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Case Commentary:

See Leong Chye @ Sze Leong Chye v United Overseas Bank (Malaysia) Berhad & Other Appeals: A Forced Marriage of Original Proprietor and Subsequent Chargee

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ABSTRACT

Deferred indefeasibility is one of the most important concepts in the Malaysian Torrens System. Under the doctrine of deferred indefeasibility, when there exist vitiating factors in the immediate transaction, the immediate purchaser will acquire a voidable title in contrast with the subsequent purchaser who will acquire good title or interest if he obtains the title or interest in good faith and with valuable consideration. However, whether a purchaser is immediate or subsequent depends on the construction of section 340 of the National Land Code (Revised 2020). In 2021, the *Federal Court laid down the decision of See Leong Chye @ Sze Leong Chye v United Overseas Bank (Malaysia) Berhad & Other Appeals* which states that the financial institution which acquired interest from an immediate purchaser was a subsequent purchaser, thereby enjoyed indefeasibility in its charge. However, such an interpretation ran afoul of section 340 of the National Land Code. This article provides a commentary on the case of *See Leong Chye* in respect of the concept of immediate and subsequent purchasers under the doctrine of deferred indefeasibility.

Keywords: Torrens system; Deferred indefeasibility; Immediate or subsequent purchaser; Section 340(3) of National Land Code; Malaysia



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1. Introduction

Section 340 of the National Land Code (Revised 2020) provides for the general rule of indefeasibility and its exceptions.¹ The case of *Tan Ying Hong v Tan Sian San*² restores deferred indefeasibility applies in Peninsular Malaysia.³ If any of the vitiating factors such as fraud, forgery or other factors stated in section 340(2) of the National Land Code is established, the person's registered title or interest (the immediate purchaser) shall be liable to be defeated. The subsequent purchaser⁴ can avail itself of the protection under the proviso of section 340(3) of the National Land Code and enjoy indefeasibility on the conditions that he acquires the title or interest in good faith and with valuable consideration. The term 'purchaser' (as defined in section 5 of the National Land Code) not only covers one who obtains a title ownership through registration of a transfer but also one who obtains an interest (a lesser degree than a title) through the registration of a charge, lease or easement; endorsement of a tenancy exempt from registration and also the entry of a lien-holder caveat. To retain the interest acquired by the chargee (usually a bank), the chargee, under section 340(3) of the National Land Code, needs to establish that the charge is acquired in good faith and with valuable consideration. Normally these two elements can be easily established by the chargee bank if the chargee is not a party or privy to or has no knowledge of the fraudulent transaction. Besides, the disbursement of loans or banking facilities is a form of valuable consideration.

Thus, a two-fold test is to be conducted to determine whether a purchaser can enjoy indefeasibility: firstly, whether the purchaser is an immediate or subsequent purchaser; secondly, whether the purchaser is a bona fide purchaser for value. An immediate purchaser cannot enjoy indefeasibility even if he obtains the title or interest in bona fide and for value.⁵

Tan Ying Hong's case has overcome the confusion created by *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng*.⁶ However, there has been much confusion on the law of indefeasibility also after the *Tan Ying Hong*, particularly on the issue of whether a registered chargee who derives its interest from a defeasible registered proprietor is considered as an immediate or subsequent purchaser. There are two approaches to this issue: firstly, the registered chargee is a subsequent purchaser and enjoys an indefeasible charge; and

¹ Act 828, formerly known as the National Land Code 1965 (Act 56 of 1965). *PJTV Denson (M) Sdn Bhd v Roxy (Malaysia) Sdn Bhd* [1980] 2 Malayan Law Journal 136 (FC) 139.

² *Tan Ying Hong v Tan Sian San* [2010] 2 Malayan Law Journal 1 (FC).

³ Between the year 2001 and 2010, the Malaysian courts were haunted by the immediate indefeasibility concept enunciated by the Federal Court in *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 Malayan Law Journal 241 (FC), [2001] 2 Current Law Journal 133 (FC).

⁴ A purchaser is defined under s 5 of the National Land Code to mean a person or body who in good faith and for valuable consideration acquires title to, or any interest in land.

⁵ *Kamarulzaman bin Omar v Yakub bin Husin* [2014] 2 Malayan Law Journal 768 (FC) [43].

⁶ *Adorna Properties* (n 3).

secondly, the registered chargee is an immediate purchaser and his charge is liable to be set aside.

2. See *Leong Chye @ Sze Leong Chye v United Overseas Bank (Malaysia) Berhad & Other Appeals*

This article will discuss the Federal Court case of *See Leong Chye @ Sze Leong Chye v United Overseas Bank (Malaysia) Bhd & Other Appeals*.⁷

2.1 Brief Facts

The impugned land originally belonged to See Leong Chye and See Ewe Lin (See Brothers). Subsequently, it was sold to Heveaplast Marketing Sdn. Bhd. (Heveaplast) with partial financing from United Overseas Bank (UOB). Heveaplast and UOB became the new registered proprietor and registered chargee respectively. Heveaplast then sold the land to Kum Hoi Engineering Industries Sdn. Bhd. (Kum Hoi) with a loan from Public Bank (PBB) to purchase the land. However, the transfer and charge could not be perfected because there was a Registrar's caveat on the land on the ground that the transfer of the land from the See Brothers to Heveaplast was premised on fraud and/or forgery.

An action was instituted by the See Brothers against Heveaplast, UOB, the lawyer and law firm who handled the conveyancing transaction, Kum Hoi and PBB to recover their land and claim indemnity from the Land Offices. A separate action was commenced by Kum Hoi for the refund of monies paid to Heveaplast and UOB. This action was based on a letter of undertaking given by Heveaplast and UOB to Kum Hoi and PBB that the purchase monies would be refunded in the event the transfer and charge could not be registered. The discussion on *See Leong Chye* in this article is confined to the issue of indefeasibility only.

At the High Court level, the court set aside Heveaplast's title as it found that the instruments used to register the transfer were forged. As an immediate purchaser, Heveaplast's title was defeasible due to fraud, forgery and/or void or insufficient instrument under section 340(2)(a) and (b) of the National Land Code. The defence of bona fide purchaser for value was not available to Heveaplast. As Heveaplast was privy to fraud, they could not claim indemnity against the Land Offices. This part of the decision was affirmed at the Court of Appeal and Federal Court levels.

The High Court had also set aside UOB's charge. The setting aside of Heveaplast's title would also render UOB's charge liable to be annulled. This is because a forged instrument is a nullity which was incapable of conferring any right, interest, or title in favour of the acquirer of immovable property. As Heveaplast had no good title, it had nothing to charge to UOB. UOB's interest was defeasible. It is this part of the decision that was controversial.

⁷ *See Leong Chye @ Sze Leong Chye v United Overseas Bank (Malaysia) Bhd & Other Appeals* [2019] 1 Malayan Law Journal 25 (FC); [2021] 6 Current Law Journal 650 (FC).

At the Court of Appeal level,⁸ the court disagreed with the High Court's finding. The court found the remarks by *Tan Ying Hong* on the case of *OCBC Bank (Malaysia) Bhd v Pendaftar Hak Milik Negeri Johor Darul Takzim*⁹ instructive. The court held that UOB was a subsequent purchaser on two grounds: firstly, UOB derived its interest as a chargee from Heveaplant's title; secondly, UOB's charge could not be registered until the transfer had been registered. As UOB was not involved in fraud or forgery, UOB was a bona fide purchaser for value which could enjoy an indefeasible interest.

2.2 Issues

See Brothers then appealed to the Federal Court on five questions of law:

- (1) Must the transaction in question have a valid registrable issue document of title prior to invoking a provision of section 340 of the National Land Code 1965?
- (2) Whether an acquirer of registered charge of interest or title under the National Land Code 1965 by means of a non-existent forged title acquires an immediate indefeasibility of title or interest?
- (3) Can an acquirer of registered charge or interest registered by means of a non-existent forged title be regarded as an immediate purchaser or a subsequent purchaser since the acquirer of the interest was merely a conduit for the purchase?
- (4) Can a person who has not acquired any title or interest as a result of the non-existent forged title, convey or pass any title or interest to another?
- (5) Whether a chargee in whose favour a charge is created by a registered proprietor whose title is defeasible is a subsequent purchaser within section 340(3) of the National Land Code 1965 having regard to the decision in *OCBC Bank Bhd v Pendaftar Hakmilik Johor* [1999] 2 CLJ 949?

2.3 The Decision

There were two Federal Court decisions, the second one being a rehearing decision. In both decisions, the court affirmed the Court of Appeal's decision by agreeing that UOB is a subsequent purchaser. The charge in favour of UOB was created by Heveaplant in the capacity of an immediate purchaser. The transfer and charge, being a two-stage transaction, would render UOB a subsequent purchaser. UOB can then rely on the protection of a bona fide purchaser for value in section 340(3) of the National Land Code and enjoy indefeasibility. In the latter decision, the court did not answer question 1 as it was vaguely and improperly framed. Questions 2 to 3 were not answered as well because they were

⁸ *Heveaplant Marketing Sdn Bhd v See Leong Chye and Another Appeal* [2017] 2 Current Law Journal 43 (CA).

⁹ *OCBC Bank (Malaysia) Bhd v Pendaftar Hak Milik Negeri Johor Darul Takzim* [1999] 2 Current Law Journal 949 (CA).

based on non-existent facts. Lastly, question 5 had no effect on the facts of the present case and remained unanswered.

3. Commentaries

Prior to the decision of *See Leong Chye*, the interpretation of whether a chargee who acquires interest from an immediate purchaser is an immediate or subsequent purchaser has been unsettled. There are two main approaches: the former regards the chargee as an immediate purchaser; the latter regards the chargee as a subsequent purchaser. Ultimately, whether the chargee is immediate or subsequent is a question of mixed fact and law.

Jeffery Tan FCJ in *CIMB Bank Bhd v AmBank (M) Bhd* held that:

Whether a purchaser is an immediate or subsequent purchaser is not determined by a tally of the number of transactions. Transaction 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.¹⁰

The notion that on a subsequent purchaser could acquire indefeasibility in his title or interest supports the approach of deferred indefeasibility, a one-of-a-kind approach practised in Malaysia. Unlike Malaysia, Australia practises immediate defeasibility.¹¹

In *Wicklow Enterprises Pty Ltd v Doysal Pty Ltd*, the court distinguished between immediate and deferred indefeasibility:

... upon the registration of an instrument that is void under the general law the person thereby registered (A) does not obtain an indefeasible title but, on the contrary, remains at risk from attack by the prior registered proprietor (B) who seeks to set aside the registration even though A has acted without fraud, in good faith and for valuable consideration. Under this principle of deferred indefeasibility, immunity from attack at the suit of B is only available to a third party (C) who purchases in good faith for valuable consideration from A and who registers the instrument by which he acquires title from A. On the other hand, the doctrine of immediate indefeasibility confers a good title on A immediately upon the registration of his instrument and regardless of its invalidity so that if A registers a transfer from B he is entitled to protection against any action instituted by B notwithstanding, for example, that B's signature is a forgery – provided, of course, that A has, at all times, acted in good faith and given valuable consideration for the transfer.¹²

¹⁰ *CIMB Bank Bhd v AmBank (M) Bhd* [2017] 5 Malayan Law Journal 142, 179 (FC) at para [90]; [2017] 9 Current Law Journal 145, 183 (FC).

¹¹ Eileen Webb and Margaret Stephenson, *Focus Land Law* (5th edn, LexisNexis Butterworths 2020).

¹² *Wicklow Enterprises Pty Ltd v Doysal Pty Ltd* (1987) 45 South Australian State Reports 247 (SASC).

Similarly, Singapore also practises immediate defeasibility. This has been promulgated in section 46 of the Singapore Land Titles Act 1993 and acknowledged in the case of *United Overseas Bank Ltd v Bebe bte Mohammad*.¹³ Thus, comparative analysis cannot be done with these countries due to the different approaches of indefeasibility. The wording of section 340 of the National Land Code should be interpreted on its own and reliance on these jurisdictions is not suitable.

3.1 Subsequent Purchaser

The famous view is that the chargee who acquires the interest from an immediate purchaser is a subsequent purchaser. This is also the view subscribed by the Federal Court in the *See Leong Chye*.

The earliest case which ruled that a chargee which acquires an interest from an immediate purchaser would be a subsequent purchaser is the case of *Owe Then Kooi v Au Thiam Seng*.¹⁴ In this case, the plaintiff parted with his 1/7th undivided share of the land after being deceived by his siblings to transfer his 1/7th undivided share out to his stepbrother. His stepbrother then charged the whole piece of land to the bank. Due to default of payment, the bank had commenced a foreclosure action. The transfer of land was invalid due to the perpetration of fraud. The approach taken by the court was to set aside the title but hold the charge as indefeasible. As a result, the title (1/7th undivided share) would be reverted to the plaintiff, but the bank's interest would remain intact in the land. Though not explicitly mentioned, the court was acknowledging that the chargee is a subsequent purchaser who was entitled to the protection under the proviso to section 340(3) of the National Land Code.

In *Public Bank Bhd v T Sivam Tharamalingam*,¹⁵ the deceased's son, transferred the land owned by the deceased to himself during his lifetime and subsequently created a charge on the land in favour of the defendant. The deceased successfully applied to the High Court and Court of Appeal to set aside the fraudulent transfer during his lifetime. The defendant was then requested to discharge the charge, but they refused or failed to do so. After the deceased's death, the deceased's administrator initiated a suit to set aside the defendant's charge. As the land was already registered in the deceased's son's name when the loan was granted, the defendant is a subsequent purchaser holding an interest. Thus, the charge was indefeasible. This point was also affirmed by the Federal Court¹⁶ but the decision was overturned because the defendant did not act in *bona fide*.

In *CIMB Bank*,¹⁷ the appellant's charge was discharged through a forged discharge of charge form and forged issue document of title before the land was transferred from Chings to Wong. Subsequently, a charge was created on the land in favour of the respondent. The

¹³ *United Overseas Bank Ltd v Bebe bte Mohammad* [2006] 4 Singapore Law Report 884 (SGCA).

¹⁴ *Owe Then Kooi v Au Thiam Seng* [1990] 1 Malayan Law Journal 234 (HC).

¹⁵ *Public Bank Bhd v T Sivam Tharamalingam* [2017] 7 Current Law Journal 176 (CA).

¹⁶ *T Sivam Tharamalingam v Public Bank Bhd* [2018] 6 Current Law Journal 1 (FC).

¹⁷ *CIMB Bank* (n 10).

court held that the respondent was a subsequent purchaser. The court viewed the transaction as being two-stage: financing and the transfer. The transaction took place firstly, by the discharge of the appellant's charge; followed by the transfer of land; and ended with the registration of the respondent's charge. The Federal Court concurred with the Court of Appeal's reasoning that the transfer to Wong was defeasible due to the forged discharge. However, such forgery would not affect the indefeasibility of the respondent's interest, as the respondent was a subsequent purchaser.

A similar approach was also taken in *Yee Poh Nyen v Raji Kasan*.¹⁸ The first respondent, the original registered proprietor of the land, entered into an agreement to sell the land with the appellant. Consent by the State Authority to transfer the land to the appellant had been obtained but the first respondent entered into another agreement with the second respondent for a higher sale price. The second respondent relied on the loan by the ninth respondent to finance the purchase. The transfer and charge were subsequently registered. The appellant then sought a declaration that the transfer to the second respondent and the charge to the ninth respondent were null and void. The court held that the transfer was defeasible because the consent application form was filled in by substituting the appellant's name with the second respondent's name, thus suffering from forgery. However, the court treated the ninth respondent, the chargee as a subsequent purchaser acting in bona fide with value, thus entitled to the protection of indefeasibility.

3.2 Immediate Purchaser

Another approach would be to regard the chargee to the immediate transferee as an immediate purchaser. The most authoritative case would be the Court of Appeal case in *OCBC Bank*.¹⁹ One Ng Kim Hwa's land was transferred to Ng See Chow by forgery and Ng See Chow obtained an overdraft facility from the appellant by creating a charge on the land. Undoubtedly, the court ruled the title of Ng See Chow to be defeasible because a forged instrument is null and void. By setting aside Ng See Chow's title, the charge that Ng See Chow created in favour of the appellant would also be liable to be set aside because a forged instrument could not create or transfer any interest in favour of a chargee.

In *Agensi KB Commodity Sdn Bhd (Dalam Likuidasi) v KB Plantation Sdn Bhd*,²⁰ the former directors of the plaintiff transferred the plaintiff's land to the second and third defendants after a winding-up petition had been presented and when the directors did not have the authority to do so. As the transfer was registered after the presentation of winding-up petition, the transfer was defeasible under section 223 of the Companies Act 1965 and section 340(2)(b) of the National Land Code. The court also made an *obiter* that the second and third defendants, who had no good title, could not pass a good title to the chargee by relying on

¹⁸ *Yee Poh Nyen v Raji Kasan* [2018] 1 Legal Network Series 1185 (CA).

¹⁹ *OCBC Bank* (n 9).

²⁰ *Agensi KB Commodity Sdn Bhd (Dalam Likuidasi) v KB Plantation Sdn Bhd* [2017] 1 Legal Network Series 1626 (HC).

the doctrine of *Nemo dat quod non habet* (the *Nemo dat* rule) instead of the interpretation of section 340 of the National Land Code.

In *The Bank of Nova Scotia Bhd v Saunah Kasni*,²¹ the original registered proprietor of the land was the first defendant with a registered charge on the land in favour of the plaintiff. The land was then auctioned off to a bidder after defaulting in repaying the debt. In the meantime, the plaintiff purportedly discharged the charge and the first defendant purportedly transferred the land to the second defendant and a charge was created in favour of the fourth defendant. The plaintiff then sought to declare that the discharge of charge, transfer of land and charge to the second and fourth defendant respectively were null and void. Both the discharge of charge and transfer were procured by forgery, rendering the transactions defeasible.

On the fourth defendant's charge, the court held that the charge was defeasible as its underlying substratum (the forged issue document of title) had been destructed due to the setting aside of the transfer to the second defendant. The High Court further ruled that the fourth defendant could not rely on the protection of a bona fide purchaser for value under section 340(3) of the National Land Code because it was not a subsequent holder of interest. The court took a rather interesting approach. The rationale behind this was by looking at the factual circumstances surrounding the case as the transfer and charge were inextricably connected to complete the transfer. Thus, both transactions took place concurrently and the charge was not an interest subsequently granted out.

3.3 Immediate or Subsequent Purchaser?

In *See Leong Chye*, the Federal Court had relied on section 340(3) of the National Land Code to justify why UOB is a subsequent purchaser, instead of an immediate purchaser. When the land was transferred from the See Brothers to Heveaplast, Heveaplast was the immediate purchaser. When Heveaplast granted a charge in the form of interest to UOB, UOB was a subsequent purchaser. Case laws such as *T Sivam Tharamalingam*, *CIMB Bank*, *Owe Then Kooi*, and *Yee Poh Nyen*, all follow the same line of reasoning. However, this decision was made by interpreting section 340(3) wrongly. Section 340(3) is quoted as follows:

- (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection (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:

²¹ *The Bank of Nova Scotia Bhd v Saunah Kasni* [2016] 1 Current Law Journal 505 (HC).

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.

It is pertinent to note that paragraphs (a) and (b) of section 340(3) are connected by the word 'and'. This means the Parliament has intended both paragraphs to be read conjunctively.²² If we read section 340(3) in line with the factual matrix of *See Leong Chye*, where the title of Heveaplant is defeasible by reason of fraud, forgery and void or insufficient instrument, the title shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred and any interest granted thereout to UOB shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested.²³ Therefore, when the title is defeasible, the interest granted thereout will also be defeasible, notwithstanding that the interest holder acquires the interest in bona fide for value because he is still an immediate interest holder who cannot rely on the defence of proviso under section 340(3). An interest holder can only enjoy the defence of bona fide for value if the title has been transferred to a subsequent proprietor and that subsequent proprietor grants an interest to a subsequent interest holder.

To illustrate, UOB in *See Leong Chye* is an immediate interest holder because it acquires interest from an immediate purchaser. However, if Heveaplant sold the land to another person or body (being a subsequent purchaser acting in bona fide for value), and that person or body grants out an interest, the person or body who acquires that interest will become a subsequent interest holder and enjoys the protection of deferred indefeasibility. As such, the decision in *See Leong Chye* is erroneous because UOB is an immediate interest holder who cannot enjoy the defence of provision to section 340(3). Its interest is liable to be set aside in the hands of the original registered proprietor, See Brothers. This is still consistent with the concept of deferred indefeasibility under section 340 of the National Land Code.

The conundrum of whether a registered chargee could acquire indefeasible interest from an immediate purchaser commenced a long time ago, notably in *OCBC Bank* where the chargee was regarded as an immediate purchaser. At this juncture, it is also pertinent to analyse the remarks made by the Federal Court in *Tan Ying Hong* concerning *OCBC Bank*. *Tan Ying Hong* was nevertheless a landmark decision which corrected the concept of indefeasibility in Malaysia, but unfortunately, it failed to provide an accurate interpretation of section 340 of the National Land Code in regard to the position of a registered chargee. The Federal Court criticised the ruling of *OCBC Bank* as being flawed as the registered chargee should be considered as a subsequent purchaser, being entitled to invoke the protection under the proviso to section 340(3) of the National Land Code.²⁴ Nonetheless, the Federal Court did not overrule *OCBC Bank* case. Subsequently, in *See Leong Chye*, the court pointed out that the comments made in *OCBC Bank* were merely *obiter* and refused to follow

²² *Thein Hong Teck v Mohd Afrizan bin Husain & Another Appeal* [2012] 2 Malayan Law Journal 299 (FC) [18].

²³ Puthan Perumal, 'A Call to Revisit *Tan Ying Hong v Tan Sian San & Ors*' [2016] 5 Malayan Law Journal v.

²⁴ *Tan Ying Hong* (n 2) [26].

the principles laid down in *OCBC Bank* case.²⁵ The court also pointed out that the remarks in *Tan Ying Hong* case were not flawed and need not be revisited.

There are two main reasonings which the court had usually relied on in concluding that a registered chargee is an immediate purchaser after acquiring interest from an immediate proprietor, namely the simultaneous nature of the transaction; and the *Nemo dat* rule.

The appellant in *See Leong Chye* attempted to rely on both reasonings but to no avail. The appellant argued that both the transfer and charge were registered exactly at the same time and the charges were made purportedly to finance the fraudulent transfer. Therefore, in relying on *The Bank of Nova Scotia*, both transactions should be treated as one.²⁶ However, this argument was rejected by the court on the ground that it would go against the system of registration of dealings under the National Land Code. The transfer and charge were registered in the order in which it was presented, first the transfer and second the charge. The charge could not have been created but for the registration of the transfer of land. It was misconceived to treat both transactions as one.²⁷ The authors opine that the approach taken by *See Leong Chye* was in line with the existing case laws such as *CIMB Bank* and the spirit of the Torrens system and the National Land Code.

The appellant also relied on the *Nemo dat* rule and argued that no rights or interest could be derived from a forged instrument. Hence, Heveaplant could not grant any interest to UOB.²⁸ However, the Federal Court had also rejected this argument by holding that the interest to UOB was an interest subsequently granted out. This argument was in line with the principles laid down in *OCBC Bank* and *Agensi KB Commodity*.

The court had erred in rejecting the *Nemo dat* rule. Section 340 of the National Land Code is the variation of the common law *Nemo dat* rule.²⁹ It means no one has the right to give what he does not have. This means the purchaser's right to title is derived from the vendor's title. This is in line with the doctrine of deferred indefeasibility where the immediate purchaser could not pass a good title to a subsequent purchaser because the immediate purchaser's title is bad in the first place. Nevertheless, the *Nemo dat* rule is modified by the proviso to section 340(3) where a subsequent purchaser acting in bona fide for value will be entitled to a good title.

However, the situation of a registered chargee still falls within the general rule of *Nemo dat* rule. This is because an interest in the land is substantially derived from the title itself. If the proprietor has a bad title, he could not grant a valid interest to a subsequent proprietor.

²⁵ *See Leong Chye* (n 7) [75].

²⁶ *See Leong Chye* (n 7) [22].

²⁷ *See Leong Chye* (n 7) [71], [72].

²⁸ *See Leong Chye* (n 7) [25].

²⁹ *Panchanath a/l Ratnavale (suing as the beneficiary to the estate of Ratnavale s/o Mahalingam @ Mahalingam Ratnavale deceased under will dated 10 February 1971) v Sandra Segara Mahalingam (sued as the executor and trustee of the last will of Ratnavale s/o Mahalingam @ Mahalingam Ratnavale deceased dated 10 February 1971)* [2012] 5 Malayan Law Journal 109 (HC); *M & J Frozen Food Sdn Bhd v Siland Sdn Bhd* [1994] 1 Malayan Law Journal 294 (SC).

In simple words, an immediate title owner could only pass an immediate interest.³⁰ In order to invoke the exception to the *Nemo dat* rule, the immediate title owner must pass a title to the subsequent title owner acting in bona fide for value followed by the granting of a subsequent interest. This is in line with the interpretation and wording of section 340(3) of the National Land Code. Hence, it is erroneous for the Federal Court to reject the *Nemo dat* argument presented by the appellant in *See Leong Chye*.

3. Conclusion

Based on the discussion, it is humbly submitted that the Federal Court had erred in interpreting section 340(3) of the National Land Code. The application of the principle in *See Leong Chye* would produce unfair and unjust results. When the original proprietor's title was fraudulently transferred to a fraudster and the fraudster subsequently created a charge in favour of a chargee, the original proprietor would be able to set aside the fraudster's title but would be unable to set aside the charge.

Eventually, he would recover his land encumbered with a charge in which his land would be foreclosed in the event of default of payment. This would be to the detriment of the original proprietor. Such injustice was evident in the case of *Owe Then Kooi* where "the title to the property had reverted to the plaintiff but the interest remains vested in the second defendant".³¹ The original proprietor is now left with the burden of repaying a loan which he has never taken out while the fraudster would go free with the loan.³² The more fortunate case scenario would be in *Yee Poh Nyen* where the defaulting party was ordered to pay the redemption sum to the current registered chargee so the plaintiff could get back his title without any encumbrances.³³ However, it is not in every case that the fraudster or defaulting party can be identified. In the event the fraudster could not be traced, the original proprietor is doomed.

In the event the authors' interpretation is adopted, it would be detrimental to those financial institutions who disburse loans to fraudsters as their interest will be set aside and their only recourse is to go against the fraudster on the ground of equitable charge. However, financial institutions are in a better financial and bargaining position to ascertain the validity of the transaction and the parties' identity. The registered proprietors, as the weaker parties, should be afforded greater protection by law.

Hence, it is hoped that the remarks made in *Tan Ying Hong* and the decision of *See Leong Chye* could be revisited by the subsequent Federal Court to render a just and satisfactory result in line with the interpretation and spirit of the National Land Code. In addition, it is timeous to revisit section 340 in particular sub-section (3) of the National Land Code to give a clearer intention of who shall be eligible of the bona fide purchaser for value defence.

³⁰ Perumal (n 23).

³¹ *Owe Then Kooi* (n 14).

³² *See Leong Chye* (n 7) [21].

³³ *Yee Poh Nyen* (n 18) [95].

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