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# Asian Journal of Law and Policy

Vol 2 No 2 (July 2022)

eISSN: 2785-8979

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## Case Commentary: Double Bona Fide: Good or Bad? The Conundrum After *Kamarulzaman bin Omar v Yakub bin Husin*

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### ABSTRACT

The concept of indefeasibility of title or interest of land is one of the core concepts in the Malaysian Torrens System, stipulated in section 340 of the National Land Code (Revised 2020). All registered title or interest over the land shall be guaranteed and remain unchallengeable against the whole world in the absence of fraud or other vitiating factors statutorily specified or judicially laid down. The debate of whether Malaysia recognised immediate indefeasibility or deferred indefeasibility has been settled by the Federal Court in the case of *Tan Ying Hong v Tan Sian Sang & Ors* since 2010. Nevertheless, the concept of deferred indefeasibility seems to be extended by the Federal Court in *Kamarulzaman*, which imposed a requirement of double bona fide. In essence, the court stated that for a purchaser to be regarded as an immediate purchaser, he must be a bona fide purchaser for value so that the purchaser following him could be a subsequent purchaser protected by the proviso of section 340(3) of the National Land Code provided he acted in bona fide with valuable consideration.

**Keywords:** Torrens system, Immediate and deferred indefeasibility, Bona fide purchaser for value, Section 340(3) National Land Code

**Received:** 28 Mar 2022, **Accepted:** 12 May 2022, **Published:** 9 Jul 2022



(2022) 2 Asian Journal of Law and Policy 113–126  
<https://doi.org/10.33093/ajlp.2022.8>

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## 1. Introduction

The concept of indefeasibility is stipulated under section 340 of the National Land Code.<sup>1</sup> According to the general rule stated in section 340(1) of the National Land Code, a registered proprietor's title or interest shall be indefeasible. In other words, registration is everything and the registered title or interest would be unchallengeable unless it falls under the exceptions. Section 340(2) of the National Land Code laid down the three categories of vitiating factors that would render a title or interest to be defeasible despite being registered. By virtue of section 340(3) of the National Land Code, the title or interest subsequently transferred or granted out by the person in section 340(2) of the National Land Code, would be defeasible too. However, the title or interest falling under section 340(3) of the National Land Code could be saved by the proviso if the person acquired such title or interest is a bona fide purchaser for value.

The application of proviso under section 340(3) of the National Land Code often becomes an issue before the court. In the case of *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng (Adorna Properties cases)*,<sup>2</sup> there has been saying that the pendulum swung too left for applying immediate indefeasibility.<sup>3</sup> While the deferred indefeasibility is restored by *Tan Ying Hong v Tan Sian Sang & Ors (Tan Ying Hong case)*<sup>4</sup> and the pendulum has been just fine, the case of *Kamarulzaman* subsequently has moved the pendulum towards the right by imposing a double bona fide requirement on the purchasers before they could invoke the protection under the proviso.

## 2. Kamarulzaman bin Omar v Yakub bin Husin

The case to be discussed is a Federal Court case in *Kamarulzaman bin Omar v Yakub bin Husin*<sup>5</sup> reported in 2014 after the much-awaited *Tan Ying Hong* case.

### 2.1 The Brief Facts

Saribu (the deceased) was the registered co-proprietor in two lots of land in Sepang. She died leaving no issue in Indonesia in 1941. Somewhere in 1984, the first defendant

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<sup>1</sup> National Land Code (Revised 2020) (Act 828) (hereinafter referred to as the 'National Land Code') which replaced the National Land Code 1965 (Act 56 of 1965). National Land Code (Revised 2020) is effective from 15 October 2020.

<sup>2</sup> *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 Malayan Law Journal 241 (FC), [2001] 2 Current Law Journal 133 (FC).

<sup>3</sup> Arthur Lee, 'A Critique of Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors' <<https://arthurlee.my/2019/03/01/a-critique-of-kamarulzaman-bin-omar-ors-v-yakub-bin-husin-ors/>>.

<sup>4</sup> *Tan Ying Hong v Tan Sian Sang & Ors* [2010] 2 Malayan Law Journal 1 (FC), [2010] 2 Current Law Journal 269 (FC). The Federal Court has restored the concept of deferred indefeasibility practised in our Malaysian land law, when they overruled the notorious *Adorna Properties* case.

<sup>5</sup> *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* [2014] 2 Malayan Law Journal 768 (FC), [2014] 1 Current Law Journal 987 (FC).

(respondent) obtained an order to distribute Saribu’s undivided share in the two lots of land among himself and the second to fourth defendants (respondents). Subsequently, all the four defendants sold and transferred their undivided share in the lands to the fifth and sixth defendants (respondents) in consideration for the purchase price of RM25,000 and RM16,000 respectively.

The plaintiffs (appellants), who were the nephew and nieces of the deceased discovered the transaction and filed a suit against all the defendants including the governmental authority. The plaintiffs, sought, among others, to set aside the letter of administration and order for distribution obtained by the first to fourth defendants; to set aside the vesting order for the share of the lands from the deceased to the first to fourth defendants; to set aside the title acquired by the fifth and sixth defendants and to register the lands in the name of the plaintiffs. The facts are summarised in Figure 1 stated below.

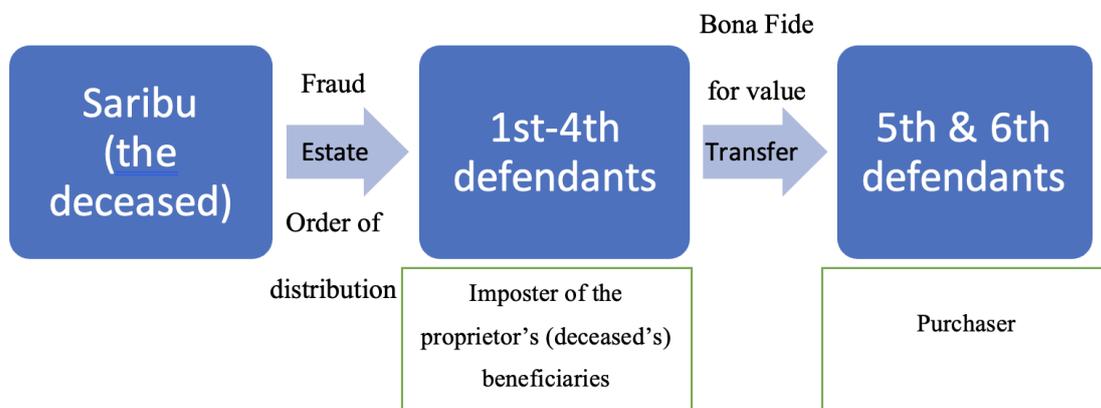


Figure 1: Summary Facts of Kamarulzaman

In the suit, the plaintiffs pleaded that the first to fourth defendants had acquired the title of the two lots of land which belonged to the deceased through fraud and misrepresentation by falsely stating that they were the children or beneficiaries of the deceased and thereby obtained the order of distribution. The plaintiffs also pleaded that the seventh defendant, the governmental authority which granted the order for distribution was negligent.

The High Court Judge granted a judgement in default against the first to fourth defendants, who did not defend the claim.

The suit against the fifth to seventh defendants was dismissed. The trial judge held that although the first to fourth defendants had no right to transfer the title or interest in the lands, the fifth and sixth defendants nevertheless had acquired an indefeasible title as they had not acquired their title or interest by fraud. It was also held that the transfer of the undivided shares of the two lots of land from the first to fourth defendants to the fifth and sixth defendants are registered validly and in accordance with the law. There is no negligence on the part of the seventh defendant.

The Court of Appeal concurred with the finding of the trial court. It found fraud on the first to fourth defendants but held that since the fifth and sixth respondents were bona fide

purchasers for value and were not tainted by the fraud, their title and interest to their respective shares are protected under section 340(3) of the National Land Code thus indefeasible.

## **2.2 The Issues**

The plaintiffs appealed to the Federal Court and leave to appeal was granted on the three questions of law.

1. What was the effect of the judgement in default, which set aside the letters of administration to the estate of the deceased, to the transfers of the lands of the estate of the deceased to the fifth and sixth defendants (respondents)?
2. What is the protection provided under the law including the National Land Code to the estate of the deceased and the beneficiary regardless if it is a Malay Reserve Land Title or not?
3. Whether the transfers of the lands of the estate of the deceased to the fifth and sixth defendants (respondents) were protected by section 340 of the National Land Code?

Nevertheless, the focus was placed on the first and third issues. In addition, the Federal Court criticised that the High Court and Court of Appeal had founded their judgement based on the bona fide of the fifth and sixth respondents. However, the issue should be whether the fifth and sixth respondents are immediate or subsequent purchasers because only the latter would avail the protection under section 340 of the National Land Code.

## **2.3 The Decision**

The Federal Court allowed the appeal by the plaintiffs, ordered the undivided shares of the fifth and sixth defendant (respondents) to be restored to the estate of the deceased. It was held that the trial court and Court of Appeal failed to consider whether the fifth and sixth defendants are the immediate or subsequent purchasers.

Jeffrey Tan FCJ held that the first to fourth defendants were imposters of the deceased's beneficiaries. Accordingly, the fifth and sixth defendants who purchased from the imposters are the immediate purchaser. Though bona fide, they were not entitled to raise the shield under section 340(3) of the National Land Code which was meant for subsequent bona fide purchasers for value. The grounds of decision will be analysed in the next part.

## **3. Commentaries**

Prior to *Kamarulzaman*, a registered proprietor who acquired the title or interest of land through a transaction tainted with vitiating factor is regarded as an immediate purchaser while a purchaser who acquired title or interest from such a tainted registered proprietor is regarded as a subsequent purchaser. The bona fide of the immediate purchaser does not

affect the status of the purchaser coming after him being a subsequent purchaser. However, after *Kamarulzaman*, a tainted registered proprietor is not regarded as an immediate purchaser if he is not a bona fide purchaser with value and thereby the purchaser who came after the tainted registered proprietor is now an immediate purchaser as there is no immediate purchaser preceding him. This has led to absurd results and seems to depart from the intention of the legislation. Hence, the discussion below would provide a commentary on the double bona fide requirement established by *Kamarulzaman*.

### **3.1 Immediate or Deferred Indefeasibility**

On the matter of interpretation of section 340 of the National Land Code, case laws have established different interpretations, which could be categorised into immediate indefeasibility and deferred indefeasibility. The significant cases decided by the Federal Court, namely *Adorna Properties Sdn Bhd v Boonsom Boonyanit*<sup>6</sup> and *Tan Ying Hong v Tan Sian San & Ors*<sup>7</sup> have illustrated the two different approaches.

Section 340 of the National Land Code reads as follows:

- a 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.
- b 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.
- c 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.

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<sup>6</sup> *Adorna Properties* (n 2).

<sup>7</sup> *Tan Ying Hong* (n 4).

- d 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.

A summary of the indefeasibility section is represented in Figure 2 below.

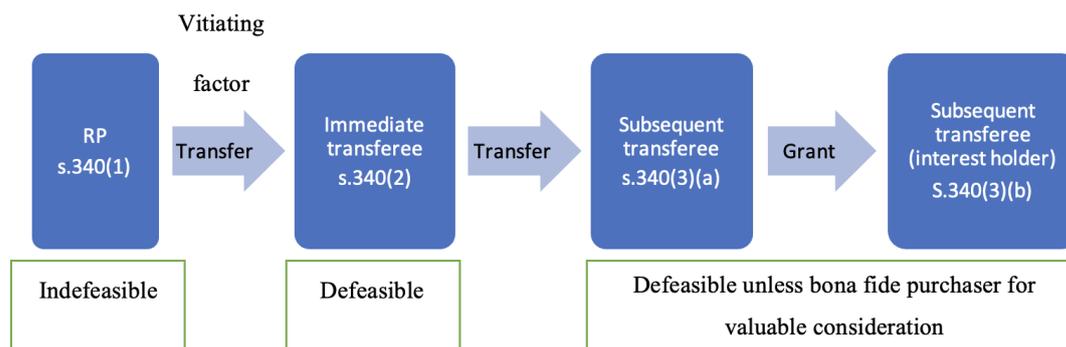


Figure 2: Indefeasibility Under Section 340

Clearly, subsection 2 refers to the status of an immediate transferee who had obtained the title or interest by forgery, an insufficient or void instrument or by an unlawful act. On the other hand, subsection 3 refers to the status of a subsequent transferee who obtained the land from the transferee referred to in subsection 2 and any holder of the interest granted thereout.

In the case of *Adorna Properties*, a vendor has procured a fake passport of Boonsom Boonyanit (the respondent), sold and transferred the respondent's land to the appellant for valuable consideration. The Federal Court viewed that the proviso of section 340 can be used by any purchaser who acquired the title or interest in good faith for valuable consideration. Hence, the appellant fell under the category of proviso, rendering them to enjoy immediate indefeasibility notwithstanding that they acquired their titles under a forged document. Nevertheless, nearly a decade after the decision, the immediate indefeasibility principle was overruled by the Federal Court in *Tan Ying Hong*. It was held that the word 'subsection' in the proviso should refer to subsection 3 only and does not refer to subsection 2 or any other subsection. Consequently, *Tan Ying Hong* reinstated the deferred indefeasibility whereby only a subsequent purchaser falling under subsection 3 who acquired the title or interest in good faith with value could invoke the proviso to protect their title and interest.

### 3.2 Double Bona Fide Requirement for Deferred Indefeasibility

The phrase 'immediate purchaser' or 'subsequent purchaser' appears nowhere in the provision but is often used when dealing with the issue of indefeasibility. To date, the position of deferred indefeasibility is trite. The proviso to section 340(3) of the National Land

Code only applies to a subsequent purchaser. Zaki Tun Azmi CJ has correctly illustrated the concept of indefeasibility under section 340 of the National Land Code.

A summary of his Lordship’s analysis is as follows:

Let’s say the owner of the land is A. A’s land was transferred to B and later transferred to C. If the transaction from A to B was tainted by any vitiating factors under section 340(2) of the National Land Code, then the title of B will be defeasible. The title of C is also defeasible according to section 340(3) of the National Land Code. However, C could be protected by proviso under section 340(3) of the National Land Code if C could prove that he is a bona fide purchaser for value. On the contrary, B could not be protected anyway even if he is in good faith with valuable consideration.<sup>8</sup>

See the explanation in Figure 3 below:

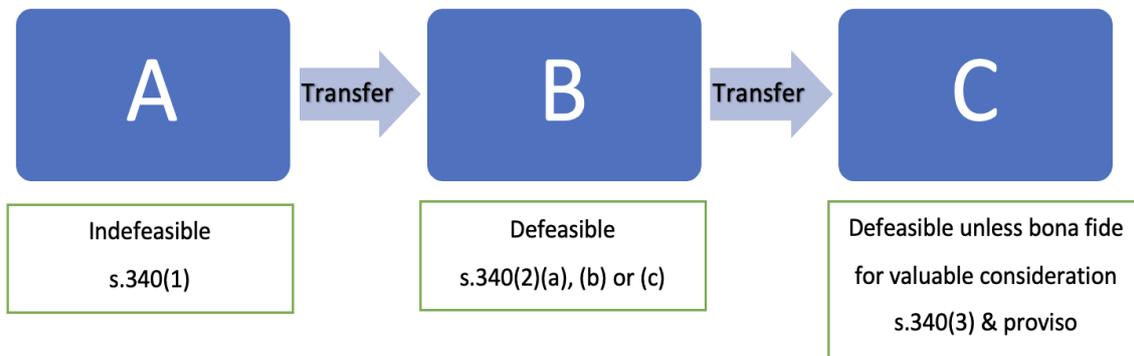


Figure 3: Deferred Indefeasibility

However, the issue arose regarding the definition of a subsequent purchaser. As described by the court in *Tan Ying Hong*, a subsequent purchaser is a purchaser who took the land after a person whose title was defeasible as stipulated in section 340(2) of the National Land Code. As a result, as illustrated in Figure 3 above, C will get protection regardless of the fides of the B.

On the contrary, Jeffrey Tan FCJ in *Kamarulzaman* viewed it differently. According to his Lordship, a subsequent purchaser shall be a purchaser followed by a purchaser. In *Kamarulzaman*, the first to fourth defendants (respondents) were not purchasers, but imposters of those entitled to the estate. Note that section 5 of the National Land Code defined a purchaser as ‘a person who in good faith and with valuable consideration acquires title to, or any interest in the land’. The first to fourth defendants (respondents) are not persons who acquired title in good faith and with valuable consideration.

Since the fifth and sixth defendants (respondents) acquired the land from the first to fourth defendants, no purchasers were preceding the fifth and sixth defendants. Consequently, the fifth and sixth defendants were immediate purchasers. The court even

<sup>8</sup> *Tan Ying Hong* (n 4) [5]–[9].

stated that the position of the first to fourth defendants is the same as the fake Boonsom in *Adorna Properties* who impersonated the proprietor of the land and sold the land out.

In fact, there is a big difference between the two cases. In *Kamarulzaman*, the so-called imposters did acquire the land and had their name on the Register of title, the transaction from the original proprietor to the imposter was contaminated but the following transaction to the bona fide purchaser was not. On the other hand, the imposter in *Adorna Properties* did not appear on the Register of title at all and the transaction from the original proprietor to the bona fide purchaser was tainted with forgery. Thus, it is inaccurate for the court to say their position is the same. Moreover, the first to fourth defendants acquired the title from the estate of the original proprietor through fraud. It fits under section 340(2)(a) of the National Land Code. Applying the situation into the provision, it will be 'the title of the first to fourth defendants shall not be indefeasible in any case of fraud or misrepresentation to which the first to fourth defendants were parties'. Hence, with due respect, there is no sound reasoning for the judge to hold that the first to fourth defendants were just imposters and not immediate purchasers.

### **3.3 Development of Cases after *Kamarulzaman***

The issue of whether a party is an immediate or subsequent purchaser has been discussed in many subsequent cases. Among the cases, the double bona fide requirement illustrated in *Kamarulzaman* when deciding the party is a subsequent purchaser is adopted in some cases.

In *CIMB Bank Bhd v AmBank (M) Bhd & Ors*,<sup>9</sup> the Chings are the original registered proprietors of the land which was charged to the Southern Bank Bhd (SBB) (now known as CIMB Bank Bhd). Chings entered into a Sale and Purchase Agreement (SPA) with Wong for the purchase of the land. Wong had applied for a loan from the first respondent to part-finance the purchase of the land and would charge the land as a security. The first respondent's solicitor conducted relevant searches and appropriate enquiries. They were informed by the solicitors who prepared the SPA that the Chings had settled the loan sum due to the appellant. Thus, they presented the relevant documentation including the charge in favour of the first respondent to the land office. In due course, the land office registered the discharge of the appellant's charge, registered Wong as the registered proprietor, and registered the first respondent as the chargee. See the Summary Facts in Figure 4 below.

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<sup>9</sup> *CIMB Bank Bhd v AmBank (M) Bhd & Ors* [2017] 5 Malayan Law Journal 142 (FC), [2017] 9 Current Law Journal 145 (FC).

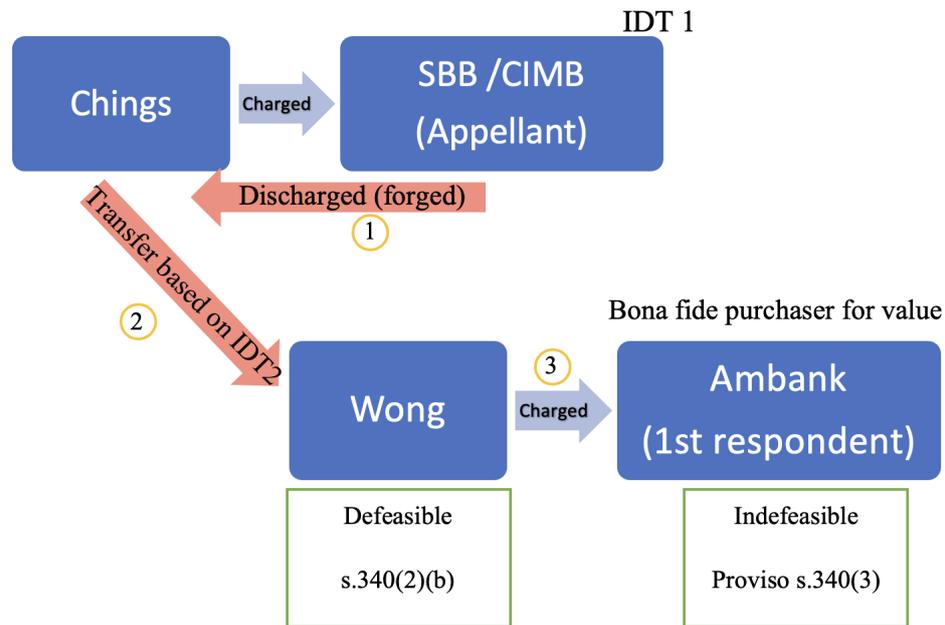


Figure 4: Summary Facts of CIMB v AmBank

The appellant commenced the action against the respondents to declare the charge in favour of the first respondent is null and void. This was because of the removal of the appellant as chargee and registration of the first respondent as chargee was found to have been carried out by means of the forged document in which the signature of the appellant was forged and there are two different documents of title.

According to section 5 of National Land Code, a purchaser includes a person who acquired title or interest. Hence, a chargee could be regarded as a purchaser as well. The High Court held that the first respondent was an immediate purchaser (or immediate chargee or interest holder) because it obtained the interest based on the discharge purportedly executed by the appellant which then allowed the charge in favour of the first respondent to be registered. Therefore, the charge in favour of the first respondent was liable to be set aside under section 340(2)(b) of the National Land Code and it was not protected by the proviso due to its status as the immediate purchaser.

On the contrary, the Court of Appeal held otherwise and stated that the first respondent was a subsequent purchaser who was protected by the proviso to section 340(3) of the National Land Code. The Court of Appeal disagreed with the High Court which stated that the first respondent obtained interest from the appellant. In fact, the only way the first respondent obtained interest is from Wong. Without the Wong being registered as the registered proprietor, the charge in favour of the first respondent could not be effected. It was the transaction between Chings and Wong that had been based on forged documents, but the charge granted from Wong to the first respondent was not. Hence, the first respondent's interest in the land had been then extinguished by the forged discharge resulting in Wong becoming the immediate purchaser. Since the charge in favour of the first respondent is following Wong, the first respondent is a subsequent purchaser.

The Federal Court was in total agreement with the Court of Appeal and dismissed the appeal. Since the first respondent derived its interest in the land from the charge executed by Wong, it became a holder of subsequent interest in the land. The first respondent must be a subsequent purchaser and thus, protected by the proviso of section 340 of the National Land Code.

Nevertheless, Jeffrey Tan FCJ dissented from the majority and emphasised the requirement of double bona fide again. It is worth taking note that Jeffrey Tan FCJ is also the judge in *Kamarulzaman*. In his dissenting judgement, he applied *Wright v Lawrence*<sup>10</sup> which proposed that:

For the title or interest of the subsequent purchaser to be indefeasible, both immediate and subsequent purchasers must be purchasers in good faith and for valuable consideration.<sup>11</sup>

Hence, Jeffrey Tan FCJ held that Wong, who obtained the title through forged discharge and forged document of title could not be considered as an immediate purchaser because he is not bona fide. Since there is no immediate purchaser preceding the charge in favour of the first respondent, thus it must be an immediate purchaser whose title is defeasible under section 340(2)(b) of the National Land Code.

Whether a purchaser is an immediate or subsequent purchaser is not determined by a tally of the number of transactions. Transactions could be contrived by fraudsters and accomplices. ... A purchaser is a subsequent purchaser only if his title or interest were derived from an immediate purchaser (his vendor) in good faith and for valuable consideration.<sup>12</sup>

The requirement of double bona fide is also stated in the case of *He-Con Sdn Bhd v Bulyah bt Ishak & Anor and another appeal*.<sup>13</sup> In this case, the document of title for the property has yet to be issued when the deceased purchased the property from He-Con through a Sale and Purchase Agreement. Later, He-Con executed a Power of Attorney in favour of the deceased which gave him absolute power to deal with the property and acknowledged that the purchase price had been paid in full. Before the deceased died, he appointed the first respondent as substitute attorney.

When the document of title was issued, the respondents had obtained the letter of administration for the estate of the deceased. The first respondent requested the title to be registered under her name but He-Con refused to effect a direct transfer because the first respondent was unable to pay the stamp duties and assessment bills in the sum of RM110,355.60. Therefore, the developer registered the property in He-Con's name instead of

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<sup>10</sup> *Wright v Lawrence* (2007) 278 Dominion Law Reports (4th) 698.

<sup>11</sup> *Wright v Lawrence* (n 10) [39], cited in *CIMB Bank* (n 9) MLJ [90].

<sup>12</sup> *CIMB Bank* (n 9) MLJ 179, [90], CLJ 183.

<sup>13</sup> *He-Con Sdn Bhd v Bulyah bt Ishak & Anor and another appeal* [2020] 4 Malayan Law Journal 662 (FC), [2020] 7 Current Law Journal 271 (FC).

the first respondent's name. Subsequently, He-Con charged the property to Ambank, who later applied to auction the land due to He-Con default in repaying the loan.

The Federal Court held that the deceased had paid the full purchase price thereby becoming the rightful owner while He-Con is a bare trustee who could not in law pass any interest to Ambank. Hence, the charge in favour of Ambank is void ab initio, caught by section 340(2)(b) of the National Land Code. Since the transaction between He-Con and Ambank is a direct one, Ambank was an immediate purchaser who is not protected by the proviso in section 340(3) of the National Land Code despite it being a bona fide purchaser for value.

The judgement was perfectly fine, but the court did not stop there. The court further discussed a variation of fact with a hypothetical scenario. Accordingly, if there is a Mr. A who bought the property from He-Con, then A would be an immediate purchaser, provided he bought the property in good faith. If Mr. A, the bona fide purchaser, then created a charge over the property and had it registered in favour of Ambank, then Ambank would become a subsequent purchaser. The reasoning of Ambank being a subsequent purchaser is because it obtained the interest in the property from Mr. A, a bona fide immediate purchaser, though Mr. A's title is defeasible under section 340(2) of the National Land Code.

Moreover, the court stated that:

The immediacy of the purchase relates to the vitiating vendor, not how far removed it is in the tally among the purchasers. To be a subsequent purchaser, it must have purchased the interest in the property that is being used as a security from a purchaser who is one that is bona fide for value. Any direct dealing with a rogue will necessarily vitiate the transaction rendering it defeasible, although it is duly registered.<sup>14</sup>

The court had referred to the case of *Kamarulzaman* and even the dissenting judgement by Jeffrey Tan FCJ in the case of *CIMB Bank*. Therefore, it should emphasise that such obiter was an express departure from the majority decision in the case of *CIMB Bank*.

### **3.4 Double Bona Fide: Good or Bad?**

The double bona fide requirement is an interesting issue as it ponders the question of whether a purchaser who is not bona fide with value should be recognised as an immediate purchaser? If the answer is affirmative, it might result in a situation allowing the forger to benefit from his wrongful act.

If there is no double bona fide requirement whereby a forger could be considered as immediate purchaser, then the position of the purchaser following the forger could be different in two kinds of transaction. First, assuming Mr. A was the registered proprietor whose land was fraudulently transferred by Forger X to Mr. B. The transaction from Mr. A

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<sup>14</sup> *He-Con* (n 13) MLJ 706, [101], CLJ 317.

to Mr. B is direct and immediate, which is caught under section 340(2) of the National Land Code. In this situation, Mr. B stands as an immediate purchaser whose title is defeasible though he is bona fide. However, if Forger X fraudulently transferred Mr. A's land to himself first then later transferred to Mr. B, Mr. B would be considered as a subsequent purchaser who could avail the protection under the proviso of section 340(3) of the National Land Code. See the illustrations in the following Figure 5:

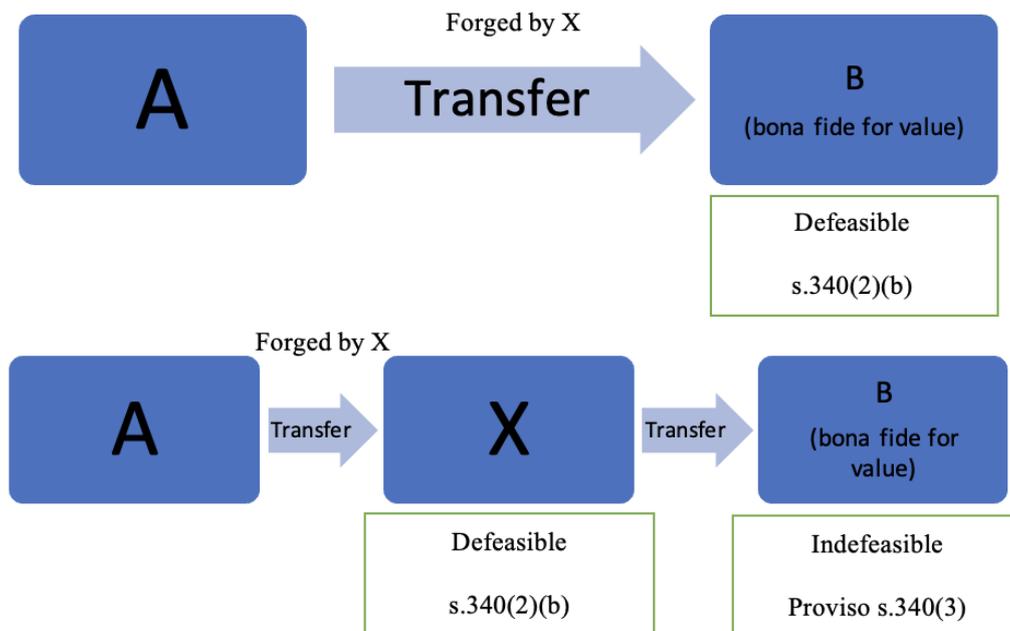


Figure 5: Illustration of Fraudulent Transactions Without Double Bona Fide Requirement

The dissenting judgement of Jeffrey Tan FCJ is somehow supported by Professor Teo Keang Sood in his article entitled 'Indefeasibility of Title/Interests: Pre- and Post-Tan Ying Hong'<sup>15</sup> when discussing the case of *CIMB Bank*. Professor Teo opines that the series of transactions carried out by the forger should be treated as a single scheme to benefit himself. It is for the sake of justice to prevent such fraudulent schemes and to prevent more forgers from acting like Wong. Hence, he supports that the proviso in section 340(3) of the National Land Code should only be available to a bona fide subsequent purchaser for valuable consideration provided that the preceding purchaser has also acted in good faith and for value. Otherwise, the subsequent purchaser would only be regarded as the immediate purchaser and the proviso cannot apply.

*Adorna Properties* was too lenient on availing the proviso of section 340 of the National Land Code to the immediate purchaser who was bona fide, resulting in immediate indefeasibility. This was later corrected by the Federal Court in *Tan Ying Hong*. Nevertheless,

<sup>15</sup> Teo Keang Sood, 'Indefeasibility of Title/Interests: Pre- and Post-Tan Ying Hong' (2018) *Journal of the Malaysian Judiciary* 193, 216 [60].

the decision of *Kamarulzaman* which requires a double bona fide has gone too far and imposed an extension in the requirements of deferred indefeasibility.

The extension in the requirements of deferred indefeasibility would be breaching the mirror principle and curtain principle under the Torrens System. According to the mirror principle, registration is everything. All the material facts including the name or the proprietor, the name of the chargee (if any), and the particular of the land shall be reflected on the Register Document of Title and the Issue of Document of title. On the other hand, the curtain principle emphasises that an intending purchaser or an interested acquirer need not look behind the curtain or beyond the register to ensure the real proprietor of the land. The details reflected in the Register would be sufficient.

When the land was transferred directly from the registered proprietor to a bona fide purchaser for value through a forger, such bona fide purchaser should have known who is the real owner of the land according to the register. Hence, the care that needs to be taken by the bona fide purchaser is to ensure that the person he is dealing with, is the same person in the register. If so happen that the person he deals with is a forger, or someone has forged the document during the transfer, then the title that he has obtained would be liable to be set aside by the previous registered proprietor under section 340(2) of the National Land Code because he is the immediate purchaser under the transaction involving the vitiating factor.

The outcome should be different if the land was first fraudulently transferred from the original registered proprietor to the forger, then later transferred by the forger to the bona fide purchaser. Based on the record in the register, the bona fide purchaser learned that the ‘forger’ he was dealing with is the registered proprietor. It would be against the curtain principle for such a bona fide purchaser to inquire into the chain of ownership and to ensure the registered proprietor is a rightful proprietor instead of a forger or fraudster. In addition, it would be unfair for the title of the bona fide purchaser who relied on the register and conducted necessary searches to be set aside because the dealing preceding his was tainted with forgery or fraud.

The first dealing from the original registered proprietor to the forger was tainted with vitiating factors thus falls under section 340(2) of the National Land Code. Since the dealing from the forger to the bona fide purchaser was following after the first dealing and was not tainted with any vitiating factor, the dealing should fall under section 340(3) of the National Land Code. As a result, such bona fide purchasers should be regarded as the subsequent purchaser who can be protected by the proviso to section 340(3) of the National Land Code. The party that obtained the title through a dealing caught under section 340(2) of the National Land Code should be regarded as the immediate purchaser and whether he acted in good faith for value or not should be irrelevant.

#### **4. Conclusion**

Although it is settled that deferred indefeasibility is applied in Malaysia, the judgement and obiter of *Tan Ying Hong* are never enough to cater to different kinds of land dealings. In

*Kamarulzaman*, the dealing involved the vitiating factor was transferred from the original proprietor to the fraudster themselves, which is relatively rare because most fraudsters would avoid themselves in the whole dealing. Nevertheless, the courts ought to provide clearer guidance in regard to the definition of immediate purchaser and the requirement of bona fide. The court should balance the interest of the original registered proprietor and the subsequent bona fide purchaser with due caution and in accordance with the intention of Parliament. Moreover, if a double bona fide standard should not be imposed, there should be a scheme to prevent the forger or fraudster from taking advantage of the system with the fraudulent scheme similar to the case of *Kamarulzaman*.

### **Acknowledgement**

The authors would like to thank the Multimedia University's Siti Hasmah Digital Library for its accessibility to the online databases.

### **Funding Information**

The authors received no funding from any party for the research and publication of this article. ◆