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SECTION 340 of the NATIONAL LAND CODE --BEFORE AND AFTER BOONSOM BOONYANIT

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The law in any area must be clear, certain and final. *The Federal Court decision of Adorna Properties Sdn Bhd v Boonsom Boonyanit*[1] has over the years, created much uncertainty and confusion in the area of land law. The Court of Appeal has recently encapsulated the effect this case has had:

> It is no exaggeration to say that Adorna Properties has wreaked havoc in the law of real property. All I have to do is to read our national newspapers. You will find new stories of innocent land owners who found themselves deprived of their land by forged instruments of dealing[2].

This paper[3] seeks to discuss the position in Malaysia pre and post the Federal Court decision in Boonsom Boonyanit. It will also discuss the following areas in relation to s 340 of the National Land Code 1965 ('NLC'):

(i) Fraud and misrepresentation;
(ii) Acts and knowledge of an agent;
(iii) Forgery or insufficient or void instrument;
(iv) A purchaser in good faith for valuable consideration.

Section 340 (4) is not addressed in this paper[4].

THE TORRENS SYSTEM AND THE CENTRAL CONCEPT OF INDEFEASIBILITY

The present system of land tenure provided for in the NLC, is that all lands alienated by the state are held under the Torrens system[5]. The Torrens system[6] was created and first used in South Australia as early as 1885 to overcome the weaknesses of the deeds system. In the deeds system, a purchaser would have to search through and get to the good root of the title or interest before purchasing a deed. This allowed many opportunities for the fraudulent creation and suppression of title deeds. Essentially the deeds system did not guarantee a secure title and proved to be neither cheap, fast nor efficient[7].

The central theme of the Torrens system is that land dealings must be recorded in a register which can be inspected by

anyone to satisfy themselves of the title, interest and encumbrances to the land. The register is meant to be the mirror of the title deeds, containing all the information one needs to know on a particular piece of land[8]. No dealing in land under this system is recognised as valid unless and until registered. This does not however, affect the contractual obligations between the parties to a transaction involving land[9].

Section 340 of the NLC is the section which confers indefeasibility of title or interest on a *bona fide* purchaser for valuable consideration. Though it is true that once registered the title becomes indefeasible, there are very clear exceptions provided for under the NLC. Therefore it would be misleading to say that the 'register is everything'.

SECTION 340

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

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

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

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-s (2):

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested;

Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or any person or body claiming through or under such a purchaser.

(4) Nothing in this section shall prejudice or prevent

(a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or

(b) the determination of any title or interest by operation of law.

THE EXCEPTIONS TO INDEFEASIBILITY

I Fraud & Misrepresentation: Section 340(2)(A)

The Malaysian Courts have adopted the definition of fraud *in Assets Company Ltd v Mere Roihi*[10] and *Waimiha Sawmilling Company Ltd v Waione Timber Company Ltd*[11].

In *Assets Company v Mere Roihi*[12], Lord Lindley defined fraud as meaning:

> ...actual fraud, ie dishonesty of some sort, not what is called constructive or equitable fraud...the mere fact that he might have found out fraud if he had been more vigilant and had he made more enquiries which he omitted to make, does not of itself prove fraud on his part; but if shown that his suspicions were aroused, and he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him.

And in Waimiha Sawmilling[13], Lord Buckmaster held:

> (if) the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear... (and) the act must be dishonest, and dishonesty must not be assumed solely by reason of knowledge of an unregistered interest.

One of the earliest cases in Malaysia which adopted the definition pursuant to s 42 of the Federated Malay States Land Code (FMSLC) is *Tueh Guat Choo v Cheah Ah Hoe*[14]. Section 42 of the FMSLC is the precursor to s 340 of the NLC which housed the Torrens doctrine of indefeasibility[15].

The Federal Court in *Krishnadas a/l Achutan Nair v Maniyam a/l Samykano*[16] held:

> In our judgment, the difference in language between the two sections -- s 42 of the Land Code and s 340 of the Code -- does not result in any difference in meaning and consequence. It follows that cases that have interpreted s 42 of the Land Code may safely be relied upon when construing s 340 of the Code[17].

In *Tueh*'s case the plaintiff, P, bought a piece of land but registered it in the name of her son, the first defendant, D1. P filed a caveat which lapsed and D1 charged the land to D2. P contended that in making the charge, D1 and D2 acted fraudulently and in collusion with intent to deprive her of her property.

Gerahty J found that D2 was aware that P was claiming the property, that P had lodged a caveat and that it was removed. However, the learned judge went on to hold that mere knowledge of an unregistered interest was not sufficient to constitute fraud in P's case, citing Lord Buckmaster in *Waimiha Sawmilling*[18]:

> Dishonesty must not be assumed solely by reason of knowledge of an unregistered interest.

Much later in 1983, the Federal Court in *Tai Lee Finance*[19] followed Tueh Guat Choo and applied the definitions of

fraud as stated in Mere Roihi and *Waimaha*. In *Tai Lee*'s case the crux of the appellants' contention was that the respondents failed or omitted to make proper enquiries,

> both as regards to the land and the building erected thereon... if proper enquiries had been made the appellant would have discovered that the chargor had entered into sale agreements with them[20].

The Federal Court again distinguished[21] the cases of PJTV Denson[22] and *Public Finance v Nayaranasamy*[23] and held that the respondents must be guilty of actual fraud not constructive or equitable fraud.

Mere Knowledge or Something More?

The law seems to be that mere knowledge of an unregistered interest is insufficient to constitute fraud and there is no duty to make further enquiries, as held by the Supreme Court in *Lian Keow Sdn Bhd (in liquidation) v Overseas Credit Finance (M) Sdn Bhd*[24] per Syed Agil Barakbah SCJ:

> Fraud under the Code means actual and not constructive or equitable fraud. Actual fraud must be proved in order to deprive a purchaser for value of the absolute title conferred by the Code. Actual fraud means dishonesty of some sort proved against the person whose registered title is impeached or *his agents*. Bona fide mistake or negligence is not fraud and each case must depend on its own particular circumstances. The equitable doctrine of constructive fraud has no application under the provisions of the Code.

Therefore, it is clear that if actual fraud or misrepresentation is proved against the registered title holder or his agent, that title is defeasible under s 340(2)(a).

However, since the Federal Court case of *Doshi v Yeoh Tiong Lay*[25], there has been much confusion in this area on whether the knowledge or actions of the agent affect the title of the principal. The brief facts of the case are that:

> Doshi obtained a loan from Chooi Mun Sou (CMS). As collateral, he deposited with CMS the title with blank transfer forms executed by him. Doshi defaulted in repaying the loan and interest. CMS transferred the title to EM Sdn Bhd. EM sold the land to YTL. YTL brought an action against Doshi for vacant possession. CMS and wife were sole directors and shareholders of EM. CMS was also the solicitor for YTL in the transaction. Doshi alleged that the loan agreement between him and CMS was in contravention of the Moneylenders Ordinance and was illegal, and that the attestation clause was false. He contended that CMS had knowledge of the illegality and fraud. Therefore that knowledge should be imputed to YTL.

The Federal Court, per Gill CJ at p 88, held:

Now the general rule is that the knowledge of the solicitor is the knowledge of the client... There is, however, an important exception to the above rule in cases of fraud, which is stated in *Halsbury's a*s follows:

> 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.

> It is thus clear that the solicitor's knowledge of fraud cannot be imputed to the agent. 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.

That exception quoted by Gill CJ in the opinion of the writer will only apply in circumstances where the fraud is committed by the agent *against the principal*[26].

In *Abu Bakar Ismail v Ismail bin Husin*[27], Raus JCA held that:

> *Doshi*'s case cannot be relied upon in interpreting s 340(2) of the Code.

Sri Ram JCA distinguished Doshi by holding that:

> 'Doshi's was not a case concerning an impeachment of title under s 340(2)(a) of 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 ...

Sri Ram JCA goes on to quote the above passage from Gill CJ's judgment in *Doshi* and highlights the following to make the point:

> It is thus clear that the solicitor's knowledge of fraud cannot be imputed to the agent. 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* as per Gill CJ at p 88.

The learned judge quite rightly pointed out that Gill CJ was considering the common law position of fraud in entering into an agreement to purchase land and not the registration of that land under the NLC. On that basis the Court of Appeal did not follow Doshi in interpreting s 340(2)(a) of the NLC.

Knowledge and Acts of Agents: The Position at Common Law

The locus classicus is found in House of Lords decision of *Lloyd v Grace Smith & Co*[28] where Lord Halsbury states:

> Holt CJ was of the opinion that the principal was accountable for the deceit of his agent, though not criminaliter but civiliter, for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in a deceiver should be a loser than a stranger ... I should be very sorry to see a principle which appears to me of so great value shaken by any authority.

It is trite law that the principal is liable under civil law for the actions of its agent including for the fraud and/or deceit committed against a third party.

Knowledge And Acts Of Agents: The Position Under The Code

In the Singapore case of *UOA Finance v Victor Sakayamary*[29], on a similar section to our s 340(2)(a), GP Selvam J categorically rejected the application of the principles applied in Doshi's case in the context of a specific statutory provision:

> The rule enunciated in Halsbury's as applied in *Doshi*, in my view, does not apply in the context of s 38(2)(a) of the (Land Titles) 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 the proprietor or his agent was a party or in which he or his agent colluded...

The learned judge goes on to explain the rationale for this rule, which clearly shows that the law cannot be otherwise:

> 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 had 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 agent's acts and knowledge. It would be an affront 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 Court of Appeal in *Abu Bakar bin Ismail*[30], after quoting the above two paragraphs from the judgment of GP Selvam J, held at p113:

> Hence ... having regard to the express wording of s 340(2)(a) of the Code...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 ... 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 plaintiff.

The law in this area is clear. We have a specific statutory provision which must be interpreted based on the express words of the NLC. The NLC makes the title defeasible if one's agent was party or privy to the fraud. Therefore there is no need to prove that the principal knew of the acts of his agent or had the knowledge his agent had to render the title defeasible under s 340(2)(a) of the NLC.

II Forgery, Insufficient Or Void Instrument: Section 340(2)(B)

In *M&J Frozen Food Sdn Bhd v Siland Sdn Bhd*[31], the Supreme Court held per Wan Yahya SCJ, that where the vendor's title is good but the instrument that was used by a purchaser for registration is void or voidable, the effect on such registration will only confer on the person in whose name the land is registered, what is usually referred to as deferred indefeasibility[32]. Under this principle, the registration of the insufficient and void instrument can be set aside:

In *OCBC Bank v Pendaftar Hakmilik, Johor*[33], the Court of Appeal held:

> Under s 340(2)(b), the registered title of the proprietor or registered charge or lease holder (such as the chargee or lessee) becomes defeasible where the registration was obtained by forgery.... In s 340(2)(b) there is no similar limitation as in s 340(2)(a) for the

> immediate proprietor, chargee or lessee to be party or privy to the 'forgery' before the registered title or interest becomes defeasible.... In this country, under the provisions of s 340(2)(b), the very fact of forgery suffices to make a registered title or interest defeasible irrespective of the absence of knowledge or implication of the immediate proprietor, chargee or lessee.

It is clear that under the NLC ss 340(2)(a) and (b) are distinct heads. Under s 340(2)(a), there is a clear limitation requiring the registered proprietor or its agent to be party or privy to the fraud or misrepresentation. Whereas, under s 340(2)(b), all that is needed to be proven is that the registration was obtained by forgery or an insufficient or void instrument. It is irrelevant whether the immediate registered proprietor was a party or privy to the forgery or a *bona fide* purchaser for good value.

III Bona Fide Purchaser: Section 340(3)

In *Adorna Properties v Boonsom Boonyanit*[34], the brief facts were that someone forged BB's signature and transferred the subject land to AP. AP had no knowledge of the forgery and had no reason to suspect that the instrument was forged. It was not disputed that the sale was done at arms' length with each party being represented by different solicitors.

The High Court found in favour of AP, as they came within the proviso to s 340(3). The Court of Appeal reversed the High Court and held that the title was defeasible under sub-s 340(2) and that the proviso under sub-s 340(3) had no application. The Federal Court agreed with the High Court and held that the proviso under sub-s 340(3) was applicable and conferred indefeasibility on AP.

The basis of the Federal Court's decision is found at p 244:

> We are aware that any sovereign country may adopt and apply the Torrens system, but in adopting the system, it may modify the system to suit its own needs. Our Parliament did not slavishly follow the wordings ... . We would therefore proceed to interpret s 340 of the NLC as it stands, and find what the real intention of Parliament was when enacting it, for the object of interpretation is to discover the intention of Parliament, and the intention of Parliament must be deduced from the language it used.

In commenting on the Federal Court's reasoning, Associate Professor Teo Keang Sood[35] had this to say:

> Unfortunately, in deducing the intention of Parliament, their Lordships ... lacked clarity in their reasoning ... . In fact, the proviso to s 340(3) was misconstrued. Their Lordships dealt with s 340 in the following manner.
>
> The effect of s 340(1) is to confer on a registered proprietor an indefeasible title or interest so long as his name is on the land register unless the title or interest was obtained in the circumstances set out in sub-s (2) and (3) to section 340. One of the circumstances in s 340(2) which renders a title or interest of a registered proprietor defeasible is where the registration has been obtained by forgery. Such a defeasible title or interest if acquired by and transferred to a subsequent registered proprietor is liable to be set aside as provided in s 340(3). However there is a proviso to sub-s (3).

Their Lordships explained the effect of the proviso as follows:

> the proviso states that any purchaser in good faith and for valuable consideration... is excluded from the application of the substantive provision of sub-s (3). For this category of registered proprietor, they obtained immediate indefeasibility notwithstanding that they acquired their titles under a forged document.

Associate Professor Teo makes six succinct points, summarised as follows:

(i) There is no quarrel with their Lordships' interpretation of s 340(1).
(ii) Having said that the effect of s 340(2) has the effect of rendering a registered title or interest defeasible in the circumstances specified therein, their Lordships should have stated further that in the case of forgery, the registered title or interest will remain defeasible notwithstanding that the registered proprietor was not a party or privy to the forgery. In other words, even if the registered proprietor acted in good faith and provided good value for the title or interest and was not either himself or by his agent a party or privy to the forgery, his title or interest remained defeasible.
(iii) Given that in *Boonsom*, the person who committed the forgery did not register the lands in her own name but sold them straight to the appellant, the latter was the immediate purchaser from the respondent. In other words, the appellant was the purchaser immediate to the forgery. That being the case, the appellant came within s 340(2)(b) and its title should be rendered defeasible. It matters not that the appellant was a purchaser in good faith for value. The appellant accordingly did not come within s 340(3).
(iv) It is important to note that s 340(3) does not apply until and unless a registered title/interest is found to be defeasible under s 340(2). Even then, it will apply only to a purchaser who subsequently buys from a registered proprietor whose title or interest is defeasible under s 340(2). Even then, as provided for in s 340(3), the title or interest of that subsequent purchaser is liable to be set aside unless such purchaser or anyone claiming through him comes within the proviso to s 340(3).
(v) Any title or interest rendered defeasible under s 340(2) can operate as the root of a good title in favour of a subsequent purchaser who comes within the proviso to s 340(3).
(vi) On the facts of *Boonsom* there was no room for s 340(3) to operate as there was no such subsequent purchaser involved. The title or interest of the appellant would be rendered defeasible under s 340(2).

The law as laid out in statute is clear and does not lend itself to the interpretations made by their Lordships in Boonsom's case.

CASE LAW POST-BOONSOM

The following cases were decided after *Boonsom Boonyanit:*

(i) *Subramaniam a/l NS Dhurai v Sandrakasan a/l Retnasamy & Ors*[36] -- Court of Appeal.
(ii) *Elizabeth Chew v Leong Fook Ngen*[37] -- High Court, common law position.
(iii) *Rokiah Hassan v Wan Zulkifli*[38] -- High Court.
(iv) *Abu Bakar bin Ismail & Anor v Ismail bin Husin & Ors and other appeals*[39] -- Court of Appeal, Federal Court (leave dismissed).
(v) *Au Meng Nam & Anor v Ung Yak Chew & Ors*[40] -- Court of Appeal.

In *Subramaniam v Sandrakasan*[41], Sri Ram & Ahmad Fairuz JJCA, held that Boonsom Boonyanit was decided per incuriam for three reasons.

Firstly, the Federal Court had failed to consider the decision of the Supreme Court in M&J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor[42].

In M&J Frozen, the Supreme Court per Wan Yahya SCJ, held that:

> A purchaser of land may fail to obtain good title in two distinct ways. *First*, if the title of the vendor is bad. *Secondly*, even if the vendor has good title, there might be some invalidating defects in conveyance or transactions in which the purchaser attempted to obtain title... *In the case of a defect in the vendor's title, the common law rule is that no person can give better title than he had -- nemo dat quod non habet. There are however, important exceptions to this rule, in particular the qualification made under the proviso to s 340(3) of the NLC where a bonafide purchaser for value without notice of the defeasible nature of the vendor's title acquires an immediate indefeasible title. In the case where the vendor's title is good but the instrument that was used by a purchaser for registration is void or voidable, the effect on such registration will only confer on the person in whose name the land is registered, what is usually referred to as deferred indefeasibility -- see Gibbs v Menser. Under this principle, the registration of the insufficient and void instrument can be set aside.*

Secondly, the Federal Court did not consider the distinctive use of the words 'proprietor' and 'purchaser' in s 340 of the NLC.

Thirdly, the different statutory definitions of 'purchaser' and 'proprietor' under s 5 of the NLC were also not considered.

In *Abu Bakar Ismail v Ismail bin Husin*[43], the Court of Appeal confirmed its previous decisions and the earlier three reasons in *Subramaniam v Sandrakasan*, and added *a fourth reason* that Boonsom must be taken to have been decided p*er incuriam.*

The Court of Appeal noted that s 340(3) in paras (a) and (b) employs the word '*subsequently*', meaning that if a registered proprietor gets on the register by any of the means set out in s 340(2), and if the registered proprietor, to use the expression housed in the Code -- *subsequently* -- transfers the land to another, the title of that other is also defeasible unless that person is a purchaser in good faith for valuable consideration.

It is clear that s 340(3) does not apply to s 340(2). The proviso states 'Provided that nothing in *this subsection*...' and this subsection refers to the sub-s 3 of s 340.

In *Au Meng Nam v Ung Yak Chew*[44], the Court of Appeal again confirmed the above reasons and added a fifth reason, that is, the Court in *Boonsom* had failed to take into account the Federal Court decision of *Mohammad Buyong v Pemungut Hasil Tanah Gombak*[45] where the Federal Court held:

> What the appellant is claiming is in fact the protection of s 340 NLC. The doctrine carried in s 340 is the doctrine of indefeasibility. What that section protects is that the title or interest of any person for the time being registered as proprietor of any land shall be indefeasible. Sub-section (2) of the section provides for the exceptions in that the title or interest shall not be indefeasible in any case of fraud or misrepresentation or where registration was obtained by forgery or by means of an insufficient or void instrument or where the title or interest was unlawfully acquired. T*his provision deals with what is called 'deferred indefeasibility*' about which we are not presently concerned.

Raus and Hassan Lah JJCA also categorically and rightly stated that:

> The Federal Court should review its decision in *Boonsom*. By virtue of s 340(2)(b), the title of *Adorna Properties* was not indefeasible as the registration was obtained by forgery[46].

It cannot be more clearly stated by lawyers[47], academicians, judges both on the bench and those retired and the Bar Council that *Boonsom Boonyanit* was wrongly decided by the Federal Court.

It has been argued by some that based on the principle of stare decisis the courts should continue to apply this wrongly decided interpretation of s 340 of the NLC to all subsequent cases. For a clear understanding of the application and

exceptions to the application of the doctrine of stare decisis, refer to the judgment of Gopal Sri Ram JCA in *Au Meng Nam v Ung Yak Chew*[48].

Burden on the Bona Fide Purchaser

What then is the burden cast upon a purchaser to come within the protection of the proviso to s 340(3)?

In *Abu Bakar bin Ismail & Anor v Ismail bin Husin & Ors and other appeals*[49] the court held:

> [T]he proof that one is a purchaser in good faith for valuable consideration lies on the person asserting it.

In A*u Meng Nam v Ung Yak Chew*[50], it was held:

> [S]ince the first defendant was relying on the proviso of s 340(3) of the Code, that he was a bona fide purchaser for valuable consideration, the evidential burden falls on him. There is no duty on the plaintiff to prove that the first defendant was a party or privy to the fraud ...

The recent Court of Appeal decision in Au Meng Nam makes it very clear that a person claiming that a title is defeasible would have to discharge the burden of proving fraud or misrepresentation or forgery. Once that is done, the burden shifts to the party claiming indefeasibility to prove that he/she is a bona fide purchaser for good value.

A NEW DEVELOPMENT

In *Au Meng Nam v Ung Yak Chew*[51], Raus JCA held:

> To the learned judge, the first defendant was a bona fide purchaser and had given valuable consideration because of the existence of a sale and purchase agreement and the purchase price had been paid in full. *An existence of a sale and purchase agreement and the payment of the purchase price in full cannot be the only indicator to show whether a person is a bona fide purchaser or otherwise. Other salient features surrounding the sale and purchase agreement must be considered.*

In this transaction:

(1) Completion date of SPA nine months after signing.
(2) Purchase price RM400,000, 80% paid on date of signing, balance paid three months after date of signing.
(3) Three months after purchase, first defendant attempted to sell said land for RM1.2m.
(4) Vendors only possessed temporary ICs.
(5) No queries or searches made

After considering the above facts, Raus JCA held:

> Taking the above facts and circumstances into consideration the learned judge cannot possibly conclude that the first defendant was a bona fide purchaser for valuable consideration so as to be protected under s 340(3) of the Code... A reasonable inference would be that the first defendant knew that at the time he bought the said land, the purchase price was below the market value. But he wanted to take advantage of the low price. He did a fast track to complete the purchase. In doing so, he disregarded his obligations to investigate the alleged proprietors and genuineness of the documents... *A purchaser in good faith does not include a purchaser who is careless or who had been negligent.*

This would seem to impose a wider duty upon a bona fide purchaser for valuable consideration in order to receive protection under the proviso to s 40(3). In other words, a subsequent purchaser who is not tainted by the fraud or forgery would not be deemed a bona fide purchaser for good value if he was negligent or careless.

It is understandable why Raus and Hasan Lah JJCA may have taken this course. They were trying to find another way to give relief without going against the decision in Boonsom.

However, interpreting the proviso in this manner may lead to uncertainty.

Exactly what must a purchaser do to receive the protection under s 340(3)? How careful must a purchaser be? What searches must be done? If it is a good deal, must a purchaser wait to pay the balance purchase price? Will a purchaser who attempts to sell the property he bought at a higher price lose the protection? It may be a question of degrees.

As Ahmad Moosdeen points out:

> ... the more the qualifications, the more they undermine the aim of the system which is to give certainty to the register as correctly setting out all , and the only, legally recognised dealings concerning the land[52]

On the other hand, it gives the courts enough room to maneuver in instances that seem unjust, to protect innocent proprietors from losing their land due to fraudulent transactions[53].

The writer would advocate another approach, that is, to apply the rationale as stated by *Lord Lindley in Assets Co v Mere Roih*i[54], which would bring the facts in Au Meng Nam within the definition of fraud under s 340(2)(a):

> The mere fact that he might have found out fraud if he had been more vigilant and made further enquiries which he omitted to make does not of itself prove fraud on his part. *But if it be shown that his suspicions were aroused and that he abstained from making enquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him.*

The facts in Au Meng Nam, by an objective standard would surely arouse the suspicion of any reasonable man. The purchaser refused to make enquiries like the relevant searches and getting proper identification documents from the vendors. The purchaser's lawyers even testified that they could not do the relevant searches because the purchaser insisted on concluding the transaction on the same day[55]. If fraud under s 340(2)(a) could have been properly ascribed to him, then he would come within that subsection which would render his title defeasible.

Section 340(3) would not apply and even if it did, he could not be termed a bona fide purchaser as he was party or privy to the fraud as interpreted by Lord Lindley which has been adopted over and over again by our Federal Court.

CONCLUSION

It is clear that the decision and reasoning in *Adorna Properties v Boonsom Boonyanit* is wrong. Subsequent decisions in

the High Court and the Court of Appeal have decided so and then went on to find ways to distinguish it.

The Bar Council has come up with a memorandum which was handed over to the Minister of Law proposing an amendment to this section of the NLC -- the writer is not in favour of the proposed amendment as the law as stated in s 340 of the NLC is clear and needs no amendment.

We cannot be redrafting legislation each time a decision of the Federal Court is not in accordance to statute and its previous decision. The better solution would be for the Federal Court to review its previous decision in *Adorna Properties v Boonsom Boonyanit* sitting in a quorum of five or more judges[56] as it has recently done in the case of *Joceline Tan Poh Choo & Ors v V Muthusamy*[57].

1 *Adorna Properties v Boonsom Boonyanit* [2001] 1 MLJ 241.

2 *Au Meng Nam & Anor v Ung Yak Chew* . A former judge of the Court of Appeal also had this to say about the case, 'The Federal Court's decision in *Adorna Properties v Boonsom Boonyanit* is an infamous example of an unjust judge who had refused to decide the case on the statute as it stands. Instead he went on to make his own decision on s 340 of the National Land Code 1965 by ignoring the true meaning of the words in the statute' Chan NH *Judging the Judges* (2007), Kuala Lumpur, Alpha Sigma Sdn Bhd, at p vii.

3 This paper was delivered at a Seminar organised by the Kuala Lumpur Bar Committee on the 12 September 2007 at the Kuala Lumpur Bar Auditorium.

4 However for a general understanding of the effect of this subsection refer to the article written by Yong Chui Mei [2006] 3 MLJ lxxvi and the decision of the *Federal Court in Krishnadas v Maniyam* [1997] 1 MLJ 94.

5 Teo KS & Khaw LT, *Land Law in Malaysia* (1995) 2nd Ed, Butterworths, at p 7.

6 Named after Sir Robert Torrens, Collector of Customs at Port Adelaide, Australia.

7 Ricquier WJM Land Law (1995) 2nd Ed, Singapore, Butterworths Asia, at p 96.

8 Which could only be discovered in the 'deeds system' by a long drawn out enquiry.

9 Section 206(3) of the National Land Code 1965.

10 [1905] AC 176.

11 [1926] AC 101.

12 At p 210.

13 *Waimiha Sawmilling Company Ltd v Waione Timber Company Ltd* [1926] AC 101 at p 106, 107.

14 [1932] 1 MLJ 109.

15 *Krishnadas a/l Achutan Nair v Maniyam a/l Samykano* [1997] 1 MLJ 94. There is no difference in principle between s 42 of the FMSLC and the present s 340 of the National Land Code. Also stated by the Court of Appeal in *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62 and the Federal Court in *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81.

16 *Krishnadas a/l Achutan Nair v Maniyam a/l Samykano* [1997] 1 MLJ 94.

17 *Krishnadas a/l Achutan Nair v Maniyam a/l Samykano* .

18 *Waimiha Sawmilling Company Ltd v Waione Timber Company Ltd* [1926] AC 101.

19 *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81.

20 *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* .

21 The Federal Court distinguished this case from PJTV by holding that 'fraud was brought home to the persons whose title was impeached' and that Public Finance 'was a case where a transferee in collusion with the transferor acted to disregard unregistered (and imperfected by caveat) interest of third parties'.

22 *PJTV Denson(M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136.

23 *Public Finance Bhd v Narayanasamy* [1971] 2 MLJ 32.

24 .

25 [1975] 1 MLJ 85.

26 Halsbury's Laws of England 4th Ed Vol 1(2) p 105 para 150

27 .

28 [1912] AC 716.

29 .

30 [2007] 3 CLJ 97.

31 [1994] 1 MLJ 294.

32 See *Gibbs v Messer* [1891] AC 248.

33 .

34 [2001] 1 MLJ 241.

35 Teo Keang Sood, 'Demise of Deferred Indefeasibility under the Malaysian Torrens System?' (Oct/Nov/Dec 2004) Infoline, p 41.

36 [2005] 6 MLJ 120.

37 [2001] 6 MLJ 403.

38 [2004] 1 CLJ 334.

39 [2007] 4 MLJ 489.

40 [2007] 5 MLJ 136.

41 [2005]3 CLJ 539 at 547

42 [1994] 1 MLJ 294.

43 .

44 [2007] 5 MLJ 136.

45 .

46 *Au Meng Nam v Ung Yak Chew* .

47 Yang Pei Keng 'Immediate Indefeasibility or Deferred Indefeasibility' INSAF [2001] No 3 XXXI, PK Nathan 'Nightmare for Registered Owners of Landed Property' [2002] 4 CLJ xiii, Ahmad Moosdeen 'On the Proviso in s 340(3) of the National Land Code 1965' [2002] 2 MLJ lxvi.

48 [2007] 5 MLJ 136. Lord Gardiner, Lord Chancellor of England issued a Practice Statement stating that there was a need to break away from a previous decision when it is right to do so -- '*Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what the law is and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules. Their Lordships nevertheless recognise that too*

rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so' Practice Statement (Judicial Precedent) [1966] 1 WLR 1234. Lord Denning also warns us of too rigid an application of the doctrine of stare decisis '*Let it not be thought from this discourse that I am against the doctrine of precedent. I am not. All that I am against is its too rigid application -- a rigidity which insists that a bad precedent must necessarily be followed. I would treat it as you would a path through the woods. You must follow it certainly so as to reach your end. But you must not let the path become too overgrown. You must cut the dead wood and trim the side branches; else you will find yourself lost in the thickets and brambles. My plea is simply to keep the path of justice clear of obstructions which would impede it*' Lord Denning, The Discipline of Law, Butterworths, 1993 at p 315.

49 Court of Appeal .

50 .

51 Court of Appeal .

52 Ahmad Moosdeen 'On the proviso in s 340(3) of the National Land Code 1965' [2002] 2 MLJ pp lxvi and lxvii .

53 Examples of fraudulent transactions can be found in cases like Tai Lee *Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81 and *Public Finance Bhd v Narayanasamy* [1971] 2 MLJ 32.

54 [1905] AC 176 at p 210.

55 *Au Meng Nam & Anor v Ung Yak Chew & Ors* .

56 The Federal Court recently on 14 September 2007 in the case of *Joceline Tan Poh Choo & Ors v V Muthusamy* [2007] 6 MLJ 485 sat as a five-man panel reviewed its earlier decision and set it aside, ordering that the appeal to be re heard.

57 *Joceline Tan Poh Choo & Ors v V Muthusam*y [2007] 6 MLJ 485.