

From bare trustee to chargee: does registration of a charge assure an indefeasible interest?

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Introduction

Modelled after the Australian Torrens System, the concept of indefeasibility is the cornerstone of Peninsular Malaysia's land administration system, which is embodied in Section 340 of the National Land Code 1965. Once an interest is registered in the title of a property, it is immune against any adverse claims. While disputes on indefeasibility are not uncommon in Malaysia, the apex court was recently faced with another dispute involving the registered interest of a licensed financial institution and an unregistered interest of an owner in *He-Con Sdn Bhd v Bulyah Ishak Appeal*.⁽¹⁾

Facts

The plaintiffs were the joint administrators of the deceased's estate. The first plaintiff was the deceased's widow. Before the deceased passed away, he bought a property from the first defendant (a company, of which the second and third defendants were the directors). A sale and purchase agreement was executed between the deceased and the first defendant. At the material time, the title of the property had yet to be issued.

Several years later the first defendant named the deceased as the attorney of the property by a registered irrevocable power of attorney dated 30 April 2002 (first power of attorney). One of the most significant features of this first power of attorney was the term on consideration, which stated that "[t]he purchase price for the property has been fully settled by the Attorney. In consideration of the aforesaid, the grantor agrees that the power of attorney created herein is irrevocable". Subsequently, the deceased, who was the attorney of the property, appointed the first plaintiff as the substitute attorney of the property via a registered power of attorney dated 21 May 2002 (second power of attorney) before he died on 26 June 2002. The appointment was affected in accordance with the power conferred by the first power of attorney.

Following the issuance of the letters of administration in November 2005, the plaintiffs were appointed as the administrators of the deceased's estate. At that time, the title of the property was ready to be issued and the first plaintiff requested the developer to register the title of the property in her name directly instead of naming the first defendant. However, this request for direct transfer was refused. Due to financial constraints, the first plaintiff held on to the direct transfer when she discovered the substantial stamp duties and assessment bills. Nonetheless, she had been paying quit rents and property fees, as well as collecting rent for the property. The first defendant did not object and these were in line with the terms stipulated in the second power of attorney. The first plaintiff was subsequently ordered by a high court to administer the property via a vesting order dated 9 September 2008.

Dispute

The dispute arose when the plaintiffs discovered that the first defendant was the owner and charged the property to the fourth defendant, a licensed financial institution, as security for financing facilities in 2011. The registration of the first defendant as the property owner was done without the first plaintiff's consent. The first

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plaintiff lodged a private caveat to protect her interests, but it was eventually removed. In December 2012 the first defendant was wound up. The fourth defendant sought an order for sale of the property when the first defendant breached the terms of the financing facilities. The property was scheduled for auction on 8 April 2013. Aggrieved, the plaintiffs filed this action in the high court. The claims against the second and third defendants were withdrawn as they had been adjudged bankrupt. Hence, the action proceeded against the first and fourth defendant.

In sum, the plaintiffs sought, among other things, a declaration that:

- the deceased was the rightful owner who had an indefeasible title and interest over the property;
- the transfer from the developer to the first defendant was invalid and should be set aside;
- the charge on the property was null and void without effect and improper due to fraud; and
- the transfer by the first, second and third defendants to the fourth defendant should be set aside under Section 340(2) of the National Land Code.

Law on indefeasibility

Section 340 of the National Land Code states as follows:

Registration to confer indefeasible title or interest, except in certain circumstances.

(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-section (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 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. (Emphasis added.)*

High court and Court of Appeal decisions

In allowing the plaintiffs' claims, the high court, ruled, among other things, that:

- the deceased was the owner of the property as he had paid the full purchase price to the first defendant;
- the first defendant, who was holding the property as a bare trustee, had no power to charge the property to the fourth defendant as a security for the financing facilities;
- the fourth defendant, having taken all reasonable measures to verify the status of the property before granting the facilities to the first defendant, was a *bona fide* party and had the right to proceed with the auction of the property, with any remaining amount from such sale paid to the plaintiffs.

Dissatisfied with the high court's decision, two appeals – one by the plaintiffs against the fourth defendant and one by the first defendant against the plaintiffs – were filed before the Court of Appeal. The Court of Appeal affirmed the high court's decisions which allowed the plaintiffs' claims against the first defendant. The plaintiffs' appeal against the fourth defendant was also allowed.

Federal Court decision

Leave to appeal was granted to both the first and fourth defendants on a series of questions of law. The

paramount question was whether the fourth defendant was an 'immediate' purchaser or a 'subsequent' purchaser within the contemplation of Section 340(3) of the National Land Code.

In dismissing the appeals and affirming the Court of Appeal's decisions, the Federal Court held that the deceased had become the beneficial owner of the property and that the first defendant was a bare trustee for the deceased in relation to the property. This was because the first power of attorney was an admission of the deceased having paid for the property in full, as it had been properly executed by the director of the first defendant.

Once the first defendant, a donor under the first power of attorney, became a bare trustee, he could not undertake any further dealing with respect to the property, including creating a legal charge. Hence, the fourth defendant did not obtain valid interest from the charge transaction as such transaction was affected via an insufficient or void instrument. As a result, the fourth defendant's interest over the land, albeit a registered interest, was defeasible by virtue of Section 340(2) of the National Land Code.

Since the charge was between the first defendant and the fourth defendant, it was a direct and immediate purchase. Therefore, the protection accorded to a "subsequent purchaser in good faith and for valuable consideration" under the express proviso to Section 340(3) of the National Land Code did not cover the fourth defendant, who was an immediate purchaser, despite it having conducted all reasonable verifications as to the property and such transaction being registered on the title of the property.

Comment

When determining whether the proviso to Section 340(3) of the National Land Code applies, the first question is whether a party is an immediate purchaser or a subsequent purchaser. The indefeasibility of a party's title or interest over a property depends on how the immediacy of the purchase relates to the vitiating vendor, not how far removed it is in the tally among the purchasers.

This case raises important questions – for example, how could such immediacy be assessed based on the documents available, such as the land searches and other documents? Also, what are the possible safeguards that could be introduced to secure a party's interests?

For further information on this topic please contact [Gan Khong Aik](#), [Lee Sze Ching \(Ashley\)](#) or [Yuen Wah Foo](#) at Gan Partnership by telephone (+603 7931 7060) or email (khongaik@ganlaw.my, szeching@ganlaw.my or fjw@ganlaw.my). The Gan Partnership website can be accessed at www.ganlaw.my.

Endnotes

(1) *He-Con Sdn Bhd v Bulyah Ishak* [2020] 7 CLJ 271.

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