

A **ABU BAKAR ISMAIL & ANOR**

v.

ISMAIL HUSIN & ORS & OTHER APPEALS

B COURT OF APPEAL, PUTRAJAYA

GOPAL SRI RAM JCA

LOW HOP BING JCA

RAUS SHARIF JCA

C [CIVIL APPEAL NOS: W-02-746-2005, W-02-758-2005,

W-02-790-2005, W-02-804-2005, W-02-395-2006]

23 MARCH 2007

D **LAND LAW:** *Indefeasibility of title and interests - Forged charge - Fraud - Solicitor acted as agent of registered chargee in transaction - Whether solicitor's knowledge of fraud imputed to registered chargee - Whether charge rendered defeasible - National Land Code, s. 340(2)*

E **LAND LAW:** *Indefeasibility of title and interests - Forged transfer - Bona fide purchaser for value - Proviso to s. 340(3) National Land Code - Applicability - Adorna Properties Sdn Bhd v. Boonsom Boonyanit*

CONSTITUTIONAL LAW: *Courts - Stare decisis - Court of Appeal - Whether bound by decision of Federal Court - Whether decision binding if rendered in ignorance of statute*

F The plaintiffs were the registered proprietors of three lots of land ('the said land'). They entered into a sale and purchase agreement with the 1st defendant for the purchase of the said land in the sum of RM7.5 million. The 2nd defendant was an advocate and solicitor and partner in the 3rd defendant firm. He prepared the relevant sale and purchase agreement. Two initial payments of RM150,000 and RM50,000 were made to the plaintiffs. The plaintiffs then deposited the title deeds to the said land with signed memoranda of transfers in blank with the 3rd defendant firm. When the plaintiffs subsequently inquired for the balance, they discovered that the said land had been charged to the 4th defendant bank to secure a loan of RM16 million in favour of the 5th defendant. Also, a sum of RM10 million had been disbursed to the 5th defendant. The plaintiffs then brought an action against all five defendants to recover the said property. The learned judge found that the instrument of the charge and other

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accompanying documents were forged and that the 1st and 2nd defendants had perpetrated a fraud upon the plaintiffs. However, he found that the 2nd defendant's knowledge of the fraud could not be imputed to the 4th defendant based on the decision of *Doshi v. Yeoh Tiong Lay*. As such, he concluded that the charge was indefeasible. Hence, the plaintiffs' appeal. The 2nd and 3rd defendants also appealed against the orders made against them whilst the 4th defendant appealed against the learned judge's order staying the effect of his judgment.

Held (allowing plaintiffs' appeal by a majority):
Per Gopal Sri Ram JCA (majority):

- (1) The learned judge's finding that there was no fraud on the part of the 4th defendant was one of pure fact based on his assessment of the credibility of witnesses. Where the primary trier of fact has acquitted a defendant on a charge of fraud, such a finding should not be reversed on appeal save on clearest grounds. (paras 5 & 6)
- (2) In finding that the 2nd defendant's knowledge of the fraud could not be imputed to the 4th defendant, the learned judge based his finding largely on the decision of the Federal Court in *Doshi v. Yeoh Tiong Lay*. That case did not concern an impeachment of title under s. 340(2)(a) National Land Code ('NLC'). It was a case decided in relation to a *bona fide* triable issue in the context of an O. 14 application under the Rules of the High Court 1980. (paras 7 & 9)
- (3) Section 340(2)(a) NLC entitles a plaintiff to defeat the title of a registered proprietor – or a registered chargee as in the present case – in two distinct circumstances. Firstly, the plaintiff may succeed by showing that the registered proprietor was a party or privy to the fraud in a given case. Secondly, assuming the plaintiff cannot show this, the plaintiff may succeed by showing that the registered proprietor's agent was party or privy to the fraud or misrepresentation in question. The said section does not require that the registered proprietor must have knowledge or notice of the agent's fraud or authorise the commission of it. (para 12)

- A (3a) Having regard to the express wording of s. 340(2)(a) NLC, the learned judge asked himself the wrong question. He merely satisfied himself that the 4th defendant was neither party nor privy to the fraud. He failed to go on and consider the agent's fraud after finding that the 2nd and 3rd
- B defendants were agents of the 4th defendant in the said transaction. Had he done so he would have concluded that the fraud of the 2nd defendant as agent of the 4th
- C defendant rendered defeasible the registered charge in the latter's hands. The learned judge erred in law when he confined himself to the position at common law without
- D having regard to the express words of the NLC. Had he directed himself correctly on the law, he would have held for the plaintiffs. Accordingly, the plaintiffs were entitled to succeed on this ground alone. No question arose as to
- E whether the 4th defendant was a *bona fide* purchaser who was protected by the proviso to s. 340(3) NLC. In any event, even if the said proviso was applicable, the 4th defendant was not a *bona fide* purchaser because it was bound by the acts of its agent. (paras 13 & 14)
- F (4) The Federal Court's judgment in *Adorna Properties Sdn Bhd v Boonsom Boonyanit* must be disregarded. There it was held that a purchaser in good faith and for valuable consideration obtains immediate indefeasibility of title notwithstanding that the title obtained was acquired under a forged instrument. It should be noted that paras. (a) and (b) of sub-s. 340(3) NLC employ the word "**subsequently**". It means that if a registered proprietor gets on the register by any of the means set out in s. 340(2) and **subsequently** transfers his land to another, the title of that other is defeasible unless that other is a purchaser in good faith and for valuable consideration. Also protected are persons who take from such a purchaser. The proof that one is a purchaser in good faith and for valuable consideration lies on the person asserting it. (paras 16, 17 & 18)
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- H (4a) *Adorna Properties v. Boonsom Boonyanit* did not declare a principle of the common law based on policy considerations as in the case of *Donoghue v. Stevenson*. It was a case involving the interpretation of a provision in a statute, namely, s. 340 NLC. A precedent is not binding if it was
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rendered in ignorance of a statute or a rule having the force of statute. Even a lower court can impugn a precedent on such grounds (Treatise on Jurisprudence, Sir John Salmond). (paras 19 & 20)

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Per Low Hop Bing JCA (dissenting):

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(1) The 5th defendant retained the 2nd and 3rd defendants for the preparation and presentation of the charge documents by way of security for the loan facility granted by the 4th defendant to the 5th defendant. The 5th defendant had also made payment to the 2nd and 3rd defendants for solicitors' fees and costs. Hence, the 2nd and 3rd defendants were the agents of the 5th defendant. Consequently, the knowledge of the 2nd and 3rd defendants' fraud could not be imputed to the 4th defendant. (paras 48, 49 & 56)

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(2) Since the 4th defendant was neither a party nor privy to the fraud, and the parties who perpetrated the fraud were not the agents of the 4th defendant, the indefeasibility of the 4th defendant's registered charge was unaffected by the circumstances set out in s. 340(2) NLC. (para 58)

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Per Raus Sharif JCA (majority):

(1) After finding that the 2nd and 3rd defendants were the agents of the 4th defendant and the 2nd defendant was not just privy but a party to the fraud concerned, the learned judge should have found for the plaintiffs by reason of s. 340(2) NLC. Section 340(2) expressly provides that the title of a proprietor may be defeated on the ground of fraud or forgery to which that proprietor or his agent was a party in which he or his agent colluded. In the present case, since the 2nd and 3rd defendants were the agents of the 4th defendant and the 2nd defendant was a party to the fraud concerned, the charge registered in favour of the 4th defendant could not be held to be valid and indefeasible. (para 81)

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(2) The learned judge, in light of the pleadings and the evidence before him, was right in holding that the 2nd and 3rd defendants were the agents of the 4th defendant. Nevertheless he fell into error when he relied on *Doshi's* case and concluded that the fraud of the 2nd defendant could not be imputed to the 4th defendant. That case could not be relied upon in interpreting s. 340(2) NLC. (paras 82 & 89)

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A (3) Despite the severe criticism levelled against the Federal Court's decision in *Adorna Properties v. Boonsom Boonyanit*, this court could not disregard it on the principle of stare decisis.
(para 80)

B ***Bahasa Malaysia translation of headnotes***

C Plaintiff-plaintiff adalah pemilik berdaftar tiga bidang tanah ('tanah tersebut'). Mereka memeterai satu perjanjian jual beli dengan defendan pertama bagi menjual tanah tersebut pada harga RM7.5 juta. Defendan kedua adalah seorang peguamcara dan peguambela dan merupakan rakan kongsi di firma guaman defendan ketiga. Beliau telah menyediakan perjanjian jual beli berkenaan. Dua bayaran pendahuluan berjumlah RM150,000 dan RM50,000 masing-masing telah dibuat kepada plaintiff-plaintiff. Berikunya, D plaintiff-plaintiff menyerah-simpan geran hakmilik tanah tersebut beserta dengan memorandum pindahmilik yang sudah ditangani dengan firma defendan ketiga. Apabila plaintiff-plaintiff kemudian membuat pertanyaan tentang baki harga jualan, mereka mendapati bahawa tanah tersebut telah digadaikan kepada bank defendan E keempat bagi mendapatkan pinjaman berjumlah RM16 juta untuk defendan kelima. Mereka juga mendapati bahawa sejumlah RM10 juta telah pun dibayar kepada defendan kelima. Berikunya, plaintiff-plaintiff memulakan tindakan terhadap kelima-lima defendan bagi F mendapat kembali tanah mereka. Yang arif hakim memutuskan bahawa instrumen gadaian dan dokumen-dokumen yang berkaitan dengannya telah dipalsukan dan bahawa defendan-defendan pertama dan kedua telah melakukan fraud terhadap plaintiff-plaintiff. Yang arif hakim bagaimanapun mendapati bahawa pengetahuan fraud defendan kedua tidak boleh dikaitkan kepada defendan G keempat berdasarkan kepada kes *Doshi v Yeoh Tiong Lay*. Beliau dengan itu merumuskan bahawa gadaian adalah tak boleh disangkal, sekaligus membawa kepada rayuan plaintiff-plaintiff di sini. Defendan kedua dan ketiga juga merayu terhadap perintah yang dibuat terhadap mereka, sementara defendan keempat merayu H terhadap keputusan yang arif hakim untuk menggantung kesan dan akibat penghakimannya.

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Diputuskan (membenarkan rayuan plaintif-plaintif dengan keputusan majoriti):

Oleh Gopal Sri Ram HMR (majoriti):

- (1) Dapatan yang arif hakim bahawa tidak terdapat fraud di pihak defendan keempat adalah dapatan fakta yang didasarkan kepada penilaian beliau terhadap kredibiliti saksi-saksi. Di mana pengadil utama fakta telah melepaskan seseorang defendan atas pertuduhan fraud, dapatan sedemikian tidak boleh diakas di peringkat rayuan kecuali atas alasan-alasan yang sangat jelas. A
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- (2) Dalam memutuskan pengetahuan fraud defendan kedua tidak boleh dikaitkan kepada defendan keempat, yang arif hakim, secara pentingnya, mengasaskan dapatannya itu kepada keputusan Mahkamah Persekutuan di dalam *Doshi v Yeoh Tiong Lay*. Kes tersebut tidak menyentuh pencabaran terhadap hakmilik di bawah s. 340(2)(a) Kanun Tanah Negara ('KTN'). Ia adalah kes berkaitan pembangkitan isu *bona fide* dalam konteks permohonan A. 14 Kaedah-kaedah Mahkamah Tinggi 1980. D
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- (3) Seksyen 340(2)(a) KTN membolehkan seorang plaintif menyangkal hakmilik seorang pemilik berdaftar – atau seorang pemegang gadaian berdaftar sepertimana kes di sini – dalam dua keadaan khusus. Pertama, plaintif boleh berjaya dengan menunjukkan bahawa pemilik berdaftar adalah pihak atau privi kepada fraud dalam kes itu. Kedua, jika itu tidak dapat dibuktikannya, plaintif masih boleh berjaya dengan menunjukkan bahawa agen kepada pemilik berdaftar adalah pihak atau privi kepada fraud atau representasi salah tersebut. Seksyen ini tidak mensyaratkan bahawa pemilik berdaftar harus mempunyai pengetahuan atau notis fraud yang dilakukan oleh agennya ataupun bahawa ia telah mengizinkan perlakuan fraud tersebut. F
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- (3a) Mengambil kira perbahasaannya nyata s. 340(2)(a) KTN, yang arif hakim telah bertanyakan soalan yang salah terhadap dirinya. Beliau hanya memuaskan dirinya bahawa defendan keempat bukanlah pihak atau privi kepada fraud. Beliau gagal mempertimbangkan selanjutnya fraud yang dilakukan oleh agen setelah mendapati bahawa defendan kedua dan ketiga adalah agen defendan keempat dalam transaksi tersebut. Sekiranya beliau berbuat demikian, beliau mungkin H
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- A merumuskan bahawa fraud yang dilakukan oleh defendan kedua selaku agen kepada defendan keempat telah menyangkal gadaian berdaftar yang berada di tangan pihak terkemudian itu. Yang arif hakim khilaf di sisi undang-undang apabila melihat halperkara cuma dari kaca mata undang-undang common tanpa menghiraukan perbahasaannya nyata
- B KTN. Jika beliau mengarahkan dirinya dengan betul, beliau mungkin akan membuat keputusan yang berpihak kepada plaintif-plaintif. Plaintif-plaintif dengan itu harus berjaya atas alasan ini semata-mata. Tiada soalan berbangkit mengenai
- C sama ada defendan keempat merupakan seorang pembeli *bona fide* yang dilindungi oleh proviso s. 340(3) KTN. Apapun, sekiranya proviso kepada s. 340(3) NLC terpakai, defendan keempat bukanlah seorang pembeli *bona fide* memandangkan ia terikat dengan perbuatan agennya.
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- (4) Keputusan Mahkamah Persekutuan dalam kes *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* harus ditolak ketepi. Di situ ianya diputuskan bahawa seorang pembeli jujur dengan balasan mendapat hak tak boleh disangkal dengan serta merta walaupun hakmilik itu diperolehi melalui instrumen yang dipalsukan. Harus diingat bahawa perenggan (a) dan (b) subseksyen 340(3) KTN menggunakan perkataan “selepas itu” atau “**subsequently**”. Maksudnya, jika seseorang pemilik berdaftar berjaya mendapatkan pendaftaran melalui mana-mana cara seperti yang dihuraikan oleh s. 340(2) dan selepas itu memindahmilik tanahnya kepada seorang lain, hakmilik orang lain tersebut adalah boleh disangkal kecuali ia merupakan seorang pembeli jujur dengan balasan. Dilindungi sama adalah orang-orang yang menerima hakmilik dari seorang lain tersebut. Beban untuk membuktikan bahawa seseorang pembeli itu adalah pembeli jujur dengan balasan terletak atas mereka yang menuntutnya.
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- (4a) *Adorna Properties v. Boonsom Boonyanit* tidak mengutarakan prinsip common law yang didasarkan atas pertimbangan polisi seperti yang dibuat oleh *Donoghue v Stevenson*. Ia adalah kes berhubung pentafsiran suatu peruntukan statut, iaitu s. 340 KTN. Sesuatu duluan itu tidak mengikat jika ia dibuat dengan membelakangkan sesuatu statut atau suatu kaedah yang mempunyai kuatkuasa undang-undang. Sebuah mahkamah rendah pun boleh mencabar suatu duluan atas alasan-alasan ini (Treatise on Jurisprudence, Sir John Salmond).
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Oleh Low Hop Bing HMR (menentang):

- (1) Defendan kelima mengambil defendan kedua dan ketiga untuk menyedia dan mengemukakan dokumen gadaian sebagai jaminan kepada kemudahan pinjaman yang diberikan oleh defendan keempat kepada defendan kelima. Defendan kelima juga telah membayar defendan kedua dan ketiga untuk fee guaman dan kos. Oleh yang demikian, defendan kedua dan ketiga adalah agen kepada defendan kelima. Ianya mengikut bahawa pengetahuan fraud defendan kedua dan ketiga tidak boleh dikaitkan kepada defendan keempat. A
- (2) Oleh kerana defendan keempat bukan pihak atau privi kepada fraud, dan pihak-pihak yang melakukan fraud bukan agen defendan keempat, ketidak-sangkalan gadian berdaftar defendan keempat tidak terjejas oleh keadaan yang dihuraikan oleh s. 340(2) KTN. B
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Oleh Raus Sharif HMR (majoriti):

- (1) Selepas mendapati defendan kedua dan ketiga sebagai agen defendan keempat dan defendan kedua bukan sahaja privi tetapi pihak kepada fraud berkenaan, yang arif hakim sepatutnya memutuskan dengan berpihak kepada plaintif-plaintif berdasarkan s. 340(2) KTN. Seksyen 340(2) secara nyata memperuntukkan bahawa hakmilik seseorang pemilik berdaftar boleh disangkal atas alasan fraud atau pemalsuan jika pemilik atau agennya merupakan pihak kepada fraud atau pemalsuan tersebut. Dalam kes semasa, oleh kerana defendan kedua dan ketiga adalah agen defendan keempat dan defendan kedua adalah pihak kepada fraud tersebut, maka gadaian yang didaftar atas nama defendan keempat tidak boleh dikatakan sebagai sah atau tak boleh disangkal. E
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- (2) Mengambil kira pliding dan keterangan di hadapannya, yang arif hakim betul bilamana memutuskan bahawa defendan kedua dan ketiga adalah agen defendan keempat. Bagaimanapun, beliau terkhilaf apabila bergantung kepada kes *Doshi* untuk merumuskan bahawa fraud yang dilakukan oleh defendan kedua tidak boleh dikaitkan kepada defendan keempat. Kes tersebut tidak boleh dijadikan tempat bergantung dalam mentafsir s. 340(2) KTN. H
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A (3) Walau bagaimana hebat sekalipun kritikan yang dilempar terhadap keputusan Mahkamah Persekutuan dalam *Adorna Properties v. Boonsom Boonyanit*, mahkamah ini tidak boleh memandang sepi terhadapnya disebabkan prinsip stare decisis.

B **Case(s) referred to:**

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

Akerhielm v. De Mare [1959] AC 789 (*refd*)

Bhup Narain Singh v. Gokhul Chand Mahton LR 61 IA 115 (*refd*)

Donoghue v. Stevenson [1932] AC 562 (*refd*)

Doshi v. Yeoh Tiong Lay [1975] 1 MLJ 85 (*refd*)

C *Keith Sellar v. Lee Kwang* [1980] 2 MLJ 191 (*refd*)

Kheng Chwee Lian v. Wong Tak Thong [1983] 2 MLJ 320 (*refd*)

Lee Yoke Chye v. Toh Thiam Hock & Co [1986] 2 CLJ 423; [1986] CLJ (Rep) 175 SC (*refd*)

Lloyd v. Grace, Smith & Co [1912] AC 716 (*refd*)

D *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 521 CA (*refd*)

M & J Frozen Foods Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 15 SC (*refd*)

Ong Chat Pang & Anor v. Valliappa Chettiar [1971] 1 MLJ 224 (*refd*)

Ryan v. Jarvis [2005] UKPC 27 (*refd*)

E *Subramaniam NS Dhurai v. Sandrakasan Retmasamy* [2005] 3 CLJ 539 CA (*refd*)

United Overseas Finance Ltd v. Victor Sakayamary [1997] 3 SLR 211 (*refd*)

Legislation referred to:

Courts of Judicature Act 1964, s. 69(1)

F Legal Profession Act 1976, s. 3

National Land Code 1965, s. 340(1), (2)(a), (3)

Rules of the Court of Appeal 1994, r. 5

Land Titles Act [Sing], s. 46(2)(a)

G **Other source(s) referred to:**

Sir John Salmond, *Treatise on Jurisprudence*, 12th edn, p. 151

(Civil Appeal No: W-02-746-2005)

For the appellants - Jerald Gomez (David Peter with him.); M/s Jerald Gomez & Assocs

H *For the 1st respondent - Ahmad Badri Idris; M/s Ram, Reza & Muhammad*

For the 2nd & 3rd respondents - Abdul Aziz; M/s Nasira Aziz & Co

For the 4th respondent - Oommen Koshy; M/s Mohamed Ismail & Co

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- (Civil Appeal No: W-02-758-2005) A
 For the appellant - M/s Nasira Aziz & Co
 For the 1st and 2nd respondents - Jerald Gomez (David Peter with him);
 M/s Jerald Gomez & Assocs
 For the 3rd respondent - Oommen Koshy; M/s Mohamed Ismail & Co
- (Civil Appeal No: W-02-790-2005) B
 For the appellant - Abdul Aziz Hamzah; M/s Zamani Ibrahim Tarmizan &
 Co
 For the 1st and 2nd respondent - Jerald Gomez (David Peter with him);
 M/s Jerald Gomez & Assocs
 For the 3rd respondent - Oommen Koshy; M/s Mohamed Ismail & Co C
- (Civil Appeal No: W-02-804-2005)
 For the appellant - Ahmad Badri Idris; M/s Ram, Reza & Mohammad
 For the respondents - Jerald Gomez (David Peter with him); M/s Jerald Gomez
 & Assocs D
- (Civil Appeal No: W-02-395-2006)
 For the appellant - Oommen Koshy; M/s Mohamed Ismail & Co
 For the respondents - Jerald Gomez (David Peter with him); M/s Jerald Gomez
 & Assocs
- [Appeal from High Court, Kuala Lumpur; Civil Appeal No: S3-22-868-1999] E
 Reported by Usha Thiagarajah

JUDGMENT

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Gopal Sri Ram JCA:

- [1] This is yet another occasion when we are compelled to decide as to which of two innocent persons who are affected by the fraud of a rogue third party must suffer. In the present case the question arises in the context of immovable property and is clearly determined by statute, namely, the National Land Code (“the Code”). The relevant facts are as follows. G
- [2] Ismail bin Mohamad (“Ismail”) and his wife Sadiyah were the registered proprietors of three lots of land. I will, for convenience, refer to these in this judgment as the subject property. Ismail and Sadiyah wanted to sell the subject property. On 30 July 1999 they entered into a written agreement with the first defendant. The purchase price was to be RM7.5 million. The written agreement was prepared by the second defendant, an advocate and solicitor. It provided, among other things, that the first defendant was to H
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- A make two initial payments of RM150,000 and RM50,000 to Ismail and Sadiah. The balance of RM7.3 million was to be paid to the third defendant firm of advocates and solicitors of which the second defendant was a partner. The initial payments were made. Ismail and Sadiah then deposited the title deeds to the subject
- B property together with signed memoranda of transfers in blank with the third defendant firm. Having heard nothing about the balance receivable by them, they made inquiries. They then discovered to their utter shock and dismay that the subject
- C property had been charged to the fourth defendant to secure a loan of RM16 million in favour of the fifth defendant and that a sum of RM10 million had been disbursed to the latter. There is no doubt – and this is the finding of the learned trial judge – that the instrument of charge and other accompanying documents had been forged and that the first and second defendants had
- D perpetrated a fraud upon Ismail and Sadiah. To quote the trial judge:

E In the present case a sum of RM10m had already been disbursed to the 5th defendant and not a single payment had been made by the 5th defendant to the 4th defendant. According to 1st defendant, the manager of the 5th defendant (Wong Kim Leng), had absconded with the money to China.

F On the evidence before me, I agree with the plaintiffs' contention that the 2nd defendant is not just privy to the fraud and/ misrepresentation but was a central figure, in planning the whole scheme with the 1st defendant and the representatives of the 5th defendant. It is common ground that the 3rd defendant, the firm of solicitors, was retained by the 4th defendant to prepare the necessary legal documentation for the loan, therefore, the legal consequence is that the 2nd and 3rd defendants were for all intent

G and purpose the agents of the 4th defendant in the said transaction.

[3] In a later passage in his judgment the learned judge made this further observation:

- H Therefore, from the evidence it is pretty obvious that the 1st defendant had entered into the sale and purchase agreement not with the genuine intention of acquiring the said lands but merely to use the said lands as security for a loan to be obtained from a financial institution. I am satisfied that all these were done not only
- I with the knowledge of 2nd defendant but with his full cooperation. The transaction could not have gone through without the 2nd defendant's cooperation. Both the charge and the charge annexure emanated from the 2nd defendant's office and presumably the

forgery must have originated from there as well. Even though there is no clear evidence as to who actually forged the plaintiffs' signatures on the charge and the charge annexure, but one thing is clear it could not have been done without the 2nd defendant's knowledge or connivance. It is, therefore, not unreasonable to assert that 2nd defendant was not just privy to the fraud and/or misrepresentation, but he was in fact a party to the fraud and/or misrepresentation.

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[4] To resume the narrative, Ismail and Sadiah then brought an action against five defendants to recover the subject property. Some time after the commencement of the action Ismail died and the instant plaintiffs are his personal representative and Sadiah. For convenience I will, hereafter in this judgement refer to them as the plaintiffs. It is part of the plaintiffs' case that the fourth defendant lender was also party or privy to the fraud because of the acts and omissions of one of its officers. The learned judge having very carefully scrutinised the evidence negated any fraud on the part of the fourth defendant lender. In this appeal, the plaintiffs have invited this court to reverse this finding. I find myself unable to accept this invitation for two reasons.

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[5] In the first place, the finding that there was no fraud on the part of the fourth defendant is one of pure fact based on the learned judge's assessment of the credibility of witnesses. In accordance with well settled principles, this court will defer to his views on the point. As Lord Hoffmann said when delivering the Advice of the Board of the Privy Council in *Ryan v. Jarvis* [2005] UKPC 27, an appeal from Antigua & Barbuda:

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It is of course most unusual for an appellate tribunal to reverse a trial judge's findings on credibility on the ground that the evidence which he rejected has the ring of truth. The true or false note is generally more audible to the judge who hears and sees the witnesses than to the appellate court reading the record.

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So too here.

[6] The second reason why I am not prepared to depart from the views of the judge on the point is this. It is the settled practice of this court that in such a case as this – where the primary trier of fact has acquitted a defendant on a charge of fraud – not to reverse such a finding save on clearest grounds. It must be an exceptional case. In other words, this court is most

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A reluctant to find what lawyers call “appellate fraud” on the part of a defendant. And I need do no more than to quote from the Advice of the Privy Council delivered by Lord Jenkins in *Akerhielm v. De Mare* [1959] AC 789:

B Suffice it to say that their Lordships are satisfied that this is not one of those exceptional cases in which an appellate court is justified in reversing the decision of the judge at first instance when the decision under review is founded upon the judge’s opinion of the credibility of a witness formed after seeing and hearing him give his evidence (see as to this *The Hontestroom* [1927] AC 37; *Watt (or Thomas) v. Thomas* [1947] AC 484; *Yuill v. Yuill* [1945] P.15; *Benmax v. Austin Motor Co. Ltd.* [1955] AC 370). Their Lordships can hardly imagine a case in which the credibility of a witness could be more vital than a case like the present where the claim is based on deceit, and the witness in question is one of the defendants charged with deceit. Their Lordships would add that they accept, and would apply in the present case, the principle that where a defendant has been acquitted of fraud in a court of first instance the decision in his favour should not be displaced on appeal except on the clearest grounds (see *Glazier v. Rolls* [1889] 42 Ch. D 436, 457).

E [7] Returning to the mainstream, despite the damning findings he made against the second and third defendants which I have quoted above, the learned judge found for the fourth defendant lender in respect of the plaintiffs’ claim against it. He made this finding by accepting a submission to the effect that the second defendant’s knowledge of the fraud could not be imputed to the fourth defendant. The learned judge’s conclusion on this part of the case was largely if not entirely based on the decision of the former Federal Court in *Doshi v. Yeoh Tiong Lay* [1975] 1 MLJ 85.

F It therefore becomes necessary to undertake a careful examination of that case.

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H [8] In *Doshi*, the facts were these. The defendant, *Doshi*, was the former registered proprietor of certain premises. He obtained a loan of \$130,000 from one Chooi. As security for the repayment of the loan he deposited the title deed to the premises and another land with the lender. He also deposited two duly executed blank transfer forms with Chooi. The defendant failed to repay the said loan. So, Chooi transferred the premises to a company called Equitable Nominees Sendirian Berhad for a consideration of \$100,000. Later, Equitable Nominees sold and

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transferred the land to the plaintiff who paid 10% of the purchase price and charged the premises to Equitable Nominees to secure payment of the balance of the purchase price. The plaintiff as registered proprietor then served a notice on the defendant to quit and deliver possession of the premises. The defendant having failed to comply with the demand, the plaintiff brought an action for recovery of possession and moved for summary judgment for vacant possession. The defendant opposed the application on a number of grounds which he claimed were triable issues. One of these was that as Chooi was the plaintiff's solicitor, his knowledge of the previous transaction which Chooi had entered into with the defendant was to be imputed to the plaintiff. The High Court entered summary judgment and the defendant appealed. The Federal Court dismissed the appeal.

[9] You will see at once that *Doshi* was not a case concerning an impeachment of title under s. 340(2)(a) of the "the Code". It was a case in which the court had to determine whether Chooi's knowledge could be imputed to the plaintiff and thereby render the plaintiff liable **at common law** for any fraud (in the widest sense) by Chooi upon the plaintiff so as to raise a *bona fide* triable issue in the context of an O. 14 application. It was in that very limited context that Gill CJ made the following statement:

Now the general rule is that the knowledge of a solicitor is the knowledge of the client, so that it is not open to the client to say that the solicitor did not disclose the true facts to him. Thus in *Rolland v. Hart* [1870] Ch App 678, 681, which was followed by the High Court of Australia in *Stuart v. Kingston* [1923] 32 CLR 309, Lord Hatherley L.C. said:

Then the only question is, what is actual notice? It has been held over and over again that notice to a solicitor of a transaction, and about a matter as to which it is part of his duty to inform himself, is actual notice to the client. Mankind would not be safe if it were held that, under such circumstances, a man has no notice of that which his agent has actual notice of. The purchaser of an estate has in ordinary cases, no personal knowledge of the title, but employs a solicitor, and can never be allowed to say that he knew nothing of some prior incumbrance because he was not told of it by his solicitor.

A In *Bradley v. Riches* [1878] 9 Ch D 189 it was held that the presumption that a solicitor has communicated to his client facts which he ought to have made known cannot be rebutted by proof that it was the solicitor's interest to conceal the facts.

B There is, however, an important exception to the above rule in cases of fraud, which is stated in *Halsbury's Laws of England* (3rd edn.) Vol. 14, para. 1019 at p. 543) as follows:

C Under the head of actual notice is included notice to an agent employed in the transaction. The notice is imputed to the principal, and it affects him whether communicated to him or not; but an exception is admitted where there has been fraud on the part of the agent in the matter. Although actual communication to the principal is not required, yet fraud excludes in practice all probability of communication, and hence the knowledge of the fraudulent agent is not imputed to the principal.

D It is thus clear that his solicitor's knowledge of fraud, if any, cannot be imputed to the respondent. I must therefore reject the appellant's contention that if the respondent had notice by his agent of the previous transactions, then **his entering into an agreement to purchase the premises was tantamount to fraud.**

E It is contended for the appellant that if the respondent had knowledge by his agent of the illegality of the loan transaction and consequently of the transfer by Chooi Mun Sou to the Nominee Company being void, he cannot be a *bona fide* purchaser. The authority relied on for this contention is the old case of *Le Neve v. Le Neve* [1747] Amb 436; 26 ER 1172. But the doctrine of constructive notice, which is all that the respondent can be said to have had in this case, is inapplicable, as a rule, to systems of registration in relation to transactions where priority and notice are governed by priority in or the fact of registration. (See 14 Halsbury, 3rd Edn. para. 1023 at p. 545). Where the effect of constructive notice would be to invalidate a transaction in relation to sale of land, the court will not readily apply the doctrine. (See 14 Halsbury, 3rd Ed. para. 1022 at p. 545).
H [Emphasis added.]

[10] The learned judge, after quoting the foregoing passage in the judgment of the Chief Justice of Malaya went on to say as follows:

I Likewise in the present case knowledge of 2nd defendant could not appropriately be imputed to the 4th defendant who was not privy to the fraud. The doctrine of constructive notice clearly is inapplicable to the facts in the present case.

[11] With respect, I am unable to agree with this reasoning of the learned judge. Section 340(2)(a) of the Code says this: A

(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; B

[12] It is to be noted that when carefully read, s. 340(2)(a) entitles a plaintiff to defeat the title of a registered proprietor – or a registered chargee as in the present instance – in two very distinct circumstances. He or she may, in the first place, succeed by showing that the registered proprietor was a party or privy to the fraud in a given case. Assuming a plaintiff cannot show this he or she is not out of court. For, he or she may, in the second place, succeed by showing that the registered proprietor’s agent was party or privy to the fraud or misrepresentation in question. The section does not require that the registered proprietor must have knowledge or notice of the agent’s fraud or authorise the commission of it. I would here very respectfully adopt as my own, the words of GP Selvam J in *United Overseas Finance Ltd v. Victor Sakayamary* [1997] 3 SLR 211, uttered when considering the equipollent provision s. 46(2)(a) of the Singapore Land Titles Act (Cap 157, 1994 edn): C

Aside from that, the rule enunciated in Halsbury’s Laws of England and applied in *Doshi v. Yeo Tiong Lay*, in my view, does not apply in the context of s 38(2)(a) (now s. 46(2)(a)) of the Act because *the section in clear language abrogates the restricted rule as regards the agent’s fraud. It expressly provides that the title of a proprietor may be defeated on the ground of fraud or forgery to which that proprietor or his agent was a party or in which he or his agent colluded. The section places no restriction that the wrongful act must be authorized by the principal. There is a simple rationale for this rule: a proprietor when he asserts a right, title or interest, as distinct from when he seeks to avoid a liability, founds his claim on the acts done and knowledge acquired by his solicitor or other agent. If the solicitor or agent has acted fraudulently the proprietor inevitably will found his action on, and benefit by, the fraud of his solicitor or agent. The law cannot allow the proprietor such benefit as he appointed the agent and he is bound by his agents’ acts and knowledge. It would be an affront to common sense to hold that the proprietor can acquire an indefeasible title because the fraud or illegality was not that of the proprietor but his agent.* The Federal D

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- A Court, in my respectful view, without justification, ignored words to the same effect in the Malaysian Land Code. *Assets Co Ltd v. Mere Roihi* 1905 AC 176 which was referred to by the Federal Court expressly recognized that fraud of an agent would defeat the title of the principal. [Emphasis added.]
- B [13] Hence, in my respectful view, having regard to the express wording of s. 340(2)(a) of the Code the learned judge asked himself the wrong question. In the passage already quoted from his judgment, he merely satisfied himself that the fourth defendant was neither a party nor privy to the fraud. But he failed to go on and consider the agent's fraud. He had held that – to quote him – “the 2nd and 3rd defendants were for all intent and purpose the agents of the 4th defendant in the said transaction”. And he had also held – to quote him once again – “that 2nd defendant was not just privy to the fraud and/misrepresentation, but he was in fact a party to the fraud and/or misrepresentation”. It was therefore incumbent for the learned judge to apply the clear words of s. 340(2)(a) to the facts as found by him. Had he done so he would have concluded that the fraud of the second defendant as agent of the fourth defendant rendered defeasible the registered charge in the latter's hands. To emphasise the point I seek to make, the learned judge, with respect, erred in law in confining himself to the position at common law without hearkening to the express words of the Code. Had he directed himself correctly on the law, he would have held for the plaintiffs.
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- F [14] Accordingly, in my judgment the plaintiffs are entitled to succeed on this ground alone. No question arises on this part of the case as to whether the fourth defendant is a *bona fide* purchaser who is protected by the proviso to s. 340(3) of the Code and I therefore find it unnecessary to consider the effect, if any, of the proviso. In any event, even if the proviso is applicable to the fourth defendant (which I do not think to be the case), the fourth defendant is not a *bona fide* purchaser because it is bound by the acts of its agent. The law on the point has been clearly set out in *Lloyd v. Grace, Smith & Co* [1912] AC 716 which is authority for the proposition “that a master is liable for his servant's fraud perpetrated in the course of the master's business whether the fraud was committed for the master's benefit or not”: *Keith Sellar v. Lee Kwang* [1980] 2 MLJ 191, *per* Hahim Yeop Sani
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- I J, (as he then was). And to quote once again from the judgment of GP Selvam J in *United Overseas Finance Ltd v. Victor Sakayamary*:

In my view the above statement in *Halsbury's Laws of England* [referred to *Doshi*] does not apply if the facts can be brought within the rule in *Lloyd v. Grace Smith & Co* [1912] AC 716, *Uxbridge Permanent Benefit Building Society v. Pickard* [1939] 2 KB 248, *Navarro v. Moregrand Ltd* [1951] 2 TLR 674 and *United Overseas Finance Ltd v. Yew Siew Kien* [1993] 3 SLR 207. The rule is that a principal is responsible for the wrongs his agent has done in the course of his employment - that is in the course of conducting the business entrusted to him. Phrases such as 'acting in the course of his employment' or 'acting within the scope of his agency' must be construed liberally - *per* Lord Macnaghten in *Lloyd v. Grace Smith & Co* at p 736.

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[15] Further, on the facts, the fourth defendant has certainly not even tried to discharge the burden on it to demonstrate that it is a *bona fide* purchaser. As such the facts of the present case do not fall within the proviso to s. 340(3).

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[16] There is another ground on which the plaintiffs' appeal has been argued. It is said that the instrument by which the charge was created being a forgery as expressly found by the learned trial judge, the fourth defendant takes no title. The learned judge quite correctly treated himself bound on this part of the case by the decision of the Federal Court in *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133. In that case the Federal Court held that any purchaser in good faith and for valuable consideration or any person or body claiming through or under him falls within a category of registered proprietors who obtain immediate indefeasibility notwithstanding that they acquired their title under a forged instrument. I have in *Subramaniam NS Dhurai v. Sandrakasan Retnasamy* [2005] 3 CLJ 539 set out the reasons why the Federal Court's judgment in *Adorna Properties* must be disregarded. I need add only one further comment to what I have already there said.

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[17] Section 340(3) tells us what happens to the title of a registered proprietor who has acquired it, *inter alia*, by means of fraud, forgery or an insufficient or void instrument. And this is how it puts it:

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- (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):

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- A (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:
- B

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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[18] Note that sub-s. (3) in paras. (a) and (b) employs the word “subsequently”. What it means is this. If a registered proprietor gets on the register by any of the means set out in s. 340(2), and if he or she to use the expression housed in the Code – **subsequently** – transfers his or her land to another, the title of that other is also defeasible unless he or she is a purchaser in good faith and for valuable consideration. Also protected are persons who take from such a purchaser. I may add that the proof that one is a purchaser in good faith and for valuable consideration lies on the person asserting it. See, *Bhup Narain Singh v. Gokhul Chand Mahton* LR 61 IA 115; *Ong Chat Pang & Anor v. Valliappa Chettiar* [1971] 1 MLJ 224; *Kheng Chwee Lian v. Wong Tak Thong* [1983] 2 MLJ 320.

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[19] Since writing this judgment in draft, I have had the advantage of reading the valuable concurrence of my learned brother Raus Sharif JCA. I understand and appreciate my learned brother’s reluctance to depart from *Adorna Properties* as it is a decision of the Federal Court. I would have joined in his view had *Adorna Properties* declared a principle of the common law based on policy considerations as was the case of *Donoughue v. Stevenson* [1932] AC 562. But *Adorna Properties* is not such a case. It is a case involving the interpretation of a provision in a statute, namely, s. 340 of the Code which I have demonstrated in *Subramaniam v. Sandrakasan* to have been done without having regard to another provision in the Code and without reference to the decision of the Supreme Court in *M & J Frozen Foods Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 15 which held that the Code creates deferred and not immediate indefeasibility.

[20] As such, in impugning the decision in *Adorna Properties*, I would take refuge in the following words of the great jurist Sir John Salmond in his *Treatise on Jurisprudence* (12th edn) at pp. 151-2:

A precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of statute, ie, delegated legislation. This rule was laid down for the House of Lords by Lord Halsbury in the leading case (*London Street Tramways v. L. C. C.* [1898] A. C., 375) and for the Court of Appeal it was given as the leading example of a decision *per incuriam* which would not be binding on the Court (*Young v. Bristol Aeroplane Co. Ltd.* (194) KR at 729 (C.A.)) The rule apparently applies even though the earlier Court knew of the statute in question, if it did not refer to, and had not present to its mind, the precise terms of the statute. Similarly, a Court may know of the existence of a statute and yet not appreciate its relevance to the matter in hand; such a mistake is again such *incuria* as to vitiate the decision. **Even a lower Court can impugn a precedent on such grounds.** [Emphasis added.]

[21] Since I have come to the conclusion that the plaintiffs are entitled to succeed in this appeal on a plain interpretation of s. 340(2)(a), it makes it unnecessary to also rule in their favour on the forgery ground.

[22] For the reasons already given, I would allow the appeal and set aside the order of the High Court dismissing the plaintiff's claim against the fourth defendant. The plaintiff shall be entitled to a declaration that the charge *vide* Presentation No. 1084/99 Jilid 62 Folio 61 dated 20-9-1999 over the property known as G.M. 186 Lot 1334, G.M. 187 Lot 1335 and G.M. 173 Lot 1336 all in Mukim 15, District of Seberang Prai Selatan, Negeri Pulau Pinang and the annexure, to same is null and void and of no effect. There shall also be a consequential order that the relevant register and the issue documents of title be rectified by the deletion of the memorial of the fourth defendant's charge. The fourth defendant shall bear the costs of this appeal. I would also vary the learned judge's order on costs by requiring the fourth defendant to pay the plaintiff's costs in the court below and to recover the same from the other defendants. The deposit shall be refunded to the plaintiffs.

A [23] One final word. When we sat on 19 September 2006, five appeals were called on. Of these two were withdrawn. The second defendant appealed against the orders made against him but did not appear at the hearing. Accordingly, I would dismiss his appeal with costs and direct the deposit in his case be paid out to the
B plaintiffs. In respect of the appeal by the firm of solicitors, the third defendant, I would dismiss it with costs to be paid to the fourth defendant as their appeal is directed against that defendant. The deposit in court shall be paid out to the fourth defendant. The fourth defendant's appeal is against the learned judge's order
C staying the effect of his judgment. In view of the orders I have proposed in the previous paragraph, I would dismiss that appeal and make no order as to costs. The deposit in that appeal shall be refunded to the fourth defendant.

D **Low Hop Bing JCA:**

Appeals

[24] Out of the multiple appeals herein, two were withdrawn on the date of hearing on 19 September 2006.

E [25] The other appeals, against the orders of the learned trial judge made on 25 June 2005, may be tabulated as follows:

	Appellant	Order appealed against
F	(1) The plaintiffs against the fourth defendant (or interchangeably, "the chargee bank").	The indefeasibility of the chargee bank's interest as a chargee. registered
G	(2) The second defendant (who was absent at the hearing); and the third defendant, a firm of solicitors ("the solicitors"), against the chargee bank.	Restitution for the loss, and also general, aggravated and exemplary damages suffered by the plaintiffs.
H	(3) The chargee bank	Staying of the effect of the judgment.

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[26] Arguments were heard on 19 and 20 September 2006, and judgment was reserved. A

Factual Background

[27] The plaintiffs, husband and wife, were the registered proprietors of three pieces of land in the district of Seberang Perai Selatan, state of Pulau Pinang (collectively, “the land”). The first plaintiff had since passed away and had been duly substituted by his son, Abu Bakar bin Ismail, by order of court dated 28 September 2004. B
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[28] The plaintiffs had entered into a sale and purchase agreement dated 30 July 1999 (“SPA1”) whereby the plaintiffs agreed to sell and the first defendant agreed to purchase the land for a total consideration of RM7.5 million. SPA1 was prepared by Abdul Aziz bin Ahmad (the second defendant) an advocate and solicitor practising under the solicitors’ name of Sajali & Aziz, the third defendant, with whom the plaintiffs had deposited the relevant title deeds and the memoranda of transfer signed in blank. The chargee bank was neither a party nor privy to SPA1. D
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[29] Pursuant to SPA1, a sum of RM150,000 payable on the date of execution and a further sum of RM50,000 payable within one month thereof had been paid by the first defendant to the plaintiffs while the balance sum of RM7.3 million, payable within three months thereof, remained unpaid. F

[30] On 9 August 1999, the first defendant entered into a sale and purchase agreement (“SPA2”) to sell the land to the fifth defendant for RM26.5 million. SPA2 was again prepared by the second defendant practising under the solicitors’ name. The chargee bank was also neither a party nor privy to SPA2. G

[31] The chargee bank had earlier on, *vide* letter dated 26 July 1999, approved to the fifth defendant a term loan facility of RM16 million to purchase machinery (RM6 million) and working capital (RM10 million) (collectively “the loan facility”). The land (the titles to which had earlier been deposited by the plaintiffs with the solicitors) was to be used as security thereof by way of third party charge. For this purpose, the fifth defendant has applied to the chargee bank for approval to retain the solicitors as the fifth defendant’s solicitors to prepare and present the charge documents and the chargee bank has duly approved the fifth defendant’s said application. H
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A [32] *Vide* the chargee bank's letter dated 4 August 1999, the solicitors were requested to prepare the charge documents with all fees and costs to be paid by the fifth defendant.

B [33] The charge documents were prepared for the fifth defendant by the second defendant practising in the solicitors' firm. For the solicitors' service, the fifth defendant has paid all the fees and costs to the solicitors.

C [34] After the preparation of the charge documents and attendance to the execution thereof, the solicitors by letter dated 20 September 1999 requested the chargee bank to release the loan facility to the solicitors as stakeholders.

D [35] *Vide* letter dated 21 September 1999, the fifth defendant requested the chargee bank to disburse to the fifth defendant a sum of RM10 million being part of the loan facility, which the chargee bank did.

E [36] Subsequently, the plaintiffs discovered that the land had been registered and charged to the chargee bank as security for the loan facility granted to the fifth defendant.

F [37] The plaintiffs' claim that their signatures on the charge documents were forged had been verified by the Government Chemist (SP2) who after an examination and analysis of the impugned signatures thereon confirmed in his report that the signatures thereon were of different authorship from the specimen signatures of the plaintiffs.

G [38] The plaintiffs further alleged that the charge came about as a result *inter alia* of the fraud and/or misrepresentation committed on the plaintiffs by the first and the second defendants. The second defendant in the solicitors' firm was a central figure in planning the whole scheme of fraud and/or misrepresentation.

H [39] The plaintiffs' statement of claim had never pleaded any fraud and/or misrepresentation on the part of the chargee bank, neither was there any such evidence against it.

I [40] For the sum of RM10 million already disbursed to the fifth defendant, no repayment whatsoever had been made by the fifth defendant to the chargee bank.

[41] Lengthy submissions and arguments were advanced for the parties herein. However, I shall consider the core issue which in my view would determine the outcome of these appeals.

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Whose Agents Are The Solicitors?

[42] It was submitted by learned counsel Mr. Jerald Gomez (Mr. David Peter with him) for the plaintiffs that in the preparation and presentation of the charge documents for the land to be used as security for the loan facility in favour of the fifth defendant, the solicitors were at the material time the chargee bank's solicitors and agents. *Lee Yoke Chye v Toh Thiam Hock & Co.* [1986] 2 CLJ. 423; [1986] CLJ (Rep) 175 SC was cited in support of this contention.

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[43] In response, the chargee bank's learned counsel Mr. Oommen Koshy argued that the solicitors were the fifth defendant's solicitors and agents.

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[44] The relevant passage of the learned trial judge's judgment reads as follows:

It is common ground that the 3rd defendant, the firm of solicitors, was retained by the 4th defendant to prepare the necessary legal documentation for the loan, therefore, the legal consequence is that the 2nd and 3rd defendants were for all intent and purpose the agents of the 4th defendant in the said transaction.

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[45] From the above submissions of learned counsel and the passage in the judgment of the learned trial judge, I find that what was otherwise a common ground has now become a contentious issue in this appeal.

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[46] In my judgment, under s. 69(1) of the Courts of Judicature Act 1964, and r. 5 of the Rules of the Court of Appeal 1994, it is trite law that appeals to the Court of Appeal shall be by way of re-hearing. In this regard, the core issue which this court has to re-hear and determine is this:

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Where the fifth defendant has retained the solicitors for the preparation and presentation of the charge documents by way of security for the loan facility granted by the chargee bank to the fifth defendant, and the fifth defendant has made payment to the solicitors of the fees and costs for the solicitors' said service, were the solicitors the agents of the chargee bank?

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A [47] At this juncture, for purposes of completeness, it is appropriate for me to consider *Lee Yoke Chye, supra*, cited for the plaintiffs. There, the real issue before the then Supreme Court was:

B When the respondent firm of solicitors received the issue document of title, did the solicitors receive it as ‘stakeholder’ or as ‘agent’ for the appellant who has retained the respondent to act for her in the purchase of a parcel of land?

C [48] Seah SCJ (as he then was) held that the respondent was holding the issue document of title as an agent for the appellant (purchaser) ie, the person who has retained the respondent firm of solicitors.

D [49] In relation to the preparation and presentation of the charge documents in this appeal, since the fifth defendant has retained the solicitors to whom the fifth defendant had paid the fees and costs for the solicitors’ service, I am of the view that the solicitors were at the material time in law and in fact the agents of the fifth defendant.

E [50] In other words, the fifth defendant was the client and hence the principal of the solicitors.

F [51] Section 3 of the Legal Profession Act 1976, where relevant, defines the word “client” as including, in relation to non-contentious business, any person, who as a principal, retains or employs an advocate and solicitor, and any person for the time being liable to pay an advocate and solicitor for his service and costs.

G [52] “Contentious business” is defined in s. 3 as meaning business done by an advocate and solicitor in or for the purpose of proceedings begun before a court of justice, tribunal, board, commission, council, statutory body or arbitrator.

H [53] In this appeal, the preparation and presentation of the charge documents did not involve proceedings before a court etc. That business comes within the ambit of “non-contentious business” in which the fifth defendant has retained, and so is the principal of, the solicitors. The retainer provides for the contractual relationship between the fifth defendant and the solicitors.

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[54] Under s. 3, even a person for the time being liable to pay an advocate and solicitor for his service and costs is included in the definition of a client. *A fortiori*, in the instant appeal, as the fifth defendant had paid the fees and costs for the solicitors' service, the fifth defendant is most certainly the client and principal of the solicitors.

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[55] On the other hand, the chargee bank was neither the person liable to pay nor has it ever paid the solicitors for their service and costs in the preparation and presentation of the charge documents. Hence, the chargee bank cannot be a client and principal of the solicitors.

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[56] Both in law and in fact, I am of the view that the answer to the core issue for determination in this appeal is in the negative ie, the solicitors were not the agents of the chargee bank, but the agents of the fifth defendant. Consequently, the knowledge of the solicitors' fraud and/or misrepresentation cannot be imputed to the chargee bank.

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[57] Section 340(1) of the National Land Code 1965 where relevant provides for the chargee bank's indefeasible interest as a registered chargee as follows:

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340 Registration to confer indefeasible ... interest, except certain circumstances.

- (1) The ... interest of any person or body in whose name any charge is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

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[58] As the pleadings and evidence revealed that the chargee bank was neither a party nor privy to the fraud or misrepresentation, and that the party or parties who had perpetrated the fraud or misrepresentation were not the agents of the chargee bank, the indefeasibility of the chargee bank's interest which has been registered as a charge remains unaffected by the circumstances set out in s. 340(2). For ease of reference, those circumstances where relevant merit reproduction as follows:

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340(2) The ... interest of any such person or body shall not be indefeasible:

- (a) in any case of fraud or misrepresentation in which the person or body, or any agent of the person or body, was a party or privy;

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A [59] That being the case, the chargee bank's interest registered as such cannot be set aside under s. 340(3).

B [60] I therefore hold that the charge registered in favour of the chargee bank is valid and indefeasible. In doing so, I must immediately emphasize that my grounds for sustaining the validity and indefeasibility of the registered charge are different from those of the learned trial judge, but the result is the same.

Pleadings

C [61] Having had the opportunity of reading the draft judgment of my learned brother Gopal Sri Ram JCA, I am constrained to say that with the utmost respect, I am unable to agree. I have therefore prepared and sent a separate draft judgment to my learned brothers, Gopal Sri Ram and Raus Sharif JJCA, for their
D comments.

E [62] I have also had the opportunity of reading the draft judgment of my learned brother Raus Sharif JCA in response to my draft judgment. In relation to the parties' pleadings, his Lordship held that "the issue that the 2nd and 3rd defendants were not the agents of the 4th defendant, but the agents of the 5th defendant, was not part of the 4th defendant's case before the learned trial judge. It was never pleaded in the 4th defendant's statement of defence."

F [63] With the utmost respect, it is incumbent upon me to refer to the plaintiffs' amended statement of claim and then the statement of defence of the second and third defendants, and finally the statement of defence of the fourth defendant, for the
G purpose of putting the pleadings in proper perspective.

[64] The relevant averments pleaded in the plaintiffs' amended statement of claim against the defendants may be tabulated as follows:

H	Para	Averment pleaded
I	4	The second defendant, an advocate and solicitor, prepared and witnessed the relevant documents and had conduct of the loan transaction, and was a partner and/or agent of the third defendant.

- 5 The third defendant acted as solicitors for the loan transaction. A
- 6 The fourth defendant is a party in whose favour a charge has been registered over the land. B
- 11.10 The plaintiff discovered that the second and third defendants have in collusion with the first defendant caused the plaintiffs' signatures to be forged and placed on to the charge documents and annexure, thereby creating a third party legal charge in favour of the fourth defendant as security for the loan to the fifth defendant. C
D
- 16.1 The second and third defendants had placed themselves in a position of conflict of interest in that the third defendant was acting for the fourth defendant in the loan transaction. E

[65] Upon reading the above averments generally; and para 16.1 specifically, I am of the view that the plaintiffs have indeed pleaded to the effect that the second and third defendants were acting for the fourth defendant in the loan transaction. Para 16.1 has in turn been denied by the second and third defendants *vide* para. 19 of their statement of defence, and by the fourth defendant *vide* para. 18 of their statement of defence which in effect averred that the fourth defendant had no knowledge and made no admission of para. 16.1 of the plaintiffs' statement of claim. I am therefore constrained to state that I am unable to agree with the aforesaid view of my learned brother Raus Sharif JCA. F
G

Evidence H

[66] In relation to the evidence adduced at the trial, the draft judgment of my learned brother Raus Sharif JCA stated as follows:

In fact the evidence adduced by the 4th defendant at the trial supported the fact that it was the 4th defendant who appointed the 3rd defendant as the solicitor for the preparation and presentation of the charge documents. I

A [67] With the utmost respect, I shall refer to the relevant evidence adduced at the trial.

[68] The witness' statement tendered for the second and third defendants may be found at pp. 440 to 453 of the appeal record.

B The relevant evidence of the second defendant was to the effect that the charge documents in Form 16A were executed before him.

C [69] When cross-examined by learned counsel for the fourth defendant, at p. 291 thereof, the second defendant testified that the third defendant, the law firm of which he was a partner, was requested to prepare the loan agreement for the fifth defendant and the fees therefor were paid by the fifth defendant.

D [70] Under cross-examination by learned counsel for the plaintiffs, from pp. 299 to 325, the second defendant confirmed that for the preparation of the loan agreement, he dealt with one En. Fadzimi and one Cik Salmah Harun, both of whom were from the fourth defendant, and that he was acting for the fourth defendant. It is significant to note that he also testified that at the material time, E he was acting for the first defendant and the fifth defendant in the various agreements in connection with the loan transaction.

F [71] In the witness' statement, SD4 Marsinah bt Arshad, an assistant manager of the fourth defendant, testified that the fifth defendant was the applicant for the loan from the fourth defendant and that the third defendant had been appointed to perfect the loan documentation.

G [72] The relevant portion of the witness' statement of SD5, Salmah bt. Harun, the fourth defendant's senior executive, in the form of question and answer (with my translation in English) merits reproductions follows:

9. Firma guaman mana yang dilantik untuk menyediakan dokumentasi pinjaman?

H Firma Tetuan Sajali & Aziz.

(9. Which legal firm was appointed to prepare the loan documentation?)

I The firm Messrs Sajali & Aziz.)

10. Siapakah yang membayar fee guaman?

- Pihak peminjam yang membayar kepada firma adalah juga bertindak bagi pihak peminjam iaitu Defendan Ke-5. **A**
- (10. Who paid the legal fees?
- The borrower paid to the firm which also acted for the borrower i.e. Defendant No. 5.) **B**
11. Kenapa firma Tetuan Sajali & Aziz yang dilantik?
- Pihak peminjam yang memohon Tetuan Sajali & Aziz sebagai peguamcara mereka. **C**
- (11. Why was the firm Messrs Sajali & Aziz appointed?
- The borrower applied for Messrs Sajali & Aziz to be their solicitors.)
12. Rujuk mukasurat 2-3 Ikatan I. Apakah dokumen ini? **D**
- Ini adalah Memo Dalaman Perlantikan Peguam Defendan Ke-4 yang disediakan oleh saya dan ditandatangani oleh pegawai-pegawai atasan saya.
- (12. Refer to pages 2-3, Bundle I. What is this document? **E**
- It is Defendant No. 4's Internal Memo for Appointment of Solicitors prepared by me and signed by my superior officers.)
13. Rujuk perenggan 2 pada perkataan "Pandangan". Apakah maksud itu? **F**
- Itu adalah pandangan saya dan jabatan saya bahawa tiada halangan untuk melantik Tetuan Sajali & Aziz sebagai peguamcara seperti yang dipohon oleh peminjam kerana Tetuan Sajali & Aziz adalah dalam panel peguam Defendan Ke-4. **G**
- (13. Refer to paragraph 2. What does it mean?
- That is my and my department's view that there was no objection to appoint Messrs Sajali & Aziz to be the solicitors as applied for by the borrower because Messrs Sajali & Aziz is on the fourth defendant's panel of solicitors.) **H**
14. Bilakah perlantikan Tetutan Sajali & Aziz diluluskan oleh Defendan Ke-4? **I**

- A** Mengikut Memo Dalaman Perlantikan Peguam, sokongan ditandatangani oleh Penolong Pengurus Besar Kredit pada 04.08.1999 dan diluluskan oleh Pengurus Besar Operasi pada 05.08.1999.
- B** (14. When was the appointment of Messrs Sajali & Aziz approved by Defendant No. 4?
- According to the Internal Memo for Appointment of Solicitors, the recommendation was signed by the Assistant General Manager Credit on 04.08.1999 and approved by the General Manager Operations on 05.08.1999.)
- C** 15. Bilakah Tetuan Sajali & Aziz dimaklumkan oleh Defendan Ke-4 mengenai perlantikannya untuk mengendalikan urusan dokumentasi pinjaman Defendan Ke-5 ini?
- D** Saya telah menyediakan satu surat daripada Defendan Ke-4 bertarikh 04.08.1999 memberitahu bahawa Defendan Ke-4 telah meluluskan pinjaman sebanyak RM16 juta kepada Defendan Ke-5 dan meminta Tetuan Sajali & Aziz menyediakan dokumentasi yang perlu.
- E** (15. When were Messrs Sajali & Aziz informed by Defendant No. 4 regarding their appointment to deal with the matter of Defendant No. 5's loan document?
- I prepared a letter from Defendant No. 4 dated 04.08.1999, notifying that Defendant No. 4 had approved a loan of RM16 million to Defendant No. 5 and requested Messrs Sajali & Aziz to prepare the necessary documentation.)
- F** 16. Rujuk mukasurat 20, Ikatan B. Apakah dokumen ini?
- G** Ini adalah surat Defendan Ke-4 kepada Defendan Ke-3 meminta menyediakan dokumentasi pinjaman Defendan Ke-5 tersebut.
- (16. Refer to page 20, Bundle B. What is this document?
- H** This is Defendant No. 4's letter to Defendant No. 3 requesting the preparation of loan documentation for Defendant No. 5.)
- I** 17. Boleh terangkan bagaimana surat kepada Defendan Ke-3 bertarikh 04.08.1999 sedangkan Memo Dalaman Perlantikan Peguam menunjukkan bahawa kelulusan perlantikan hanya ditandatangani pada 05.08.1999?

Saya telah menyediakan surat bertarikh 04.08.1999 kepada Defendan Ke-3 sebaik sahaja Memo Dalaman Perlantikan Peguam disokong oleh Penolong Pengurus Besar Kredit pada 04.08.1999. Lumrahnya, Pengurus Besar Operasi tidak akan mempunyai apa-apa halangan terhadap perlantikan peguam yang berada dalam panel peguam Defendan Ke-5 dan kelulusan beliau hanyalah untuk formality urusan dalaman Defendan Ke-4 sendiri.

A

B

(17. Can you explain how the letter to Defendant No. 3 was dated 04.08.1999 while the Internal Memo for Appointment of Solicitors showed that the approval for the appointment was signed on 05.08.1999?)

C

I prepared the letter dated 04.08.1999 to Defendant No. 3 as soon as the Internal Memo for Appointment of Solicitors was recommended by the Assistant General Manager Credit on 04.08.1999. Normally, the General Manager Operations would have no objection to the appointment of Defendant No. 5's solicitors from the panel of solicitors and his approval is merely a formality for Defendant No. 4's internal matter.)

D

18. Anda kenal Encik Abdul Aziz bin Ahmad?

E

Kenal.

(18. Do you know Encik Abdul Aziz bin Ahmad?)

I know.)

F

19. Bagaimana anda kenal beliau?

Encik Abdul Aziz bin Ahmad adalah peguam dari Tetuan Sajali & Aziz yang berurusan dengan saya bagi urusan dokumentasi Defendan Ke-4.

G

(19. How do you know him?)

Encik Abdul Aziz bin Ahmad is a lawyer from Messrs Sajali & Aziz who dealt with me in the matter of Defendant No. 4's documentation.)

H

20. Adakah anda menerima deraf dokumentasi daripada Defendan Ke-3 seperti yang diminta dalam surat Defendan Ke-4 bertarikh 04.08.1999?

Saya meminta deraf Asset Sale Agreement, Asset Purchase Agreement, Letter of Guarantee dan Annexure Charge daripada Defendan Ke-3 pada 06.08.1999.

I

A (20. Did you receive the draft documentation from Defendant No. 3 as requested in Defendant No. 4's letter dated 04.08.1999?

B I received the draft Asset Sale Agreement, Asset Purchase Agreement, Letter of Guarantee and the Charge Annexure from Defendant No. 3 on 06.08.1999.)

21. Apa yang anda buat selepas menerima deraf dokumentasi tersebut?

C Deraf dokumentasi tersebut kemudiannya di "vet" oleh jabatan undang-undang Defendan Ke-4 sebelum saya kembalikan semula kepada Defendan Ke-3.

(21. What did you do after receiving the draft documentation?

D The draft documentation was vetted by Defendant No. 4's legal department before I returned the same to Defendant No. 3.)

[73] Learned counsel for the second and third defendants did not cross-examine SD5 in relation to the aforesaid testimony.

E [74] SD6 Mohd Sabi bin Mohd Tahir, a manager of the fourth defendant, testified in Question and Answer 34 of his witness' statement that the third defendant was appointed to prepare the charge document.

F [75] In my view, there is ample evidence adduced at the trial to support the finding that, on the application of the fifth defendant, the third defendant was appointed as solicitors to prepare the charge documents for which the fees had been paid by the fifth defendant to third defendant. Indeed, exh. D29 at pp. 638 and

G 639 of the appeal record demonstrated that the borrower ie, the fifth defendant had applied to the fourth defendant to appoint the third defendant as the fifth defendant's solicitors for the loan facility and the fourth defendant had no objection to that application. In other words, the third defendant was appointed at
H the instance and on the application of the fifth defendant.

[76] In my respectful view, the evidence that the legal fees for the preparation and presentation of the charge documents had been paid by the fifth defendant to the third defendant has removed any doubt that the fifth defendant was the client of the
I third defendant in the loan transaction. The third defendant's

retainer and appointment by the fifth defendant was supported by the fifth defendant's payment of legal fees. The fourth defendant, having approved the fifth defendant's application for the appointment of the third defendant as the fifth defendant's solicitors, can hardly be constituted as the client of the third defendant in the preparation and presentation of the charge documents. The absence of any contractual obligation on the part of the fourth defendant to pay for the legal fees has effectively negated the essential element of consideration which is fundamental in the formation of a solicitor and client relationship, in order to bring about a principal and agent relationship between the fourth and the third defendants.

Issue Raised For First Time

[77] While it is true that the above core issue was not raised and argued before the court of first instance, I am of the view that in the interest of justice, the parties are at liberty to ventilate it at the appellate stage for the first time here, as this appeal is after all proceeded with by way of rehearing. It is the plaintiffs' learned counsel who has raised this core issue for the first time at the appellate stage in this court. I can find no reason to exclude this issue from hearing and determination.

[78] In *Luggage Distributors (M) Sdn. Bhd. v. Tan Hor Teng @ Tan Tien Chi & Anor* [1995] 3 CLJ 521 CA, the respondent sought to admit a new point for argument for the first time in the Court of Appeal. Gopal Sri Ram JCA, with whom VC George JCA (as he then was) and Abu Mansor Ali JCA (later FCJ) concurred, gave the answer as follows:

In my judgment, the categories of cases in which an appellate Court will admit a new point are not closed. The governing principle is this: an appellate Court will permit a new point to be raised for the first time before it where the interests of justice so require. The question whether the interests of justice are met in a particular case depends on the peculiar facts of that case. The factors for and against the admission of the new point must be weighed on a balance to see where the justice of the case lies.

Conclusion

[79] On the foregoing grounds, I make the following orders:

- (1) The plaintiffs' appeal is dismissed with costs to the chargee bank and the plaintiffs' deposit is to be paid to the chargee

- A bank on account of taxed costs; and the learned trial judge's order on the indefeasibility of the chargee bank's interest as a registered chargee and the consequential orders are hereby affirmed;
- B (2) In the absence of the second defendant at the hearing, his appeal is dismissed with costs to the chargee bank, and the second defendant's deposit is to be paid out to the chargee bank on account of taxed costs;
- C (3) The solicitors' appeal is also dismissed with costs to the chargee bank and the solicitors' deposit is to be paid out to the chargee bank on account of taxed costs; and
- (4) The chargee bank's appeal against the trial judge's order staying the effect of his Lordship's judgment is allowed but with no order as to costs. The chargee bank's deposit is to be refunded to it.
- D

Raus Sharif JCA

- E [80] I have read the judgment in draft of my learned brother Gopal Sri Ram, JCA. I agree with the views expressed and the orders made by his lordship therein save for his views that "the Federal Court's judgment in *Adorna Properties* must be disregarded". With the utmost respect, I am of the view that despite the severe criticism that had been levelled against the
- F Federal Court's judgment in *Adorna Properties*, it cannot be disregarded by this court. To do so would be to go against the principle of *stare decisis*.
- G [81] My concurrence with the orders made by my learned brother Gopal Sri Ram, JCA is basically on one ground: that the learned trial judge was wrong in holding that the 2nd defendant's knowledge of the fraud could not be imputed to the 4th defendant. My respectful view is that the learned trial judge, after holding that the 2nd and 3rd defendants were for all intent and
- H purpose the agents of the 4th defendant and the 2nd defendant was not just privy to the fraud but he was in fact a party to the fraud, should have found for the plaintiffs by reason of s. 340(2)(a) of the National Land Code 1965 ("Code"). This is because the section expressly provides that the title of a proprietor
- I may be defeated on the ground of fraud or forgery to which that proprietor or his agent was a party in which he or his agent

colluded. In the instant case since the 2nd and 3rd defendants, as found by learned trial judge, were the agents of the 4th defendant and the 2nd defendant was the party to the fraud, the charge registered in favour of the 4th defendant cannot be held to be valid and indefeasible.

A

[82] The learned trial judge's conclusion on the issue was largely based on the decision of the Federal Court in *Doshi v. Yeoh Tiong Lay* [1975] 1 MLJ 85. But my respectful view, adopting the reasoning of my learned brother Gopal Sri Ram, JCA, is that, *Doshi's* case cannot be relied upon in interpreting s. 340(2) of the Code.

B

C

[83] My learned brother Low Hop Bing, JCA in his draft judgement, which I had the opportunity to read, nevertheless agreed the learned trial judge's conclusion. But his grounds for sustaining the validity and indefeasibility of the registered charge were different from those of the learned trial judge.

D

[84] In essence, my learned brother Low Hop Bing, JCA held that the 2nd and 3rd defendants were not the agents of the 4th defendant but the agents of the 5th defendant. According to my learned brother, since the 4th defendant was neither a party or privy to the fraud or misrepresentation, and that the party or parties who had perpetrated the fraud or misrepresentation were not the agents of 4th defendant, the indefeasibility of the 4th defendant's interest which has been registered secured by the charge remains unaffected by the circumstances set out in s. 340(2) of the Code.

E

F

[85] With the utmost respect, I am unable to agree. My respectful view is that the issue that the 2nd and 3rd defendants were not the agents of the 4th defendant, but the agents of the 5th defendant, was not part of the 4th defendant's case before the learned trial judge. It was never pleaded in the 4th defendant's statement of defence. In fact the evidence adduced by the 4th defendant at the trial supported the fact that it was the 4th defendant who appointed the 3rd defendant as the solicitors for the preparation and presentation of the charge documents.

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I

A [86] The Senior Executive Officer of the 4th defendant, Salmah bte Harun (SD5), in her witness statement, specifically stated that it was the 4th defendant who appointed the 3rd defendant as the solicitors for the loan documentation. SD5 relevant statements in Bahasa Malaysia when translated into English are as follows:

B Q. Which legal firm was appointed to prepare the loan documentation?

A. Messrs. Sazali & Aziz.

C Q. When did the 4th defendant approve the appointment of Messrs. Sazali & Aziz?

A. According to the Memo of the Appointment of Solicitors, the recommendation was signed by the Assistant Credit Manager on 4.8.1999 and was approved by the Operation General Manager on 5.8.1999.

D Q. When were Messrs. Sazali & Aziz being informed by the 4th defendant regarding its appointment in handling the 5th defendant's loan documentation?

E A. I prepared a letter from the 4th defendant dated 4.8.1999 informing that the 4th defendant has approved the RM16 million loan to the 5th defendant and asking Messrs. Sazali & Aziz to prepare the relevant documentation.

F Q. Do you know Abdul Aziz Ahmad?

A. I know him.

Q. How do you know him?

G A. Encik Abdul Aziz bin Ahmad is a lawyer from Messrs. Sazali & Aziz who I have been dealing with for the 4th defendant's documentation purposes.

[87] Messrs. Sazali & Aziz and Abdul Aziz Ahmad referred to therein by SD5 were the 3rd and 2nd defendants respectively.

H [88] The statements of SD5 on the matter were repeated in a witness statement's of another Senior Executive Officer of the 4th defendant, Mohd. Sabi bin Mohd. Tahir (SD6). Hence, it was not surprising for the learned trial judge to conclude that it was common ground that the 3rd defendant was retained by the 4th

I defendant to prepare the necessary legal documentation for the

loan and therefore the 2nd and 3rd defendants were for all intent and purpose the agents of the 4th defendant in the said transaction.

[89] Thus, it is my respectful view that the learned trial judge, in light of the pleadings and the evidence before him, was perfectly right to hold that the 2nd and 3rd defendants were for all intent and purpose the agents of the 4th defendant in the said transaction. Nevertheless, he fell into error when he relied on *Doshi's* case and concluded that fraud of the 2nd defendant could not be imputed on the 4th defendant.

[90] On the above reasons, I would make the same orders as that of my learned brother Gopal Sri Ram, JCA.

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