge, whilst a sum of RM5,034,767.58 was paid to Heveaplast by Kum Hoi. The release of the sums was premised on an undertaking by Heveaplast to repay the same if Kum Hoi and Public Bank could not effect the transfer and charge on the land, respectively. Both the transfer and the charge of the land could not be lodged with the land office as there was then a Registrar's caveat on the land
I which was premised on the See brothers' complaint that they had never sold the land to Heveaplast. This resulted in two High Court suits. In Suit 233, See brothers commenced an action against Heveaplast, the UOB, Zainudin,

Messrs Zainudin, Kum Hoi and Public Bank and the issues that arose for the courts consideration were: (i) whether the memorandum of transfer was a forged document; (ii) whether sale and purchase agreement by Heveaplast was a forgery; (iii) whether Heveaplast, Zainudin and Messrs Zainudin were parties to the fraud; (iv) whether Heveaplast's title to the land was defeasible by virtue of s. 340 of the National Land Code ('NLC'); and (v) whether the UOB's interest over the land created under the registered charges was defeasible under s. 340 of the NLC. Heveaplast joined the Petaling and Shah Alam Land Offices as third parties for indemnity and contribution in this action. The High Court Judge answered the issues in the affirmative resulting in the registered interest of Heveaplast and the UOB being set aside. Two appeals arose from this decision *ie*, (i) Appeal No 489 wherein Heveaplast appealed against the See brothers, Pentadbir & Pengarah Tanah dan Galian Petaling and Pentadbir & Pengarah Tanah dan Galian Shah Alam; and (ii) Appeal No 33 wherein UOB appealed against the See brothers, Heveaplast, Zainudin, Messrs Zainudin, Pengarah Tanah dan Galian Petaling and Pentadbir & Pengarah Tanah dan Galian Shah Alam. The other High Court suit was Suit 216 in which Kum Hoi claimed for the refund of monies paid to Heveaplast and the UOB. The High Court Judge decided in favour of Kum Hoi on the grounds that the sale and purchase agreement and the letters of undertaking were interlinked and since Kum Hoi was not able to effect the transfer of the land, Heveaplast and the UOB were required to refund the monies paid. Both Heveaplast and the UOB appealed separately against the decision, *ie*, Appeal Nos. 2129 and 173, respectively.

Held (dismissing Appeal Nos 489, 2129 and 173; allowing Appeal No 33 with no order as to costs)
Per David Wong Dak Wah JCA delivering the judgment of the court:

(1) The judge's findings were premised on established evidence and had not been arrived at without full judicial appreciation of the totality of the evidence. It had not been shown that the judge was plainly wrong in his conclusion. The title of Heveaplast was that of an immediate purchaser and therefore was not protected against any claim by the original owners, the See brothers. Further, the evidence which formed the basis of the findings by the trial judge that the transfer of the land to Heveaplast was done by fraud was never rebutted by Heveaplast. In view of Heveaplast's culpability in the fraud, Heveaplast could not maintain an action against the land offices for negligence. (paras 24, 26, 31 & 32)

(2) The letter of undertaking by Heveaplast, for refund in the event that the transfer of the land to Kum Hoi could not be effected, was clear and succinct. Not to order a refund against Heveaplast would run contrary to common sense. It was simply complying with what was agreed in the letter of undertaking. (para 35)

(3) The lodgement of the UOB's charge could not have been created until the first step of transfer to Heveaplast had been effected. Since there was no suggestion that the UOB was tainted by fraud or forgery, the UOB was a purchaser for good consideration and without notice. Hence, the UOB was a subsequent purchaser and protected by the shelter of deferred indefeasibility provided for under s. 340 of the NLC. The fact that Heveaplast's interest being an immediate purchaser was defeasible by the See brothers, did not affect the indefeasibility of the UOB's interest. (paras 44 & 45)

(4) The letter of undertaking could not be interpreted in vacuum in that one could not ignore the fact that the loan from Public Bank was to finance Kum Hoi's purchase of the land and the amount released was to satisfy or redeem the loan to Heveaplast. The transfer of the land to Kum Hoi could not be effected todate as there was still a live dispute as to the validity of the transfer of the land to Heveaplast. Without the transfer to Kum Hoi, Public Bank could never satisfy the UOB's charge and become a chargee of the land. The fault was not attributable to the UOB but laid squarely on Heveaplast. (para 50)

(5) The court was duty bound to infer an implied term to the letter of undertaking. Public Bank would not be able to become a chargee of the land until and unless the condition precedent, that Heveaplast transfer the land to Kum Hoi, was satisfied. The implied term gives 'business efficacy' for the simple reason that all the loans extended by any financial institution must be premised solely on the ground that the borrower has good title to the land which would give good security to the financial institution. In the present case, there was a complete lack of consideration wherein Heveaplast could not physically effect any sort of transfer of the land to Kum Hoi. (paras 51 & 53)

(6) Although the redemption money was released by Public Bank to the UOB, the fact that the money paid originated from the loan account of Kum Hoi could not be ignored. Hence, Public Bank was nothing but a conduit for the payment of the redemption amount by Kum Hoi to the UOB. The UOB's contention that it had no obligation to refund the monies paid was rejected. (para 57)

Bahasa Malaysia *Headnotes*

Heveaplast Marketing Sdn Bhd ('Heveaplast') membeli sebidang tanah, perkara pertikaian dalam kes ini, daripada See Leong Chye dan See Ewe Lin ('See bersaudara'), yang memiliki dokumen hak milik manual asal ('dokumen hak milik keluaran'). Heveaplast memperoleh pinjaman daripada United Overseas Bank ('UOB') dan menurut perjanjian, Heveaplast menjadi pemilik berdaftar sementara UOB adalah pemegang gadaian berdaftar tanah. Zainudin, seorang peguam yang beramal di Tetuan Zainudin Wan Nadzim Chua & Maslinda ('Tetuan Zainudin') bertanggungjawab menyediakan

perjanjian pembelian tanah tersebut oleh Heveaplast. Kemudian, Heveaplast menjual tanah tersebut kepada Kum Hoi Engineering Industries Sdn Bhd ('Kum Hoi') yang memperoleh pinjaman daripada Public Bank. Sejumlah RM3,255,211.58 dibayar oleh UOB sebagai jumlah penebusan untuk menyelesaikan gadaian UOB, sementara sejumlah RM5,034,767.58 dibayar kepada Heveaplast oleh Kum Hoi. Pelepasan jumlah yang dijanjikan adalah berdasarkan aku janji oleh Heveaplast untuk membayar semula jumlah tersebut jika Kum Hoi dan Public Bank tidak dapat memindah milik dan menggadai tanah tersebut. Kedua-dua pindah milik dan gadaian tanah tersebut tidak boleh dibuat di pejabat tanah kerana pada masa itu terdapat kaveat Pendaftar atas tanah tersebut yang berasaskan aduan oleh See bersaudara bahawa mereka tidak pernah menjual tanah tersebut kepada Heveaplast. Perkara ini menjurus kepada dua guaman Mahkamah Tinggi. Dalam Guaman 233, See bersaudara memulakan tindakan terhadap Heveaplast, UOB, Zainudin, Tetuan Zainudin, Kum Hoi dan Public Bank dan isu-isu yang berbangkit bagi pertimbangan mahkamah adalah: (i) sama ada memorandum pindah milik dokumen palsu; (ii) sama ada perjanjian jual beli oleh Heveaplast adalah palsu; (iii) sama ada Heveaplast, Zainudin dan Tetuan Zainudin adalah pihak-pihak dalam penipuan; (iv) sama ada hak milik Heveaplast terhadap tanah boleh disangkal melalui s. 340 Kanun Tanah Negara ('KTN'); dan (v) sama ada kepentingan UOB terhadap tanah yang dibentuk di bawah gadaian berdaftar boleh disangkal di bawah s. 340 KTN. Heveaplast memasukkan Pejabat-Pejabat Tanah Petaling dan Shah Alam sebagai pihak ketiga bagi indemniti dan sumbangan dalam tindakan ini. Hakim Mahkamah Tinggi menjawab isu-isu yang berbangkit secara afirmatif, menyebabkan kepentingan berdaftar Heveaplast dan UOB diketepikan. Dua rayuan berbangkit daripada keputusan ini iaitu (i) Rayuan No. 489 di mana Heveaplast merayu terhadap See bersaudara, Pentadbir & Pengarah Tanah dan Galian Petaling dan Pentadbir & Pengarah Tanah dan Galian Shah Alam; dan (ii) Rayuan No. 33 di mana UOB merayu terhadap See bersaudara, Heveaplast, Zainudin, Tetuan Zainudin, Pengarah Tanah dan Galian Petaling dan Pentadbir & Pengarah Tanah dan Galian Shah Alam. Guaman Mahkamah Tinggi yang satu lagi adalah Guaman 216 di mana Kum Hoi menuntut pemulangan wang yang dibayar kepada Heveaplast dan UOB. Hakim Mahkamah Tinggi memutuskan berpihak pada Kum Hoi atas alasan perjanjian jual beli dan surat-surat aku janji saling berkaitan satu sama lain dan oleh sebab Kum Hoi tidak berjaya memindah milik tanah tersebut, Heveaplast dan UOB perlu mengembalikan wang yang telah dibayar. Heveaplast dan UOB merayu secara berasingan terhadap keputusan tersebut, iaitu Rayuan No. 2129 dan 173.

A B C D E F G H I

A **Diputuskan (menolak Rayuan No 489, 2129 dan 173; membenarkan Rayuan No 33 tanpa perintah untuk kos)**
Oleh David Wong Dak Wah HMR menyampaikan penghakiman mahkamah:

B **(1)** Dapatan hakim adalah berasaskan keterangan matan dan tidak dicapai tanpa pertimbangan kehakiman penuh keseluruhan keterangan. Tidak dibuktikan bahawa hakim jelas salah dalam kesimpulannya. Hak milik Heveaplast adalah pembeli terus dan oleh itu tidak dilindungi terhadap apa-apa tuntutan oleh pemilik asal, See bersaudara. Malahan, keterangan yang menjadi asas dapatan hakim bicara bahawa pindah
C milik tanah kepada Heveaplast dibuat secara penipuan tidak dipatahkan oleh Heveaplast. Berdasarkan kebersalahan Heveaplast dalam penipuan tersebut, Heveaplast tidak boleh mengekalkan tindakan terhadap pejabat-pejabat tanah tersebut bagi kecuaian.

D **(2)** Surat aku janji oleh Heveaplast, bagi pemulangan wang jika pindah milik tanah kepada Kum Hoi tidak dapat dibuat adalah jelas dan padat. Tidak memerintahkan pemulangan terhadap Heveaplast adalah bertentangan dengan akal budi. Ini semata-mata mematuhi apa yang dipersetujui dalam surat aku janji.

E **(3)** Pemasukan gadaian UOB tidak boleh dibuat sehingga langkah pertama iaitu pindah milik kepada Heveaplast dibuat. Oleh sebab tiada cadangan bahawa UOB tercemar dengan penipuan, UOB adalah pembeli bagi balasan sempurna dan tanpa notis. Oleh itu UOB adalah pembeli terkemudian dan dilindungi oleh ketakbolehsangkalan tertangguh yang diperuntukkan di bawah s. 340 KTN. Fakta bahawa kepentingan
F Heveaplast sebagai pembeli terus boleh disangkal oleh See bersaudara, tidak menjejaskan ketakbolehsangkalan kepentingan UOB.

(4) Surat aku janji tidak boleh ditafsirkan secara berasingan di mana seseorang tidak boleh tidak mengendahkan fakta bahawa pinjaman daripada Public Bank adalah untuk membiayai pembelian tanah oleh
G Kum Hoi dan jumlah yang dilepaskan adalah untuk menyelesaikan atau menebus pinjaman kepada Heveaplast. Pindah milik tanah kepada Kum Hoi tidak boleh dibuat sehingga ke hari ini kerana terdapat pertikaian yang belum diselesaikan berkaitan kesahan pindah milik tanah kepada Heveaplast. Tanpa pindah milik kepada Kum Hoi, Public Bank tidak
H boleh menyelesaikan gadaian UOB dan menjadi pemegang gadaian tanah tersebut. Kesalahan tersebut tidak boleh dikatakan berpunca daripada UOB tetapi adalah kesalahan Heveaplast semata-mata.

(5) Mahkamah bertanggungjawab mentafsir terma tersirat dalam surat aku janji. Public Bank tidak boleh menjadi pemegang gadaian tanah tersebut
I sehingga dan kecuali syarat awalan, bahawa Heveaplast memindah milik tanah tersebut kepada Kum Hoi, dipenuhi. Terma tersirat tersebut

memberikan 'keberkesanan perniagaan' atas alasan mudah bahawa kesemua pinjaman yang diberi oleh mana-mana institusi kewangan mesti berasaskan satu-satunya alasan bahawa peminjam mempunyai hak milik sah atas tanah tersebut yang akan memberikan jaminan wajar kepada institusi kewangan. Dalam kes ini, tiada langsung balasan di mana Heveaplast tidak boleh secara melakukan apa-apa pindah milik tanah tersebut secara fizikal kepada Kum Hoi.

(6) Walaupun wang penebusan telah dilepaskan oleh Public Bank kepada UOB, fakta bahawa wang yang dibayar berasal daripada akaun pinjaman Kum Hoi tidak boleh dinafikan. Oleh itu, Public Bank tidak lebih daripada konduit bagi pembayaran jumlah penebusan oleh Kum Hoi kepada UOB. Dengan itu hujahan UOB bahawa UOB tidak bertanggungjawab mengembalikan wang yang telah dibayar adalah ditolak.

Case(s) referred to:

Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 FC ***(refd)***

Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor [2011] 9 CLJ 257 FC ***(refd)***

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***

Kamarulzaman Omar & Ors v. Yakub Husin & Ors [2014] 1 CLJ 987 FC ***(refd)***

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

MBf Property Services Sdn Bhd & Anor v. Balasubramaniam K Arumugam [2000] 2 CLJ 230 CA ***(refd)***

OCBC Bank (Malaysia) Bhd v. Pendaftar Hakmilik Negeri Johor Darul Takzim [1999] 2 CLJ 949 CA ***(refd)***

Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong [1998] 3 CLJ 503 FC ***(refd)***

Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(refd)***

Legislation referred to:

National Land Code, s. 340

(Civil Appeal No: B-01-489-12-2014)

For the appellant - Pramjit Kaur; M/s Mann & Assocs

For the 1st respondent - Premshangar Venugopal, Muralidharan Balan Pillai; M/s Lewis & Co

For the 2nd respondent - See Ewe Lin & Su Tze Wei; M/s Ooi Lee & Co

For the 3rd & 4th respondents - Ahmad Fuad Othman; State Legal Advisor's Office, Selangor

(Civil Appeal No: B-02-2129-12-2014)

For the appellant - Pramjit Kaur; M/s Mann & Assocs

For the respondent - Rewathy K Kutty; M/s Rastam Singa & Co

(Civil Appeal No: B-02-173-01-2015)

For the appellant - Andrew Chiew & Kenneth Seet; M/s Lee Hishammuddin Allen & Gledhill

For the 1st respondent - Rewathy K Kutty; M/s Rastam Singa & Co

For the 2nd respondent - Pramjit Kaur; M/s Mann & Assocs

A *(Civil Appeal No: B-01-33-01-2015)*
For the appellant - Andrew Chiew & Kenneth Seet; M/s Lee Hishammuddin Allen & Gledhill
For the 1st respondent - Premshangar Venugopal, Muralidharan Balan Pillai; M/s Lewis & Co
For the 2nd respondent - Anthony Chew & Su Tze Wei; M/s Haniff & Partners
B *For the 3rd respondent - Pramjit Kaur; M/s Mann & Assocs*
For the 6th & 7th respondents - Ahmad Fuad Othman & Salwati Umar; State Legal Advisor's Office, Selangor

[Appeal from High Court, Shah Alam; High Court Suit Nos: 22-233-2010 & 22-216-2010 (overruled in part).]

C

Reported by S Barathi

JUDGMENT

D **David Wong Dak Wah JCA:**

Introduction

[1] Before us are four appeals which we, with the agreements of respective counsel, heard simultaneously. These four appeals emanated from two suits:

E (a) Suit 22-233-2010 (suit 233); and

(b) Suit 22-216-2010 (suit 216)

which were heard together by the learned High Court Judge who delivered one judgment.

F **[2]** The factual matrix are these. The subject matter of this dispute relates to a piece of land held under EMR 2884, Lot 549, Mukim 02, Daerah Petaling (the land). The original owners of the land are See Leong Chye and See Ewe Lin (collectively referred to as See brothers) who held the same in equal shares. They also had in their possession the original manual issue document of title (IDT).

G

[3] By an agreement dated 26 December 2008, Heveaplast Marketing Sdn Bhd (Heveaplast) purchased the land from the See brothers. To finance the purchase, Heveaplast obtained a loan from United Overseas Bank (UOB). Pursuant to the aforesaid agreement, Heveaplast became the registered owner with UOB as the registered chargee of the land.

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[4] One Zainudin Maksom a lawyer practising at Messrs Zainudin Wan Nadzim Chua & Maslinda was instrumental in preparing the agreement for the purchase of the land by Heveaplast.

I **[5]** By another agreement dated 12 February 2009, Heveaplast sold the land to one Kum Hoi Engineering Industries Sdn Bhd (Kum Hoi) for the sum of RM8,895,556. To finance the purchase of the land, Kum Hoi obtained a loan from Public Bank. A sum of RM3,255,211.58 was paid to UOB as the

redemption sum to satisfy the UOB charge. A further sum of RM5,034,767.58 was paid to Heveaplast by Kum Hoi. The release of the aforesaid sums was premised on an undertaking by Heveaplast to repay the same if Kum Hoi and Public Bank cannot effect the transfer and charge on the land respectively.

[6] Both the transfer and the charge of the land could not be lodged with the land office as there was then a Registrar's caveat on the land which was premised on See Brother's complaint that they had never sold the land to Heveaplast.

Suit 233

[7] In this High Court suit the See brothers are the first and second plaintiffs who took legal action against Heveaplast (first defendant), UOB (second defendant), Zainudin bin Maksom (third defendant) and Messrs Zainuddin Wan Nadzim Chua and Maslinda (fourth defendant), Kum Hoi (fifth defendant) and Public Bank (sixth defendant). Heveaplast joined the Petaling and Shah Alam Land Offices as first and second third parties for indemnity and contribution. The claims of the See brothers, in essence as per their statement of claim, were these:

(i) A declaration that the plaintiffs (the See brothers) are still the registered owners of the land;

(ii) A declaration that the ownership of the land was fraudulently transferred to the first defendant (Heveaplast) pursuant presentation No 2735/2009 on 22 April 2009 and the transfer is null and void;

(iii) A declaration that the defendants (Heveaplast, UOB, Kum Hoi dan Public Bank) have no rights and interest whatsoever (both legal and beneficial) to the land;

(iv) Consequently, the transfer of the land to Heveaplast be set aside and the Registrar of Lands of Selangor be directed to rectify the memorandum of register of lands to reflect the See brothers as owners of the land and the duplicate issue of document of title of the land be surrendered to the Pendaftar Hakmilik Negeri Selangor Darul Ehsan for cancellation;

(v) An order that the defendants be restrained from registering any transaction and/or dealings on the land;

(vi) An order directing the Pendaftar Hakmilik Negeri Selangor be restrained and/or abstained from registering all future dealings and transactions of whatsoever nature without obtaining the consent of the plaintiffs (the See brothers);

(vii) An order that the registration of charges presented by the second defendant (UOB) on the land be cancelled;

(viii) Losses and damages suffered by the plaintiffs to be assessed by the Registrar of the court; and

(ix) Interest on the losses and damages at the rate of 8% per annum from the date of judgment till date of realisation.

[8] The third and fourth defendants did not file any defence nor appear at the trial.

[9] The first defendant's defence was one of *bona fide* purchaser for value without notice of the fraud relying on the fact that there was a genuine sale and purchase agreement prepared by a firm of solicitors.

[10] The second defendant's defence was that its charge on the land was obtained *bona fide* for full consideration and without notice whatsoever of any forgery or fraud.

[11] The claim against the third parties was premised on the alleged negligence of the respective land offices in issuing a computerised IDT despite the fact that the See brothers had in their possession and custody the manual IDT.

High Court Decision

[12] The learned judge listed four issues for his consideration and they were:

(a) Whether the memorandum of transfer dated 21 January 2009 was a forged document?

(b) Whether Heveaplast sales and purchase agreement was a forgery?

(c) Whether the first, third and fourth defendants were parties to the fraud?

(d) Whether the first defendant's title to the land is defeasible by virtue of s. 340 of National Land Code?

(e) Whether the second defendant's interest over the said land created under the registered charges is defeasible by virtue of s. 340 of the National Land Code?

[13] The learned judge answered the aforesaid issues in the affirmative, hence allowing the See brothers' claims. The effect thereof was that the registered interests of Heveaplast and UOB were set aside. As for the action against the respective land offices they were dismissed as Heveaplast was found to be involved in the forgery.

[14] Arising from this decision, two appeals were lodged and they are:

(a) B-01-489-12-2014 (Appeal 489) where the appellant is Heveaplast; and

(b) B-01-33-01-2015 (Appeal 33) where the appellant is UOB.

[15] In Appeal 489, the appellant was Heveaplast (the first defendant in this case), while the respondents were See Leong Chye @ Sze Leong Chye (first respondent), See Ewe Lin (second respondent), Pentadbir & Pengarah Tanah dan Galian Petaling (third respondent) and Pentadbir & Pengarah Tanah Dan Galian Shah Alam (fourth respondent).

[16] In Appeal 33, the appellant was United Overseas Bank Berhad (the second defendant in this case), while the respondents were See Leong Chye @ Sze Leong Chye (first respondent), See Ewe Lin (second respondent), Heveaplast Marketing Sdn Bhd (third respondent), Zainuddin bin Maksom (fourth respondent), Zainuddin Wan Nadzim Chua & Maslinda (fifth respondent), Pentadbir & Pengarah Tanah Galian Petaling (sixth respondent) and Pentadbir & Pengarah Tanah Dan Galian Shah Alam (seventh respondent).

Suit 216

[17] In Suit 216, Kum Hoi Engineering Industries Sdn Bhd is the plaintiff while the first and second defendants are Heveaplast and United Overseas Bank Berhad respectively.

[18] Kum Hoi's claims, in essence, were for the refund of monies paid to Heveaplast and UOB pursuant to the agreement for the purchase of the land between Kum Hoi and Heveaplast. The suit was premised on the undertakings by the respective defendants to refund whatever monies paid if the transfer of the land could not be effected for whatever reasons.

[19] The defence of Heveaplast was simply that Kum Hoi had not terminated the sale and purchase agreement.

[20] As for UOB, their defence was that the obligation to refund must have emanated from the fact that the inability to register the charge was attributed to their fault and since there is no such fault, they contended that there was no obligation to refund.

High Court Decision

[21] The learned judge rejected the defences of both defendants and ordered them to refund the monies to Kum Hoi. The essence of the learned judge's rationale was that the sales and purchase agreement and the letters of undertaking were interlinked and since Kum Hoi was not able to effect the transfer of the land, both defendants were required to refund monies paid.

[22] From the aforesaid decision, two appeals were lodged and they are as follows:

(a) B-02-2129-12-2014 (Appeal 2129) where the appellant is Heveaplast (first defendant) and the respondent is Kum Hoi (plaintiff); and

(b) B-02-173-01-2015 (Appeal 173) where the appellant is UOB (the second defendant) and the respondent is Kum Hoi (the plaintiff).

Our Grounds Of Decision

Appeal 489 - Heveaplast v. See Brothers & 2 Others (Suit 233)

[23] To recapitulate, this appeal concerned the indefeasibility of Heveaplast's title. The learned judge rejected the contention that Heveaplast had an indefeasible title premised on the following:

> [50] Going by the above authority, it is clear, the fact that the 1st Defendant being an immediate purchaser alone made the defence of *bona fide* purchaser not available to 1st Defendant. When it is proven that the registration in 1st Defendant's name was obtained by forgery or by mean of insufficient or void instrument its title on the Land is liable to be set aside by the previous land owners (Plaintiffs) who has good title. There is no need to show 1st Defendant was privy to the forgery. What more in this case, the evidence showed a high degree of probability, the 1st Defendant through its director SD2 was privy to the fraud that resulted in the Land being registered in its name.
>
> [51] As an upshot, I find, this case falls squarely under S. 340(2)(a) and (b) of NLC. Under any of the two sub-sections, the 1st Defendant's title over the said Land is defeasible and liable to be set aside.

[24] We have no issue with the reasoning of the learned judge on the title of Heveaplast as that of an immediate purchaser, hence not protected against any claim by the original owners, the See brothers.

[25] As for forgery of the relevant documents, the learned judge found as follows:

> [35] Taking the above evidence as a whole, there is no doubt the signature on the MOT26-1-2009 and the Heveaplast SPA which Defendant claimed to have been executed by the Plaintiffs were not made by the Plaintiffs. This finding is in line with SP1's expert testimony which basically meant although he could not ascertain the authorship of these documents but since the signatures were of different structure, in general they were written by different person.
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> [36] Furthermore, in this case, the 1st Defendant was the immediate purchaser who purportedly bought the Land from 1st and 2nd Plaintiff. Heveaplast SPA was purportedly executed by Plaintiffs, witnessed by 3rd Defendant who held himself as the solicitor representing 1st and 2nd Plaintiff. He was also the witness to the purported signatures of 1st and 2nd Plaintiff on the Heveaplast SPA and certified to be true a photocopy of a forged identity card purportedly belong to 2nd Plaintiff.
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> [37] Clearly, the 3rd Defendant played major roles in the whole scheme. He has a lot to answer. However, the 3rd Defendant did not appear at the trial. In the absence of any evidence from 3rd Defendant, I had to agree with the 2nd Plaintiff counsel's submission that all the allegations of fraud perpetrated by 3rd Defendant in effecting the transfer of the Land to 1st Defendant went unrebutted.

[38] Given that the fraud alleged against the 3rd Defendant was wholly unanswered, it was incontestable proof of fraud by the 3rd Defendant in preparing and execution of the MOT26-1-2009 and the Heveaplast SPA. A

[39] For the aforesaid reasons, I find Plaintiffs had proven beyond reasonable doubt that the Heveaplast SPA and the MOT 26-1-2006, the two documents, used to effect the transfer of the Land to 1st Defendant were in fact not executed by any of the Plaintiffs. The transfer of the said Land to 1st Defendant was done by fraud. The next issue is whether the 1st Defendant was party to the fraud. B

[26] The learned judge in coming to his conclusion had also relied on the evidence of SP1, the handwriting expert evidence called by the See brothers. Further, there were direct testimonies from the See brothers that the impugned signatures were not theirs. There was evidence of forged identity cards of the See brothers. There was also evidence that no monies from the sale of the land were ever received by them. These evidence were never rebutted by Heveaplast. What Heveaplast attempted to do was to say that the See brothers were never on good terms (see pp. 12 and 13 of submission of appellant) which could lead to the conclusion that See Leong Chye (first respondent) had forged the signature of See Ewe Lin (second respondent). This, of course, was not canvassed by the learned judge but we think for good reason and that is, it was never part of the Heveaplast's pleaded case. C D E

[27] As to the role of an appellate court when confronted by a finding of fact by the trial court, the Federal Court in a recent case of *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453 had this to say:

It is now established that the principle on which an appellate court could interfere with findings of fact by the trial court is "the plainly wrong test" principle; see the Federal Court in *Gan Yook Chin & Anor (P) v. Lee Ing Chin @ Lee Teck Seng & Anor* [2004] 4 CLJ 309; [2005] 2 MLJ 1 (at p. 10) per Steve Shim CJ SS. More recently, this principle of appellate intervention was affirmed by the Federal Court in *UEM Group Berhad v. Genisys Integrated Engineers Pte Ltd* [2010] 9 CLJ 785 where it was held at p. 800: F G

> It is well-settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence. (See *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 1 LNS 32; *Watt v. Thomas* [1947] AC 484; and *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309). H

[28] We are bound by the Federal Court's pronouncement and since we are not shown there were plainly wrong findings of fact by the trial judge, we affirm the aforesaid findings. I

Heveaplast's Claim of Indemnity Against The Respective Land Offices (Suit 233)

[29] The learned judge dismissed this claim premised on the following grounds:

> [55] Heveaplast's claim for indemnity from the Land Offices was based on the alleged negligence on the part of the two Land Offices in issuing a computerised IDT notwithstanding the fact the Plaintiff had in their possession and custody the manual IDT. The 3rd Parties denied that they were negligent.
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> [56] In view of the finding made by this court that the 1st Defendant through it director SD2 was a party in the fraud to have the Land registered in the 1st Defendant's name, I find no further need to discuss whether there was in fact negligence on the part of 3rd party in issuing the computerised IDT. Whether the computerised IDT was in fact issued by the Land Office or whether the Land Office was negligent in issuing the IDT is no longer relevant. The 1st Defendant claim against the 3rd parties falls. As such, the 1st Defendant's claim against the 3rd parties was dismissed with cost of RM20,000.

[30] His Lordship's finding that Heveaplast's knowledge of the fraud was premised on the following:

> [40] From the totality of evidence presented during trial, I am of the view it is reasonable to conclude, the 1st Defendant did in fact was privy to the fraud. The evidence showed a high degree of probability that the 1st Defendant was privy to the fraud committed by the 3rd Defendant.
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> [41] Pertinent to note, the 1st Defendant is a company. As such it could only act through it directors. In this case, Wong Ban Ting (SD2) a director of 1st Defendant was the only person who dealt in the transaction. According to SD2, he never met the Plaintiffs in respect to the purchase of the Land. All negotiations were done through his golfing partner name Simon Siew Fui Kong.
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> [42] SD2 informed the Court that he negotiated with his golfing buddy, Simon Siew Fui Kong, on the purchase price of the Land and they agreed amongst themselves the price to be fixed at RM5,230,754.00 as stated in the Heveaplast SPA. The value of the Land at that time, according to valuation report, was RM8,500,000.00.
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> [43] It was not in dispute, Simon Siew Fui Kong was charged in Criminal Court together with 3rd Defendant and was found guilty *inter alia* for cheating and sentenced to 4 years imprisonment.
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> [44] Simon Siew Fui Kong, was found guilty of the Charge of deceiving Wong Ban Tin (SD2), the director of 1st Defendant, to believe that the Plaintiffs had agreed to sell the Land at the price of RM5,071,344.80 and deceitfully causing the 1st Defendant to part with the sum of RM5,071,344.80. Despite Simon Siew being found guilty of deceiving the 1st Defendant, SD2 maintained that his golfing buddy never deceived the 1st Defendant and maintains that the transfer transactions using the forged Heveaplast SPA and forged Memorandum of Transfer and forged Plaintiffs' NRICs were all in order.

[45] Despite the Criminal Court having found that Simon Siew Fui Kong was guilty of deceiving the 1st Defendant, SD2 never sued Simon Siew for the return of the money. The 1st Defendant was also never sued by the 3rd Defendant for the return of the monies despite the Criminal Court having found the 3rd Defendant had committed criminal breach of trust on the monies due to the 1st Defendant.

[46] Looking at the evidence in its totality, I find there were high degrees of probability that SD2 was well aware and participated in the fraudulent transfer of the Land.

[31] Again we say that the learned judge's findings were premised on established evidence and cannot be said to be arrived at without full judicial appreciation of the totality of the evidence. Hence applying the aforesaid principle of judicial intervention, we again have not been shown that the judge was plainly wrong in his conclusion.

[32] Further, we are also of the view that the learned judge was right to rule that in view of Heveaplast's culpability in the fraud, Heveaplast cannot maintain an action against the land offices for negligence. The learned judge's ruling was nothing but an application of the legal principle of *ex turpi causa non oritur actio* (in plain English - no one should benefit from his or her wrongful conduct). Hence there is no necessity for us to deliberate on the alleged negligence on the part of the land offices.

Appeal 2129 - Heveaplast v. Kum Hoi (Suit 216)

[33] To recapitulate, Kum Hoi had bought the land from Heveaplast for the sum of RM8,895,556 where Kum Hoi had paid a sum of RM5,034,767.58 with another payment of RM3,255,211.58 *via* a loan from Public Bank. Kum Hoi had also incurred a sum of RM324,805 being legal fees and stamp duties.

[34] The learned judge sustained Kum Hoi's claim against Heveaplast premised on the following:

[68] 1st Defendant [Heveaplast] raised the following allegation in its defence:

(a) That the 1st Defendant is not under obligation to refund/pay all the payments made by the Plaintiff under the said Sale & Purchase Agreement as the said Sale & Purchase Agreement is not terminated by the Plaintiff i.e. no notice of termination was issued by the Plaintiff to the 1st Defendant.

(b) That the Plaintiff has no cause of action to claim the said redemption sum amounting to RM3,255,211.58 as the sum was paid directly to the 2nd Defendant.

[69] The 1st Defendant despite admitting that it was under obligation to refund moneys paid under the SPA in case it was unable to transfer the Land to Plaintiff, had raised the above said reasons or allegation for not fulfilling its obligation. After going through the evidence, I find this allegation or reasons given by 1st Defendant was nothing but a feeble excuse not to refund what was rightly belong to the Plaintiff.

A [70] Pertinent to note, when Plaintiff filed this suit one of the original prayer against the 1st Defendant was for specific performance of the terms of the SPA or in the alternative for the refund of all monies paid. As such, it is obvious, the need for Plaintiff keeping the SPA alive by not issuing termination notice. When the case came up for trial, Plaintiff abandon the prayer for specific performance. Now that the Plaintiffs in Suit 22-233-
B 2010 who was the original owner had successfully reclaimed their title over the said Land, it is obvious the SPA between Plaintiff and 1st Defendant could never be completed. It could not be completed due to no fault of the Plaintiff. As such I find the said SPA was automatically terminated upon inability of the 1st Defendant to effect transfer of the
C Land to Plaintiff.

[71] With regard to the 2nd issue raised ie, Plaintiff had no cause of action because the payment was made directly to 2nd Defendant, I find it hard to agree. No doubt the payment was made directly to 2nd Defendant by the Plaintiff's financier. But it was made out of Plaintiff's loan account to discharge a charge on the said Land created by 1st Defendant for loan
D taken by 1st Defendant. As such in my considered view Plaintiff has every right to demand the said amount be refunded. Furthermore, the amount was released after 1st Defendant had given its undertaking in letter dated 19-6-2009. For the above said reasons I find no merit in 1st Defendant's defence.

E **[35]** There is no reason to disturb the finding of the learned judge on this claim by Kum Hoi for the simple reason that the letter of undertaking by Heveaplast to refund in the event that the transfer of the land to Kum Hoi cannot be effected is clear and succinct. Not to order a refund against Heveaplast would run contrary to common sense. It is simply complying
F with what was agreed in the letter of undertaking.

Appeal 33 - UOB v. See Brothers and 5 others (Suit 233)

[36] In this appeal, the legal interest as chargee of the land was also set aside by the learned judge premised on the following grounds:

G [52] It was the 2nd Defendant case that even if the MOT26-1-2009 was forged, the charges created by 1st Defendant on the Land remain valid because 2nd Defendant acquire the interest in good faith and for valuable consideration. With respect, I am unable to agree to this line of reasoning.

[53] Since the registered title in 1st Defendant's name is defeasible under s. 340(2)(b) and also (2)(a) because its registration was obtained by forgery,
H it is liable to be annulled by the Plaintiffs. This is because a forged document is a nullity. It is void and of no effect. As a consequence, the setting aside of 1st Defendant title to the Land will also make the charge, which the 1st Defendant created by using its defective title to charge, the interest in the Land similarly liable to annulment. This is because a forged
I instrument is a nullity, incapable of conferring any right, interest or title in favor of the acquirer of immovable property, which in this case 1st

Defendant. And, if 1st Defendant had no right, interest or title in the Land then, he had nothing that was his to charge to the 2nd Defendant. Hence, the 2nd Defendant's interest created under the registered charges is defeasible under s. 340 NLC.

[37] It appears from the above that the learned judge had found that UOB was also immediate purchaser, hence cannot claim any shelter of indefeasibility under s. 340 of the National Land Code (NLC). With respect, we disagree with the conclusion of the learned judge and our reasons are these.

[38] The concept of indefeasibility is embodied in s. 340 of the National Land Code which reads as follows:

Section 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 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) 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

[39] In Peninsular Malaysia, the law on the concept of indefeasibility is settled and established since the overturning of the judgment of *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133 in the Federal Court case of *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269; [2010] 2 MLJ 1.

[40] In *Tan Ying Hong*, the Federal Court discussed in detail the development of the law on indefeasibility and concluded that the *Adorna Properties* was wrongly decided when it applied the "immediate indefeasibility" rule as opposed to the "deferred indefeasibility".

[41] The rationale of the Federal Court was one of construction of s. 340 of the NLC. This is how the then Chief Judge of Malaya put it:

> [44] We agree with the court that the issue before the court, and likewise before us, is one of proper interpretation to be accorded to s. 340(1), (2) and (3) of NLC. The court then went on to say that s. 340(1) of the NLC confers an immediate indefeasible title or interest in land upon registration, subject to the exceptions set out in s. 340(2) and (3). Thus far, we think the court was right. The difficulties arose in the interpretation of sub-s.(2) and sub-s. (3). This is what it said at p. 342:
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> > Subsection (2) states that the title of any such person, ie, any registered proprietor or co- proprietor for the time being is defeasible if one of the three circumstances in sub-s. (2)(a), (b) or (c) occurs. We are concerned here with sub-s. (2)(b) where the registration had been obtained by forgery.
> >
> > Subsection (3) says that where that title is defeasible under any of the three circumstances enumerated under sub-s. (2), the title of the registered proprietor to whom the Land was subsequently transferred under the forged document, is liable to be set aside. Similarly, sub-s. (3)(b) says, any interest under any lease, charge or easement subsequently "granted thereout", ie, out of the forged document may be set aside.
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> At p. 343 it said:
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> > The proviso to sub-s. (3) of s. 340 of the NLC deals with only one class or category of registered proprietors for the time being. It excludes from the main provision of sub-s. (3) this category of registered proprietors so that these proprietors are not caught by the main provision of this subsection. Who are those proprietors? 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.

[45] In that case, it was stated that the court was concerned with sub-s. (2)(b) where the registration had been obtained by forgery. This is correct because the appellant obtained its title through or under a forged instrument of transfer. That was the finding of the Court of Appeal and affirmed by the Federal Court.

[46] The Court of Appeal took the view that "s. 340 of the Code makes defeasible the title of a registered proprietor tainted by one or more of the vitiating elements set out in its second subsection but creates an exception in favour of a *bona fide* purchaser who takes his title from such a registered proprietor." By this bifurcation, the Court of Appeal concluded that Parliament had intended to confer deferred and not immediate indefeasibility. The Court of Appeal stated with approval the view of Dr. Visu Sinnadurai in his book entitled "*Sale and Purchase of Real Property in Malaysia*" which reads:

In Malaysia, it is submitted that under s. 340 of the National Land Code, deferred indefeasibility applies. The registered proprietor who had acquired his title by registration of a void or voidable instrument does not acquire an indefeasible title under s. 340(2)(b). The indefeasibility is postponed until the time when a subsequent purchaser acquires the title in good faith and for valuable consideration. In other words, a registered proprietor, the vendor, under a sale and purchase agreement, even though he himself does not possess an indefeasible title, may give an indefeasible title to a *bona fide* purchaser.

[47] What the Federal Court differed from the Court of Appeal was on the effect to be given to sub-s.(3).

[48] Having said that the appellant in *Adorna Properties* had acquired its title to the Land through or under a forged instrument and it therefore came under the category of title in sub-s. (2)(b), the court then went on to hold that such a title is insulated from impeachment by the proviso to sub-s. (3).

[49] The question is, does the proviso following immediately after sub-s. (3), apply to the other provisions of s. 340, in particular to sub-s. 2(b). This can only be deduced from the proviso itself. *NS Bindra's*, *Interpretation of Statutes*, 9th edn, at p. 110 states that: "A proviso is something engrafted on a preceding enactment. The proviso follows the enacting part of a section and is in a way independent of it. Normally, it does not enlarge the section, and in most cases, it cuts down or makes an exception from the ambit of the main provision." A proviso to a subsection would not apply to another subsection (*M/s Gajo Ram v. State of Bihar* AIR 1956 Pat 113). A proviso carves out an exception to the provision immediately preceding the proviso and to no other (*Ram Narain Sons Ltd v. Assistant Commissioner of Sales - Tax* AIR [1955] SC 765).

[50] As we see it, sub-s. (3) merely provides that any title or interest of any person or body which is defeasible by reason of any the circumstances specified in sub-s.(2) shall continue to be liable to be set aside in the hands of subsequent holder of such title or interest. This subsection, however, is subject to the proviso which reads:

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> 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. (emphasis added)

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[51] We are of the view that the proviso is directed towards the provision of sub-s.(3) alone and not to the earlier subsection. This in our view is supported by the use of the words "in this subsection" in the proviso. Therefore, its application could not be projected into the sphere or ambit of any other provisions of s. 340.

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[52] Furthermore, even though sub-s. (3)(a) and (b) refer to the circumstances specified in sub-s. (2) they are restricted to subsequent transfer or to interest in the Land subsequently granted thereout. So it could not apply to the immediate transferee of any title or interest in any land. Therefore, 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

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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 so doing the court had clearly gone against the clear intention of Parliament. 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.

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[53] For the above reasons, with respect, we 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

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which we think is contrary to the provision of s. 340 of the NLC.

[42] In a subsequent Federal Court case of *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987 His Lordship Jeffrey Tan FCJ gave the following advice:

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> [41] Before we adjourn, we would summarise the foregoing and pass on the following, as a guide to trial courts. Whenever a registered title or interest is sought to be set aside under s. 340, first ascertain whether the title or interest under challenge is registered in the name of an immediate purchaser or a subsequent purchaser. If the title or interest is registered in the name of an immediate purchaser, the *bona fides* of the immediate purchaser will not offer a shield of indefeasibility. The title or interest of

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> an immediate purchaser is still liable to be set aside if any of the vitiating elements as set out in s. 340(2) has been made out. If the title or interest is registered in the name of a subsequent purchaser, then the vitiating elements in s. 340(2) would not affect the title or interest of a *bona fide* subsequent purchaser. The title or interest of a subsequent purchaser is

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> only liable to be set aside if the subsequent purchaser is not a *bona fide* subsequent purchaser. The title or interest acquired by a subsequent purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a subsequent purchaser, is indefeasible.

[43] The learned judge, with respect, should have adhered to the advice of His Lordship in *Kamarulzaman Omar & Ors v. Yakub Husin & Ors (supra)* and asked the question whether UOB was a subsequent purchaser. This question, in our view, is an issue of fact. The salient facts which were not considered by the learned judge were these:

(a) UOB had derived interest as chargee of the land from Heveaplast;

(b) The financing of the property involved a two-stage transaction in the following manner:

(i) The lodgement of the memorandum of transfer from the See brothers to Heveaplast; and

(ii) Then the lodgement of UOB's charge.

[44] Though the above dealings were on the same day and were done simultaneously on 22 April 2009, it cannot be disputed nor can we ignore the fact that the lodgement of the UOB's charge could not have been created until the first step of transfer to Heveaplast had been effected. And since there was no suggestion that UOB was tainted by fraud or forgery, UOB was what you call a purchaser for good consideration and without notice. Hence for the aforesaid reasons, we find that UOB is a subsequent purchaser and protected by the shelter of deferred indefeasibility provided for under s. 340 of the NLC.

[45] Further, we say that the fact that Heveaplast's interest being an immediate purchaser was defeasible by the See brothers did not, in our view, affect the indefeasibility of UOB's interest. Our view is supported by two decisions of the apex court, namely *Kamarulzaman Omar & Ors v. Yakub Husin & Ors (supra)* and *Tan Ying Hong v. Tan Sian San & Ors (supra)*.

[46] In *Kamarulzaman Omar*, the Federal Court opined as follows:

> ... Thus, so long as a defeasible title or interest remains on the register and has not been set aside, it is capable of subsequent dealings by its holder. And, indeed, it can be a root of good title in favour of any subsequent purchaser "in good faith and for valuable consideration".

[47] In *Tan Ying Hong*, the then Chief Judge of Malaya (now the Chief Justice of the Federal Court) had remarked that the Court of Appeal decision in *OCBC Bank (Malaysia) Bhd v. Pendaftar Hak Milik Negeri Johor Darul Takzim* [1999] 2 CLJ 949; [1999] 2 MLJ 511 was wrongly decided. The factual matrix in the OCBC case was similar to the present case, hence making those remarks, to say the least, instructive if not binding on this court. This is what His Lordship said:

> [24] ... This was followed by another panel of Court of Appeal in *OCBC Bank (Malaysia) Berhad v. Pendaftar Hak Milik Negeri Johor Darul Takzim* [1999] 2 CLJ 949. In the latter case the appellant bank granted an overdraft facility to one Ng See Chow ('the borrower') which was secured by a charge registered in favour of the appellant over some lands in

A Johore. The borrower defaulted in the overdraft facility and the appellant commenced foreclosure proceedings and obtained an order for sale on 12 May 1992. On 15 September 1992, at the request of the police, the respondent entered a registrar's caveat on the Land on the basis of police investigations into the report of one Ng Kim Hwa who claimed that the Land belonged to him and that he had never executed any transfer in
B favour of the borrower. Nevertheless, this first caveat was removed on 3 February 1993 with the consent of the respondent. Ng Kim Hwa thereafter brought an action against the borrower to recover the Land and intervened in the appellant's foreclosure proceedings to set aside the order for sale or to stay the execution of the same pending the outcome of his civil suit against the borrower. The appellant contended that the charge
C on the Land was indefeasible pursuant to s. 340 of the NLC as the appellant had obtained the same in good faith for valuable consideration.

...

[26] NH Chan, JCA in delivering the judgment of the Court of Appeal
D was of the opinion that the proviso to s. 340(3) of the NLC applies exclusively to those situations which are covered by sub-s. (3). The court then went on to hold that the charge granted by Ng See Chow to the appellant was liable to be set aside by the true owner since the title was obtained by forgery. On the facts of that case we agree that the title of Ng See Chow is defeasible under s. 340(2) of the NLC as he obtained
E his title through a forged instrument. However, we are of the opinion that the appellant bank, being the holder of subsequent interest in the Land is protected by the proviso to s. 340(3) of the NLC. For that reason, we are of the view that the finding of the Court of Appeal in that case is to that extent flawed.

F *Appeal 173 (Suit 216) - UOB v. Kum Hoi*

[48] The learned judge also sustained the claim for refund by Kum Hoi against UOB for monies released by Public Bank, the financier for the purchase of the land by Kum Hoi. The reasoning of the learned judge read as follows:

G [73] The defence by 2nd Defendant could be summarised as follows:

(a) That the Plaintiff and/or Public Bank Berhad did not present the discharge of charge for registration within 14 days from the release the documents;

H (b) That the 2nd Defendant is not a privy to the said Sale & Purchase Agreement and the 2nd Defendant did not issue any Letter of Undertaking in favour of the Plaintiff;

(c) 2nd Defendant's obligation to refund the redemption sum to Public Bank Berhad only arises if the discharge of charge cannot be registered for reasons attributable to the 2nd Defendant;

I (d) 2nd Defendant has a registrable and registered interest in the Land and therefore is in a position to give good discharge of charge.

[74] No doubt the discharge of charge was not registered within 14 days from the date 2nd Defendant released the relevant documents. In fact until the date the case went on for trial the discharge of charge was yet to be registered. This was because of the existence of Registrar caveat on the Land. What was important was that the Plaintiff did attempt to have the discharge of charge registered within 14 days from the date the relevant documents were released by 2nd Defendant. From the chronology of the events, this was done by Plaintiff.

[75] It was not in dispute, the money the Plaintiff's financier paid 2nd Defendant to redeem the Land was from Plaintiff loan account to which the Plaintiff is servicing by paying interest on the said loan. The monies that were disbursed, to the 2nd Defendant was to enable the 1st Defendant to settle its loan with the 2nd Defendant in order for the 2nd Defendant to discharge the existing charge over the respective Land. I find the 2nd Defendant's letter of undertaking would not have been issued by the 2nd Defendant if there had not been any SPA between the 1st Defendant and Plaintiff. Having regard to the above, I am of the view the letter of undertaking and the SPA were interlinked to each other. The 2nd Defendant's undertaking cannot exist without the SPA. As such the 2nd Defendant as the 1st Defendant's agent has an implied contract with the Plaintiff. Now that the original owner of the Land had successfully claimed back the title to the Land and the registration of the charges presented by the 1st Defendant vide presentation No. 2736/2009 and 2737/2009 on the said Land ordered to be cancelled, the 2nd Defendant registrable and registered interest in the Land no longer exist and any money paid by Plaintiff towards the redemption of the said Land must be refunded.

[49] Learned counsel for UOB submits that there is no obligation to refund simply on the ground that obligation had not kicked in as provided for in the letter of undertaking issued by UOB to Public Bank. The relevant clause is as follows:

2. To refund to you the redemption sum paid to us, free of interest in the event:

2.1. the Receipt and Reassignment cannot be perfected for any reasons attributable to us, provided that all documents released by us are returned to us intact within thirty (30) days from the date of the release of the said documents by us to you, and/or

2.2. the Deed of Release of Debenture and/or the Discharge of Charge cannot be registered for any reasons attributable to us, provided that the documents released by us are returned to us with our Debenture and/or Charge intact and provided further that the said documents are presented for registration within fourteen (14) days from the date of release of the said documents by us to you;

whichever is applicable.

[50] Learned counsel submits that the inability to cancel the charge and register the same was not "attributable to" UOB, hence the obligation to refund did not arise. With respect, the letter of undertaking cannot be

A interpreted in vacuum in that one cannot ignore the fact that the loan from Public Bank Bhd was to finance Kum Hoi's purchase of the land and the amount released was to satisfy or redeem the loan to Heveaplast. It is undisputed that the transfer of the land to Kum Hoi till today could not be effected as there still a live dispute as to the validity of the transfer of the land
B to Heveaplast. Without this transfer to Kum Hoi, Public Bank Bhd can never satisfy UOB's charge and become a chargee of the land. The fault here, no doubt, was not attributable to UOB but laid squarely on Heveaplast. To thus interpret the letter of undertaking as suggested by learned counsel, with respect, does not make any commercial sense.

C **[51]** Under such circumstances, the court is duty bound to infer an implied term to the letter of undertaking. The legal principle relating to "implied term" had been set out in *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong (c)* [1998] 3 CLJ 503; [1998] 3 MLJ 151 where the Federal Court at pp. 531-533 (CLJ); p. 169 (MLJ), per Pah Swee Chin FCJ, said as follows:

D > Implied terms are of three types. The first and most important type is an implied term which the court infers from evidence that the parties to a contract must have intended to include it in the contract though it has not been expressly set out in the contract. The implied term contended for in this appeal belongs to this type and much more about this later.
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E > The second type of implied term is one by operation of law, and not based on the inference just explained. By operation of law, I mean that a large number of specific implied terms have been held in to arise from previous decided cases on certain specific facts. Such *ratio decidendi* in respect of such decided implied terms are normally adopted by courts in subsequent cases on similar facts as a matter of course without the necessity of any
F > court to decide afresh whether it ought to draw the inference as explained above. Thus, such implied terms come from decided cases exclusively. Thus, in a contract of employment, there is an implied term that the employee will serve his employer faithfully, and not to act against the employer's interest, and again there is another implied term that the employer will provide a safe system of work. Many of such decided and
G > specific implied terms have been incorporated into statutes such as the Sale of Goods Act 1957 and others; it is not necessary to discuss it further except to emphasise that such an implied term of this particular type may sometimes be excluded by parties by an agreement to the contrary and more importantly, it is not dependent on the court having to draw an
H > inference explained above.
>
> The third kind of an implied term is one that is implied by custom or usage of any market or trade which is reasonable, and again it is not dependent on a court's inference explained above but by virtue of such a custom or usage from the market or trade. Interestingly, s. 92(e) of the Evidence Act 1950 seems to be custom-made to provide logistical support for this
I > particular type of implied term. It will be remembered that s. 92(e) aforesaid is one of the exceptions to the rule against evidence to contradict or vary any terms of a written contract.

Reverting to the first type of implied term which is dependent on a court drawing an inference as explained above, there are two tests to fix the parties with such an intention, ie,. that the parties must have intended to include such an implied term in the contract. The first test is a subjective test, as stated by MacKinnon LJ in *Shirlaw v. Southern Foundries* (1926) Ltd [1939] 2 KB 206 at p. 227, that such a term to be implied by a court is 'something so obvious that it goes without saying, so that if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress his with a common "Oh, of course".'

The second test is that the implied term should be of a kind that will give business efficacy to the transaction of the contract of both parties. The test was described by Lord Wright in *Luxor (Eastbourne) Ltd & Ors v. Cooper* [1941] AC 108 at p. 137, that in regard to an implied term, '... it can be predicated that "It goes without saying", some term not expressed but necessary to give the transaction such business efficacy as the parties must have intended'. Business efficacy in my opinion, simply means the desired result of the business in question. Thus, in *Shirlaw*'s case, Shirlaw who was appointed the managing director by the defendant company for 10 years, sued for and obtained damages for breach of agreement. It was held that it was an implied term that the defendant company would not alter its articles of association to create a right for itself to remove the plaintiff before the 10-year term expired. The implied term inferred by the court there was to let both parties achieve the desired result that the post of the managing director would continue to be available for 10 years to Shirlaw as both parties must have intended it at the time when making the agreement.

The testy answer to the question of the officious bystander of 'Oh, of course' spoken of by Mackinnon LJ was described equally elaborately by Scrutton LJ in *Reigate v. Union Manufacturing Co (Ramsbottom) Ltd & Anor* [1918] 1 KB 592 at p 605 as '... of course, so and so will happen, we did not trouble to say that, it is too clear'.

Both tests in my opinion must be satisfied before a court infers an implied term. Thus, Lord Wilberforce in *Liverpool City Council v. Irwin & Anor* [1977] AC 239 at p 254 spoke of an implied term as a matter of necessity, so that the element of 'business efficacy is inseparable'. Lord Simon of Glaisdale in *BP Refinery (Westernport) Pty Ltd v. Hastings Shire Council* (1977) 16 ALR 363 described both tests as conditions the compliance of which the court must be satisfied, in addition to what I may describe as other requirements, of existing law. Closer to home, Chong Siew Fai J (as he then was) in *Yap Nyo Nyok v. Bath Pharmacy Sdn Bhd* [1993] 2 MLJ 250 held that both tests must be satisfied. If the implied term was not necessary to give business efficacy, the answer to the officious bystander, would have been a testy answer of 'Oh, don't talk rubbish'.

The two tests referred to earlier are to enable the court to decide as to whether it should or should not infer that the implied term contended for is a term which parties to a contract must have intended to include in the contract. Such being the case, the intention of both parties from the contract in question ought to be ascertained. In doing so, I will not set

A out the evidence below in detail except to refer to such parts of it as and when necessary, as after all, this matter is not likely at all to go elsewhere from this court, as long as the parties and their counsel and the courts below are apprised of detailed facts.

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

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

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

[55] It is settled principle of law that all agreements which form part of the same transaction must be read together and cannot be considered in isolation of each other. In the case of *MBf Property Services Sdn Bhd & Anor v.* H *Balasubramaniam K Arumugam* [2000] 2 CLJ 230 at p. 234; [2000] 2 MLJ 267, at pp. 270-27, where this court discussed the decision of the English Court of Appeal in *Manks v. Whiteley* [1912] 1 Ch 735 and opined as follows:

...

I The three documents; the sale and purchase agreement, the agreement with the first appellant and the loan agreement with the second appellant, must be read together as they form part of the same transaction. This is in accordance with settled principles of law.

Thus, in *Manks v. Whitely* [1912] 1 Ch 735, Fletcher Moulton LJ said (at p. 754):

> [W]here several deeds form part of one transaction and are contemporaneously executed, they have the same effect for all purposes such as are relevant to this case as if they were one deed. Each is executed on the faith of all the others being executed also and is intended to speak only as part of the one transaction, and if one is seeking to make equities apply to the parties, they must be equities arising out of the transaction as a whole. It is not open to third parties to treat each one of them as a deed representing a separate and independent transaction for the purpose of claiming rights which would only accrue to them if the transaction represented by the selected deed was operative separately. In other words, the principles of equity deal with the substance of things, which in such a case is the whole transaction, and not with unrealities such as the hypothetical operation of one of the deeds by itself without the others.

[56] The decision in *Manks v. Whitley* has also been considered by the Federal Court in *Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 9 CLJ 257 at pp. 268-269; [2011] 6 MLJ 464, at pp. 475-476, where it opined as follows:

> [15] The crux of the Plaintiff's argument is that the Courts below fell into error by construing the PDA as a stand-alone agreement. Counsel for Plaintiff submitted that there were four Agreements executed on the same date (7th January 1993) namely the Main Agreement, the New Property Development Agreement, the Property Sales Agreement and the PDA. It was therefore contended by the learned counsel that the four Agreements were interlocking in nature and ought to be considered as a whole. In other words, none of the said Agreements could be considered in isolation.
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> And he pointed out that a close scrutiny of all four Agreements would show the commercial intention behind the bargain of the parties which was that the Plaintiff had bought the right to remain on the subject land and develop the whole or any part of the Land at its own pace and discretion. It was also emphasised that the Plaintiff had in fact performed its obligations under the other Agreements such as the payments of RM40 million. Such payment should be taken into account as consideration since all the four Agreements were interlocked.
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> ...
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> [18] In any event, we do not think it is in dispute in that the general rule is that where several deeds are executed at the same time (contemporaneously executed), reference should be made to all the deeds to ascertain the intention of the parties. (See: *Manks v. Whitley* [1912] 1 Ch 735; [1914] AC 132 and *Mohamed Isa v. Abdul Karim* [1970] 2 MLJ 165).

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

[58] Accordingly, we agree with the order to refund the sum of RM3,255,211.58 (being the redemption sum) made by the learned judge,
C though on different grounds.

Conclusion

[59] For the reasons set out above, we made the following orders:

(i) Appeal No 489:

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Appeal dismissed with costs of RM20,000 subject to payment of allocator fees for first and second respondents and RM10,000 subject to payment of allocator fees for the third and fourth respondents. Deposit to be refunded to the appellant.

E (ii) Appeal No 33:

Appeal allowed with no order as to costs.

(iii) Appeal No 2129:

Appeal dismissed with costs of RM20,000 subject to payment of
F allocator fees to the respondent. Deposit to be refunded to the appellant.

(iv) Appeal No 173:

Appeal dismissed with no order as to costs.

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