

He-Con Sdn Bhd v Bulyah Ishak & Anor and Another Appeal [2020] 7 CLJ 271

A Much-Welcomed Decision by the Federal Court

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Section 5 of the National Land Code 1965 defines “purchaser” as a “**person**” or “**body**”, who in good faith and for valuable consideration, “**acquires title to or any interest**” in land.

A registered charge by a bank, is one of the many examples of an interest in land.

Going by the definition in the National Land Code 1965, “a person who acquires a title becomes a purchaser”. Likewise, a body — such as a bank, that acquires an interest through a registered charge — also becomes a purchaser.

The issue that calls for determination is whether a person or body is an immediate purchaser or a subsequent purchaser.

This determination is important because fraudulent transfers and creation of charges are liable to be set aside if done by an immediate purchaser (under section 340(2) of the National Land Code 1965), whereas subsequent transfers done in good faith and for valuable consideration can be saved if done by a subsequent purchaser (under the *proviso* to section 340(3) of the National Land Code 1965).

In the recent decision of *He-Con Sdn Bhd v Bulyah Ishak & Anor and Another Appeal* [2020] 7 CLJ 271, the Federal Court said:

"[96] In the final analysis, we are left with the following scenario. The first defendant, having been rendered a bare trustee for the deceased, had no interest whatsoever in the said property. The fourth defendant had a registered interest in the charge that was defeasible, as it was obtained from the first defendant via a void instrument ...

[99] The result is that the interest, albeit registered, of the fourth defendant bank, in relation to the charge is not indefeasible. The fourth defendant could not avail itself to the proviso to s. 340(3) of NLC because it was not a subsequent purchaser. Being an immediate purchaser, the fact that the fourth defendant might be, for all intents and purposes, a bona fide purchaser for value without notice, would not amount for much, or at all.

[101] As such, we agree with the COA that the fourth defendant was an immediate purchaser and was therefore not protected under the proviso to s. 340(3) of NLC. Its registered charge over the said property is not entitled to the protection of the shield of indefeasibility ...

[102] ... Any direct dealing with a rogue will necessarily vitiate the transaction rendering it defeasible, although it is duly registered.

[110] ... As is clear to us, the paramount issue in this appeal is whether the fourth defendant was an immediate or a subsequent purchaser. The relevance of its fides depends upon that determination. On the evidence, there is no subsequent purchaser in this appeal now before us, and at the risk of being repetitive, the fourth defendant is not a subsequent purchaser."

Essentially it is this:

If a person or body not legally having any title or interest in land, somehow through unlawful means have their name on the title, and that person or body then creates a charge with a bank, both the title and the charge will now be set aside, even though the bank is an innocent party. This is because the bank is, in law, an immediate purchaser. Whether the bank is innocent or not, it does not matter. Being an immediate purchaser, the charge is liable to be set aside under section 340(2) of the National Land Code 1965.

This is a very much welcomed decision for innocent legal landowners who find themselves in the midst of some fraudulent dealing by some fraudsters meddling with their property and suddenly having a charge on it.

Prior to this decision of the Federal Court in *He-Con*, the banks could rely on the *proviso* to section 340(3) of the National Land Code and the charge would stand, even if the innocent legal landowners did not create one.

There is, however, one observation, if I may be allowed to make.

In the Court of Appeal case of *OCBC Bank (M) Bhd v Pendaftar Hakmilik, Negeri Johor Darul Takzim* [1999] 2 MLJ 511, NH Chan JCA held at page 521 para C, that:

“So that, since a forged instrument (such as a forged transfer) is a nullity, it does not confer any right or title to the land. A person who has no right or title to the land has no right to charge it because the land is not his, in the first place, for him to grant any interest (like a charge or a lease) in the land to someone else (such as a charge or a lessee).”

It would seem that way back in 1999, NH Chan JCA had pronounced the correct principle, which we can see now, and this principle was also pronounced by the Federal Court in the *He-Con* case.

However, in 2010, the Federal Court in *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1, said this:

“[26] NH Chan JCA in delivering the judgment of the Court of Appeal was of the opinion that the proviso to s340(3) of the NLC applies exclusively to those situations which are covered by sub-s(3). The court then went on to hold that the charge granted by Ng See Chow to the appellant was liable to be set aside by the true owner since the title was obtained by forgery. On the facts of that case, we agree that the title of Ng See Chow is defeasible under s340(2) of the NLC as he obtained his title through a forged instrument. However, we are of the opinion that the appellant bank, being the holder of subsequent interest in the land is protected by the proviso to S340(3) of the NLC. For that reason we are of the view that the finding of the Court of Appeal in that case is to that extent flawed.”

So why did the Federal Court in *Tan Ying Hong* comment this: “...However, we are of the opinion that the appellant bank, being the holder of subsequent interest in the land is protected by the *proviso* to S340(3) of the NLC”?

Whatever may be the reason, it would have been nice if the Federal Court in the *He-Con* case had made reference to this issue and stated that the principle set forth by NH Chan JCA in the *OCBC Bank* case is applicable and that the remarks made by the Federal Court at paragraph 26 in the *Tan Yin Hong* case, is no longer applicable.