

Recent Federal Court's Decision on section 340 of the National Land Code 1965: *Tan Ying Hong v Tan Sian San & Ors* – Are Landowners and Banks Secured?

by Andrew Wong Fook Hin¹

1 Deferred Indefeasibility finally restored

After nearly 10 years, deferred indefeasibility under Malaysian Torrens System was finally restored by the Federal Court in its recent decision in *Tan Ying Hong v Tan Sian San & Ors*.²

Lee Hun Hoe CJ (Borneo) had described the protection conferred on a registered proprietor by section 340 National Land Code ("NLC") as "the centrepiece of the National Land Code".³

Since the Federal Court decision in *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng*⁴ in 2001, which was said by many, to have placed landowners on thin ice and in jeopardy, two limbs of this centrepiece have created havoc in the Malaysian law of real property.

2 *Tan Ying Hong* made an immediate impact

On 22 Feb 2010, the *Sun* reported that the High Court in Shah Alam returned to a 71-year old retiree his land in Hulu Langat which was stolen from him "through the hands of government officers and individuals".

The newspaper also reported that "This is the first case to find in favour of land theft victims since the Federal Court last month reviewed its *Adorna Properties* decision".

In that case the true landowners were two brothers who inherited the land from their

father. The land was "transferred" to a limited company (Propaxis). Identity cards of the two brothers were forged and they were made directors of Propaxis through forged signatures. Records showed they later "resigned" as directors.

The transfer deed from the two brothers to Propaxis was attested by an "advocate & solicitor" who was not on the Roll of Advocates and Solicitors. The scheme involved the transfer of shares in Propaxis. The same rogues were involved in a similar land theft of a neighbouring piece of land.

It was reported that the High Court ordered that the land be returned to the two brothers.

3 Legal effect of *Tan Ying Hong*

Tan Ying Hong has made clear the statutory exceptions to indefeasibility set out in section 340(2) NLC. Basically, if a person gets his title or interest registered on the document of title and registration was obtained, *inter alia*, by fraud or misrepresentation to which the person or his agent was a party or privy or by forgery or by means of an insufficient or void instrument, then that person's title or interest shall not be indefeasible.

However the protection conferred by section 340(2) NLC requires the true owner to act quickly to attack the indefeasibility before that person uses his title as a good root to pass an indefeasible title to a third party. Time is of the essence.

4 So, are landowners and banks secured after *Tan Ying Hong*?

Fraudulent schemes have become more and more sophisticated and complex as shown in the case of the retiree from Hulu Langat.

In *Tan Ying Hong*, the Chief Justice referred to the first owner as "A" who then transfers the same piece of land to "B" and which subsequently is transferred to "C".

Forgers today have already begun a *modus operandi* of transferring land from A to B and then immediately from B to C, presumably C to seek protection under the proviso to section 340(3) NLC.

Fraud and forgery will continue, whether indefeasibility is immediate or deferred. Landowners and banks cannot be regarded as secured unless additional steps or measures are taken by all parties involved in land administration and transactions.

5 Additional steps and measures

We need to carefully examine in detail and consider the type of documents or instruments used to perpetuate the fraud or forgery and the individuals involved.

Forgery involves fraud but fraud does not always involve forgery.

For example, in *Owe Then Kooi v Au Thiam Seng & Anor*⁵ the plaintiff was in prison and he thought he signed some papers to make his half brother hold his 1/7th share

There was no application for a duplicate title on the ground that the original title had been lost.

Both vendors possessed only temporary identity cards, and were not represented by a solicitor in the transaction. Their signatures on the instrument of transfer were attested by an advocate & solicitor.

Case study No 6

In *Ahmad Md Daud & Anor v Che Yah Man*¹⁰ a forged court order was used to effect the transfer of land.

6 Common factors

Nearly all of the forgery cases above involve identity theft. The forgers assume the identity of the landowner, create fake identity cards, and forge signatures and attestations.

The target is usually vacant and idle lands. They do not involve a plot of land with a residential house or an apartment or condominium. The cases usually involve the attestation of instruments of dealings, whether by a solicitor or by the land administrator.

Other common elements involved in forgeries relates to the issue of a duplicate title; "fake" title; change of name by proprietor; alienation; power of attorneys; statutory declarations; and passports or identity cards.

7 Attestation of instruments of dealings in Malaysia

Section 211 NLC stipulates that the execution by a natural person of any instrument of dealing shall be attested by one of the officers or persons specified in the Fifth Schedule. Currently, the attestation clause is in Form 13B:

*I, ... hereby testify that the above *signature/thumb print was *written/affixed in my presence this ... day of ... 20..., and is the true *signature/thumb print of -*

... who has acknowledged to me -

- (i) that he is of full age;*
- (ii) that he is a citizen of Malaysia;*
- (iii) that he has voluntarily executed this instrument; and*

(iv) that he understands the contents and effect thereof.

As witness my hand this ...day of ... 20...

.....
Signature

It is no secret that many solicitors in Malaysia do not require the person executing an instrument of dealing to sign in his presence, even though this may make the instrument insufficient or void under section 340(2)(b) NLC.

In *Albert Chew v Hong Leong Finance Bhd*¹¹ the solicitor attested the signature of a bank's attorney on a discharge of charge. He admitted that the bank's attorney did not sign in his presence or before him. It turned out that the signature of the bank's attorney was forged. RK Nathan J said,

In other words, the advocate and solicitor had falsified the attestation. He had breached a code so fundamental to the legal profession that the excuse he gave that it was the practice of the legal firm to do as he did, makes the commission more heinous.

8 Attestation in New South Wales

The Real Property Act 1900 of New South Wales requires the person attesting¹ a signature to personally know the person signing. Under the Registrar General's Directions, a general form of attestation is:

Signed in my presence by ... (their full name) ...who is personally known to me.

If the words "who is personally known to me" are omitted or struck out, further proof of execution will be required. The witness must also clearly show his full name and his full residential or business address.

In *Graham v Hall*¹² the Court of Appeal in New South Wales held that a person who signs a document as a witness owes a duty of care to the person whose signature they witness. Mr Hall was in financial trouble and decided to mortgage the family home which he owned with his wife, without the wife's knowledge. He told the solicitor that his wife was dying and that he would take the mortgage papers home for her to

sign. Hall then forged his wife's signature and asked Graham, a Justice of Peace, to witness his wife's signature. The attestation clause stated that the mortgage was "signed in my presence by the mortgagor who is personally known to me."

Graham was made to pay the wife \$137,479.66 in damages. The Court of Appeal explained that the reason why a signature on property documents must be properly and protectively witnessed is that there is always a serious risk of loss resulting from forgery.

9 Authentication of documents in Botswana

Botswana has an Authentication of Documents Act, and the attestation clause used is:

*I, X.Y., in my capacity as [insert qualification] do certify that A.B. signed this document in my presence, and that A.B. is personally known to me (*or that C.D. and E.F., being persons known to me, have severally testified before me that the person signing this document is personally known to them as A.B.)*

Given under my hand (and seal)... at...in...on the ...day of...

(Signature)

C.D. and E.F are required to be "respectable and responsible persons", otherwise X.Y. shall refuse to attest the document.

10 Certificate of correctness in Singapore

In Singapore, the registrar may reject any instrument purporting to deal with or to affect land unless there is endorsed thereon a certificate by the parties to the instrument that it is correct for the purposes of the Land Titles Act.

Where a solicitor has been employed by a party to the instrument, the certificate shall be signed by the solicitor. The certificate shall imply representations that the instrument is made in good faith; the matters set forth therein are substantially correct; the person acquiring title accepts proprietorship and is of full age and legal capacity; or the person divesting title is entitled to divest the interest and is of full age and legal capacity.

11 Proposed measures on attestation to prevent identity fraud

An appropriate measure will be to require that a person never attest to having witnessed a signature unless he knows the person and has actually seen the person sign the document.

Alternatively, a witness to the execution of any instrument of dealing under the NLC should certify that he has known the person executing the document for more than 12 months or that he has taken reasonable steps to ensure the identity of that person.

Another measure may be to require financial institutions to take reasonable steps to confirm the identity of the borrower or the security party, and to maintain records of such steps taken for at least seven years.

Finally, any instrument of dealing under the NLC which is executed by a natural person should consist of his signing it and affixing his thumb print thereto (to include also the thumb print of the person or officer attesting the execution). Currently the use of the thumb print is an option but is not mandatory. Under section 210 NLC, the execution of any instrument of dealing by a natural person shall consist of his signing it or affixing his thumb print thereto, although section 377 NLC empowers the registrar, if he thinks it expedient, to require any person by whom any instrument has been executed to affix his thumb print thereto.

12 Application for a duplicate issue document of qualified title

Under section 187B of NLC, a proprietor or any person claiming under him, may apply for a duplicate issue document of qualified title on the grounds that his issue document of title has been lost, destroyed or is being improperly or wrongfully withheld. An application is required to be in writing and supported by evidence of the loss, destruction or the wrongful withholding.

Upon such an application, the registrar or land administrator has the power to issue a duplicate issue document of qualified title, if he is of the opinion that the register document of title to the land does not require replacement. Before issuing a duplicate issue document of qualified title, a notice is required to be published in the

Gazette. A copy of the notice is required to be served on every person having a registered interest, and to be published in accordance with section 433 NLC.

Section 433 prescribe stringent requirements on publication of such notices. A copy of the notice shall be affixed:

- in a conspicuous position on the land; and
- on the *penghulu's* office or *balai* in the area in which land is situated; and
- in that area, on such court-houses and mosques (if any) and in such markets and other public places (if any) as the director thinks fit; and
- where the state authority considers that publication of the notice in a newspaper is desirable, the notice shall be published in such newspaper circulating in the state as the director thinks fit.

13 Application for a duplicate issue document of final title

The procedure to apply for a duplicate issue document of final title, if the original has been lost, destroyed or is being improperly or wrongfully withheld, is basically the same as that which applies to a qualified title.¹³ The registrar or land administrator may, if he is of opinion that the register document of final title does not require replacement and that the final title was issued under the NLC, instead of issuing a title in continuation, issue a duplicate issue document of final title.

Similar provisions are in place regarding publication of notices in the Gazette, service and publication of the copy of such notice.

14 Lacuna in a case where original issue document of qualified title is lost and the final title for the land has been issued

Although the land administration authorities all over Peninsular Malaysia are to be commended for their speed and efficiency in issuing final titles for alienated lands, a lacuna has emerged which, if not addressed, will be taken advantage of by forgers in the waiting. This concerns a case where:

- the original issue document of qualified title has been lost; and

- an application is made for a duplicate qualified title at a time when the qualified title has been converted to a final title; and
- the original issue document of final title is still with the registrar as it has not been delivered to the proprietor.

In such cases section 187B NLC will not be complied with. Once the registrar is satisfied that the original issue document of qualified title is lost, the original issue document of final title will simply be delivered to the proprietor or the applicant, without having to go through the procedure of publication of a notice in the Gazette, serving and publication of the notice in accordance with section 433 NLC.

In *Au Meng Nam*¹⁴ the "original issue document of title" produced by the vendors to the purchaser's solicitors could well have been the original issue document of final title, since there was no application for a duplicate qualified title. What the real and original owners had in their possession all the time could have been the original issue document of qualified title, and the forgers had somehow got their hands on to the original issue document of final title in order to perpetrate the fraud on the purchaser and his solicitor.

In *AGS Harta Sdn Bhd*,¹⁵ the original issue document of title in the possession of the real Liew Yok Yin could have been the qualified title and the title in the possession of the forger could have been the original issue document of final title.

15 Proposed measures on issue of duplicate titles, qualified or final

Firstly, on receiving any application for a duplicate qualified title or final title, an enquiry ought to be held in accordance with the provisions similar to that contained in Chapter 4, sections 23 to 39 NLC. In such an enquiry, the applicant must be personally present. The registrar or the land administrator will then not just rely on a statutory declaration, which can so easily be forged.

Secondly, the discretion of the state authority in section 433(b) NLC, ie whether or not to publish a copy of the notice in a newspaper, ought to be removed and publication of a notice of intention to issue a duplicate title in a national newspaper

21 Torrens Assurance Fund

In a majority of countries that practise the Torrens system of land registration, an assurance fund is set up to compensate those whose interest are defeated or those who are deprived of their land, through no fault of their own. Usually the moneys in the fund are contributed from registration fees paid on the lodgement of instruments of dealings for registration.

Currently provisions for compensation from the State are inadequate. Under section 386 NLC, any purchaser of any alienated land who suffers loss or damage by reason of any error in, or omission from, any official search certificate applied for under section 385(1), shall be entitled to such compensation as may be agreed or determined in accordance with section 434. If the amount of compensation cannot be agreed, then it shall be determined by arbitration under the Arbitration Act 1952.

Under section 22 NLC, no officer shall be liable to be sued in any civil court for any act or matter done by him in good faith and in the intended exercise of any power or performance of any duty conferred or imposed on him under the National Land Code, and this makes a claim difficult to pursue.

It has often been said that the Torrens system works on three principles, namely the mirror principle, the curtain principle and the insurance principle. Salleh Buang in an article published in NST on 15 Oct 2008 wrote:

Sir Robert Richard Torrens, a former premier of South Australia and author of the land registration system, said "a state guarantee is an integral part of a system of registration of titles."

When Sir William Maxwell (the then British Resident in Selangor) first implemented the system in the state towards the close of 19th century without the state guarantee or the assurance fund, it was like a trainee building up something new but with an important component missing, against his instructor's advice.

It is time for us to look seriously into establishing an assurance fund to compensate victims of land scams. There are usually two victims, the innocent landowner and the innocent purchaser or the innocent bank. In *Tan Ying Hong*, the victim was the bank.

The assurance fund can also be applied for any compensation payable by the State under section 386 NLC. Whether such an assurance fund is to be administered by the Federal Government or by the state requires detailed and further consideration.

22 Title insurance

Title insurance is principally a no-fault indemnity insurance that protects against loss from problems connected to the title of a property. The insurer will defend any legal suit attacking the title or reimburse the insured for actual monetary loss incurred up to the sum insured.

Title insurance was first developed for the US market, but it is now available in many other countries such as Canada, Australia, UK, Northern Ireland, Mexico, New Zealand, China, Korea and throughout Europe.

It is suggested that our government together with the insurance industry should consider introducing title insurance to protect an owner's or a lender's financial interest in real property against loss due to title defects, liens or other matters. The bank in *Tan Ying Hong* would have benefited from such title insurance.

Title insurance is inexpensive. The premium is a one-off cost payment that protects the purchaser for the life of ownership. For example, in Victoria, Australia, a premium of \$332.75 will cover a purchase price of up to \$600,000 (approximately 0.05%).

24 Conclusion

In concluding, the additional steps and measures which are required to be taken before landowners or banks can be regarded as secured are summarised as follows:

- Much more stringent attestation clause for instrument of dealing under the National Land Code, power of attorneys and statutory declarations and requiring personal knowledge or steps to be taken to verify identity of person signing;
- Execution and attestation of an instrument by signing and affixing thumbprint of both signatory and person attesting;
- Issue document of final title not to be issued unless the issue document of qualified title has been surrendered;
- Much more stringent procedures for the issue of a duplicate issue document of title, qualified or final, or change of name of proprietor or application for alienation, perhaps only after an enquiry;
- Mechanism for verification of foreign passports;
- Setting up a Torrens Assurance Fund; and
- Introducing title insurance.

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2 [2010] 2 MLJ 1.

3 *Yap Lai Yoke v Chin Fook Wah & connected case* [1984] 2 MLJ 274.

4 [2001] 1 MLJ 241.

5 [1990] 1 MLJ 234.

6 [2001] 1 MLJ 241.

7 [1999] 2 MLJ 511.

8 [2010] 1 MLJ 309.

9 [2007] 5 MLJ 136.

10 [2009] 6 CLJ 530.

11 [2001] 4 MLJ 497; [2001] 4 CLJ 419.

12 [2006] NSWCA 208.

13 Sections 166, 168 and 175 NLC.

14 [2007] 5 MLJ 136.

15 [2010] 1 MLJ 309.

ought to be mandatory, as it is likely that landowners do not pay close attention to notices affixed on the *penghulu's* office or *balai* or court-houses or mosques or markets, if at all such notices are affixed.

Thirdly, section 187B NLC ought to be amended to provide that, if at the time of application for a duplicate qualified title:

- the qualified title has been converted into a final title; and
- the original issue document of final title is still in the possession of the Registrar;

Then the original issue document of final title should be deemed to have been lost as well, as if it is lost, the issue of a duplicate final title will have to follow the stringent procedures set out above, as if the qualified title had not been converted to a final title.

Fourthly, the provisions contained in section 192(2) NLC ought to be strictly complied with to safeguard proprietors. Where a qualified title exists in respect of the land, section 192(2) requires the registrar or land administrator to call for its production before issuing a final title. If the original qualified title is not produced, then a notice of intention to issue the final title is required to be published in the Gazette, and a copy of such notice is required to be served and published in accordance with section 433.

What is happening today is that final titles are being prepared and issued before the surrender of the qualified titles. Most proprietors are not even aware that their qualified titles have been converted to final titles unless an instrument of dealing is presented for registration, or a search on the land is conducted.

16 Security measures on computerised titles

A computerised title comes in two sheets of paper, the first sheet being the Borang 5BK or 5CK or 5DK or 5EK (final title); or Borang 11AK or 11BK (qualified title), and the second sheet being a copy of the plan of the land in Borang B1 (final title) or Borang B2 (qualified title).

The first sheet contains a barcode and a number at the bottom left hand corner. The plan on the second sheet will be

demarcated in "green" for a final title and "red" for a qualified title. Security measures on computerised titles are closely guarded secrets.

The public ought to be given sufficient information or a working knowledge to enable them to look out for security measures on computerised titles. The Registrar or Land Administrator ought to take steps to allay the public fear that due to human factors or greed, it is always possible for another copy of an original issue document of title to be printed out from the computer for improper use.

It is also suggested that when authenticating the copy of the plan in Borang B1 or B2, the Registrar or the Land Administrator should not sign in black ink, so that one can immediately differentiate an original from a photocopy.

17 Change of name of proprietor

Currently, the procedure to enable a proprietor to change his name is just too simple. Under section 378 NLC, the Registrar may, upon production of satisfactory evidence of a change of name of any person vested with any alienated land or interest, make a memorial of the change in the register document of title and in any issue document of title. Evidence can be by a deed poll, official certificate, statutory declaration or otherwise. As we have seen in many forgery cases, all these evidence can be easily forged.

There ought to be a specific form in the First Schedule to effect a change of name, with a stringent attestation clause. The person applying for a change of name should be made to appear in person before the Registrar or an enquiry under Chapter 4, sections 23 to 39 NLC, should be held, before a duplicate title can be issued to the proprietor.

18 Alienation of land by State

In *Tan Ying Hong*, it was not disputed that he did not apply for alienation of land from the state and yet the land was alienated to him. Although under section 921 NLC, the Minister may, with the approval of the National Land Council, make regulations to provide for the form and contents of any application for alienation, to the best of the writer's knowledge and information, no such regulations have been made.

Application forms for alienation of land may be found in some state land rules, but none requires a closer scrutiny of the identity of the applicant.

It is suggested that the applicant should be made to appear in person before the State or an enquiry under Chapter 4, sections 23 to 39 NLC, should be held, in any application for alienation.

19 Power of attorney and statutory declaration

Immediate steps ought to be taken to ensure that a power of attorney or a statutory declaration be properly and protectively witnessed. The form of authentication in the First Schedule of Powers of Attorney Act 1949, and attestation clause to the statutory declaration in the Schedule to the Statutory Declarations Act 1960 ought to be changed:

- to ensure that a person never attest to having witnessed a signature unless he knows the person and has actually seen the person sign the document; or
- to require a witness to the execution of a power of attorney or a statutory declaration to certify that he has known the person executing the document for more than 12 months or has taken reasonable steps to ensure the identity of that person.

20 Verification of identity card, etc, and of citizenship

Section 436A NLC requires, in the case of a natural individual, a description of his citizenship, and the number of the identity card issued to him under the National Registration Act 1959, or where no such identity card has been issued to him, the description and number of his passport or other official document of identity.

The name of any natural person to be inserted in any instrument of dealing shall be the name appearing on such person's identity card or passport or other official document of identity.

A Malaysian identity card can be verified at the Department of National Registration. However, in practice passports issued by another country are not verified.

Perhaps it is time to establish a mechanism or procedure for verification of a foreign passport.