Indefeasibility of Title in Malaysia—The Revivification of Deferred Indefeasibility under the Torrens System—Focus on Fraudulently Obtained and Forged Titles

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Abstract

The article examines s 340 of the National Land Code 1965 and pays particular attention to transfer of titles and creation of registered interests by way of fraud, misrepresentation, forgery and insufficient instruments. The concept of deferred indefeasibility and its position in Malaysia is explored in the light of the decision of the Federal Court in the recent case of Tan Ying Hong v Tan Sian San & Ors.1 The case had appraised the decision of the Federal Court in Adorna Properties v Boonsom Boonyanit @ Sun Yok Eng2 and analysed the law and the facts to succinctly fortify the principle that indefeasibility of title or interest remains fortified as deferred indefeasibility in Malaysia and not immediate indefeasibility.

Introduction

The aims and objectives of the Torrens system3 of conveyancing are to provide for simplicity, certitude and registration of titles and interests. These objectives therefore include the concept of indefeasibility of title, which according to David Wong “is central in the system of registration”.4 The concept of indefeasibility has also been given much prominence by many learned authors

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2 [2001] 1 MLJ 241, FC. The unfortunate decision in Adorna Properties was followed, albeit reluctantly, in a number of subsequent cases. See Ismail bin Mohamed & Anor v Ismail bin Husin & Ors [2005] 7 MLJ 103; Mok Yong Chuan v Mok Yong Kong & Anor [2006] 7 MLJ 526; Liew Yok Yin v AGS Harta Sdn Bhd [2006] 7 MLJ 49. However in this case, the court held that the purchaser had not proved that he had acted in good faith. But good faith does not apply to an immediate purchaser: s 340(3)(a), (b).
3 The Privy Council, in Gibbs v Messer [1891] AC 248, PC, at 254, described the Torrens system in the following concise manner: “The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author’s title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author’s title”.
and is therefore now to be considered as the fundamental right of a registered landowner or a person holding a registered interest in land.5

When referring to indefeasibility of title, we have to be aware that there are two kinds of indefeasibility: immediate indefeasibility and deferred indefeasibility. Immediate indefeasibility occurs when a purchaser is registered, irrespective of whether the registration was obtained using a valid transfer document or a transfer document that had been forged.6 The concept of deferred indefeasibility, however, takes the indefeasibility principle one step removed. Under the principle of deferred indefeasibility, where a registration had been obtained by using a forged instrument, or by use of an insufficient instrument, or a void instrument, the person in whose name the transfer had been made does not obtain an indefeasible title. However, when the person in whose name the title had been registered, then transfers the title to another person, or creates a charge on the property, then the subsequent person will obtain indefeasibility of title, or indefeasibility of the registered charge, if the person is a bank or financial institution which had disbursed a loan based on the title as collateral. We shall now discuss the concepts of simplicity, certainty and registration of title briefly.

• Simplicity in conveyancing. To provide for this concept, a purchaser wishing to purchase a piece of property only has to look at and rely upon the information appearing on the Register Document of Title (register) which is kept at the Land Office in the town or district where the land is situated.7 This is also known popularly as the “curtain” principle where a purchaser is not required to go behind the curtain (i.e. draw the curtain aside) and question the mode by which transactions that appeared on the register had taken place. Simplicity was also achieved by a second popular principle, i.e. the “mirror” principle, where to ensure that the simple method of conveyancing was preserved, a person would only be bound by the encumbrances or interests that were mirrored or reflected upon the register.

• Certainty of title. This means that once a person is registered as the owner, he attains “indefeasibility of title” which means that his title to the land could only be challenged by the provisions of the National Land Code 1965 (“NLC 1965”) and certain other instances where it was obviously

6 See Mayor v Coe (1968); Breskvar v Wall (1971) 126 CLR 376.
7 One should not, under any circumstances, rely upon the information kept in the possession of the buyer. A landowner is given an identical document to that kept in the Land Office, i.e. known as the Issue Document of Title. However, any claims and encumbrances are entered on the copy kept in the Land Office and may not appear on the copy kept by the landowner.
clear that the purchaser had clear notice of any encumbrances or prior claims to the said land and had proceeded with the sale and transfer despite this notice. This may be contrary to the “mirror” principle, i.e. that one is only bound by whatever interests or claims are denoted clearly on the register. Secondly, it may be alleged that by recognising claims that are not on the register would in fact be against the “curtain” and “mirror” principles of the Torrens system. However, courts in the past had been cautious in allowing claims that had not been entered on the register.8 But to be fair to the court decisions, only where it had been clear that something was not quite right, i.e. where there was crystal-clear evidence that an act offending the conscience or one that had gone against the principles of equity, only then had the courts allowed such claims.9

• **Title by registration.** Title to the land or ownership could only be vested and divested by the process of registration and not otherwise.10 Approval of alienation of land to a particular person would still not be proof that a person was the owner of the land (in legal terms) unless official registration had taken place.11

The administration of land, in Malaysia, is based on the Torrens system which provides for the registration of all titles and interests that are registrable. The NLC 1965 contains detailed provisions pertaining to registration procedures. The provisions in the NLC 1965 support the “curtain” and “mirror” principles that persons dealing with the registered owner of the land need not be concerned with carrying out a detailed investigation to ascertain the validity of the process that had led to the registration of the owner of the land. The circumstances by which the owner had obtained the land are of no consequence to the current buyer. The land title, as viewed in the registration department, would mirror the registered proprietor of the land, and all other encumbrances that were registered on the property. All other claims to the land, including prior unregistered claims, would be defeated.12

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8 **Ong Chat Pang v Valliappa Chettiar** [1971] 1 MLJ 224.
9 However, in accepting the general principles of indefeasibility of title, the Privy Council in **Frazer v Walker** [1967] 1 AC 569, PC, at 585 stated that: “… this principle (principle of indefeasibility) in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant”. In relation to claims in personam, the Privy Council continued at 585: “The principle must always remain paramount that those actions which fall within the prohibition of ss 62 and 63 may not be maintained”. The reference to the two sections is a reference to the Land Transfer Act 1952 (NZ) which roughly corresponds with ss 68 and 199 of the Transfer of Land Act 1893 WA.
10 Section 89.
11 Section 73.
12 **Associated Credit Corporation Sdn Bhd v Fahlum Development Sdn Bhd & Anor** [1990] 2 CLJ 952. See also **PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd** [1980] 2 MLJ 136, a Federal Court decision, where Raja Azlan Shah CJ (Malaya) (as His Majesty then was) observed: “The concept of indefeasibility of title is so deeply embedded in our land law that...
However, of late, these objectives appear to have been brushed aside or have paled into insignificance. Free acceptance of equitable rights and interests, and decisions that are not in tandem with the intention of those who formulated the NLC 1965 are delivered. Hence, it is timely to explore the provisions of the NLC 1965 and accord the rules of interpretation to Parliament’s intention when the NLC 1965 was enacted way back in the 1960s. This article focuses on the concept of indefeasibility of title as provided by the NLC 1965, with special emphasis on registration of titles or interests obtained by forgery. The purpose of this article is to emphasise that the fact of registration per se, does not confer indefeasibility if it falls under any of the exceptions mentioned in s 340 of the NLC 1965, especially where a title was transferred pursuant to circumstances preceded by fraud or forgery. What must be remembered and stated at the very outset is that forgery is a species of fraud. Forgery cannot be innocent, it cannot be overlooked, and it is an action prompted by fraud on the part of one of the parties to a transaction. There is a difference, however, between a forged document and a fake document. A fake document and anything fake is a work of art that is deliberately made or altered to appear as the maker wants it to appear. A forgery, on the other hand, is a fraudulent imitation of another thing that already exists, in our instance, the signature of the original landowner. The key word to be focused on is fraudulent. Thus, a forged document cannot confer indefeasibility, unless it was created in the absence of fraud. Such a situation is an almost impossible scenario except where the law provides for it.

What the NLC 1965 provides for in cases of forgery is the concept of deferred indefeasibility. This happens when one person forges the title, and transfers to himself and then sells the land to another purchaser. The second purchaser, or subsequent purchaser, is of course unaware of the forgery that had taken place. It seems almost trite to restate it. Therefore the registration of the transfer of the said land under the National Land Code defeats all prior unregistered interests in the land. The significance of registration is further reiterated in Ong Chat Pang & Anor v Valliappa Chettiar [1971] 1 MLJ 224 at 231, where Gill FJ remarked: “… the conception [sic] of indefeasibility being central in the system of land registration, so long as land stands registered in the name of a particular person such registration constitutes conclusive evidence that that person is in fact the registered proprietor of the land unless and until his registered title is cancelled or set aside in accordance with some relevant provision of the law”. The learned judge Ajaib Singh J, in Teh Bee v K Maruthamuthu [1977] 2 MLJ 7 at 10, also observed that “… the act of registration per se is paramount and when registered a title becomes indefeasible and remains so unless and until declared otherwise by the court which can only be done if the title can be successfully challenged within the somewhat restricted scope of the exceptions stated in s 340”.

Forgery is more than fraud, and it is unthinkable that a forged transfer can confer indefeasibility. See also Assets Co Ltd v Mere Roihi [1905] AC 176, PC, at 204, where Lord Lindley says: “Lord Watson in his observation on the protection given to bona fide purchasers, points out that a bona fide purchaser from a registered owner is in a better position than a first registered owner whose title may be impeached for fraud. But there is nothing in his judgment in favour of the view that an original registered owner claiming through a real person does not get a good title against everyone except in the cases specially mentioned, fraud being one of them”.

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earlier, and it is not incumbent on him to discover how the buyer came about the title. As long as the buyer was dealing with Mr X, and Mr X’s name was on the title as the registered owner, then the buyer was acting in good faith, and hence protected under the proviso to s 340(3) NLC 1965. Their Lordships in Gibbs v Messer tidied up the surroundings of forgery when they said (at 248):

Those who deal not with the registered proprietor, but with a forger who uses his name, do not transact on the faith of the register and they cannot by registration of a forged deed acquire a valid title in their own person, although the fact of their being registered will enable them to pass a valid right to third parties who purchase from them in good faith and for onerous consideration …

The Torrens system would therefore only be able to confer indefeasibility upon the persons who deal with a person who was actually registered on the register and thus could be said to be dealing on the faith of the register. Registration is the cornerstone of the Torrens system, and to interpret its effectiveness and significance in any other way would not reflect the integrity and honesty underlying the intention of Parliament when the NLC 1965 was enacted. To interpret the sections to allow deceitful persons to benefit from

14 By analogy, a person who gives change for a stolen bank note, has a good title to it, if in fact he did not suspect the theft.
15 Ong Lian v Tan Eng Jin; Han Ngee Toon [1917] FMSLR 325. Although this case was decided way before the NLC 1965, the Court of Appeal was convinced that, applying the provisions of s 30 of the Registration of Titles Enactment, the registration of the transfer to a third person had given the third party an indefeasible title. The fact that the so called vendor had obtained the title by forgery from the previous owner had no impact on the transaction. The third parties had been dealing with the vendor, believing him to be the owner, and the title was in his name. The third parties had acted bona fide in the sale and purchase transaction. The purpose of the Torrens system was to provide certainty to a person who was registered. Persons who were dealing with registered proprietors did not have to go behind the register to investigate the history of the title of the person who was the vendor, and to satisfy themselves of the validity of the said title.
16 [1891] AC 248, PC.
17 Creelman & Anor v Hudson Bay Insurance Co [1920] AC 194, PC, clearly states the importance of registration and why one should not go behind the register to question the position of the person who is reflected on the register. As Lord Buckmaster, delivering the judgment of the Judicial Committee said, at 197: “Their Lordships are unable to accede to either of these propositions. In their opinion the certificate of title referred to in s 22 of the Land Registry Act is a certificate which, while it remains unaltered or unchallenged upon the register, is one which every purchaser is bound to accept. And to enable an investigation to take place as to the right of the person to appear upon the register when he holds the certificate which is the evidence of his title, would be to defeat the very purpose and object of the statute of registration”.
18 As observed by Abdul Malik Ishak J in Muthammah v Masri Mohamed [2005] 5 MLJ 518: “It is now trite law that upon registration, the party in whose favour the registration has been effected will obtain an indefeasible title to or interest in the land (s 340(1) of the National Land Code 1965). The phrase ‘indefeasible title’ means a title or an interest which is free of all adverse claims or encumbrances not noted in the register. It is quite obvious that the effect of registration is to defeat all prior unregistered claims”. The judge further held that even if the title had been unlawfully acquired as in the case of Teh Bee v K Maruthamuthu [1977] 2 MLJ 7, the registered holder of the land will continue to enjoy indefeasibility of title until someone brings a challenge against him.
dubious transactions is tantamount to disrespect for the lawmakers. It can never be that Parliament would have intended an unfair or unjust result as a result of the interpretation of the enactment that it had passed. When a court interprets a statute, particularly one that concerns and touches upon the rights of a person, or one that can grant a particular interest to a person, the court has to be cautious in the interpretation of that particular provision. Guidelines that the court may consider will be fairness and justice to the party or parties affected, and also to interpret the statute in accordance with the purpose intended by Parliament when the particular enactment was passed. An interpretation that produces an unfair or unjust result should never be arrived at by the courts.

The courts’ views

We shall now discuss the scrutiny of the courts when cases on indefeasibility were before them. We shall take each section and subsection to provide ease of discussion and flow of thought.

Section 340(1) states that:

(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.

Section 340(1) confers an indefeasible title in the land when it is transferred to another person, to that person, and if the land is charged, then to a chargee. If the land has been given to someone on a long lease, then the lessee is entitled to indefeasibility upon registration. The term indefeasibility of title has been explained by the Privy Council in *Frazer v Walker & Ors* as follows:

… it is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever … there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims in personam. These are matters not to be overlooked when a total description of his rights is required; but as registered proprietor, and while he remains such, no adverse claims (except as specifically admitted) may be brought against him.

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19 The presumption is that Parliament does not intend an unfair or unjust result: *Pesuruhiaya Ibu Kota Kuala Lumpur v Public Trustee & Ors* [1971] 2 MLJ 30; *“The Boucraa”* [1944] 1 All ER 20; *Lim Phin Khian v Kho Su Ming* [1966] 1 MLJ 1. This has been approved by the Privy Council in the case of *Bissonauth v The Sugar Fund Insurance Bond* [2007] UKPC 17. The criteria of fairness and justice when interpreting statutes was discussed at length in that case.

20 *Holee Holdings (M) Sdn Bhd v Chai Him & Ors* [1997] 4 MLJ 601 at 602.


22 [1967] 1 All ER 649, PC, at 652, per Lord Wilberforce.
The concept of indefeasibility is further enhanced by the observation of the Court of Appeal in *Fels v Knowles*23 as follows:

The cardinal principle of the statute is that the register is everything, and that except in cases of actual fraud on the part of the person dealing with the registered proprietor such person upon the registration of the title under which he takes from the registered proprietor has an indefeasible title against the entire world.

*Frazer v Walker & Ors*24 held that registration25 conferred on a registered proprietor a title or to the interest in respect of which he is registered, immunity from all adverse claims except where it was provided otherwise. The immunity would cover all prior claims to the land as well as subsequent interests. Where the exceptions contained in s 340(2) of the NLC 1965 did not apply, then the proprietor or the registered interest holder would defeat a prior equitable right or interest that was being claimed against the said land.26 As to subsequent interests that had been created after the registration of the title, the registration itself would be notice to the entire world, and any interest created after the registration would be held to have had notice of the registration. Once registered,27 the title of the registered owner became indefeasible.28 The next subsection for discussion concerns circumstances where a person’s title may be defeated where there was proof that fraud or misrepresentation had preceded the registration of the title or interest.

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23 (1906) 26 NZLR 640 at 620.
24 [1967] 1 All ER 649, PC.
25 *Cahaya Ideal (M) Sdn Bhd v Orang-orang Yang Mengenali Diri Sebagai “Ponga” & Ors* [1999] 3 CLJ 257. In this case, the plaintiff was the registered owner of a piece of property. The defendants were occupiers of the property. The plaintiff claimed that the defendants were trespassers but the defendants claimed that they were occupying the land as their parents had been employees of the Estate which was owned by the Cooperative. The defendants alleged that with the consent of the Cooperative, their parents had cleared the forest to cultivate vegetables under the Green Book Scheme and subsequently, they had built houses and had continued to occupy the property. The court held that there was no proof in respect of the defendants’ claims. The consent given by the Cooperative was to cultivate the land and not to occupy the land indefinitely. There was no sale and purchase agreement between the Cooperative and the defendants nor was there a lease arrangement. There was no tenancy agreement either. Clearly, the defendants had no interests in the property that could be considered. Once the plaintiff became the registered proprietor of the land, the title became indefeasible under s 340 of the NLC 1965 and was free of all adverse claims or encumbrances. The fact that the defendants had been in occupation of the land for the last 20 years had no bearing and did not confer any interests on the defendants, neither did it improve the defendants’ claims to the land. See also *Suratmin Othman v Yusof Omar & Ors* [1998] 2 CLJ Supp 380.
26 This was supported by the learned judge, Peh Swee Chin J (as he then was), in *Bank Bumiputra Malaysia Bhd v Mahmud bin Hj Mohd Din (Datin Hajjah Salma bte Mohd Jamin, intervener)* [1989] 1 MLJ 381 at 382.
27 Registration is a prerequisite to indefeasibility: *Muhammad bin Buyong v PEMUNGGUT HASIL TANAH GOMBAK & Ors* [1982] 2 MLJ 53 at 54.
Section 340(2) states as follows:

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.

(a) “The title or interest of any such person or body shall not be indefeasible 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 …”

Indefeasibility under the NLC 1965 is not absolute and there are exceptions provided in the NLC 1965, s 340(2). Certain well established principles regarding fraud are as follows: first, fraud must be specifically pleaded; secondly, fraud must mean “actual fraud, i.e. dishonesty of some sort” to which a person had been party or privy; thirdly, the question of fraud is one of fact to be determined on a case by case basis; and finally, the person

29 Fraud must mean actual fraud and not imputed or constructive fraud.
30 See Assets Co v Mere Roihi [1905] AC 176, PC, at 210, “It appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value … must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge is brought home to him or his agents”.
31 Although in this subsection it appears that the person, or agent of the person or body, need not have been party of privy to the forgery, in Ong Lian v Tan Eng Jin [1917] FMSLR 325 at 331, the court observed that: “Doubtless ‘forgery is more than fraud and gives rise to considerations peculiar to itself’. But forgery was the special sort of fraud considered in Lord Watson’s judgment (referring to the case of Assets Co Ltd v Mere Roihi [1905] AC 176, PC).” The learned judge opined that the later remarks in the case actually referred to forgery.
32 The current law is similar to the previous land law: Section 42 of the FMS Land Code provided as follows: “(i) The title of a proprietor, chargee or lessee shall be indefeasible except as in this section provided; (ii) in the case of fraud or misrepresentation to which he is proved to be a party, the title of such proprietor, chargee or lessee shall not be indefeasible; (iii) if the registration of any proprietor, chargee or lessee has been obtained by forgery or by means of an insufficient or void instrument such registration shall be void; (iv) Nothing in sub-section (ii) or (iii) shall affect the title of a proprietor, chargee or lessee who has taken bona fide for valuable consideration from any proprietor; chargee or lessee whose registration as much was procured by any such means or by means of any such instrument as aforesaid or of any person claiming bona fide through or under him”.
33 Vijayalechimy v Annamalai Chettiar [1990] 2 MLJ 492 at 493; Ellamah d/o Ellapen v Renganathan s/o Komarasamy & Ors [1988] 3 MLJ 121 at 123.
alleging fraud has the burden of proving, on a balance of probabilities, the allegation of fraud. To vitiate title to the land under the NLC 1965, there has to be a dishonest intention of the person who perpetrated the fraud, a dishonest intention to deprive the landowner of his right to the land and an act that involves personal dishonesty or moral turpitude. On the Malaysian scene, Lee Hun Hoe CJ (Borneo) who delivered the Federal Court judgment in the celebrated case of Datuk Jaginder Singh & Ors v Tara Rajaratnam defined fraud as follows:

A registered proprietor who took a transfer with actual knowledge of an existing adverse claim against his transferor, acquired an indefeasible title as his mere knowledge of the existence of the adverse claim did not amount to fraud. Fraud may also be caused by deliberately and dishonestly registering an interest and then transferring the interest even before the ink is dry to another person without the consent of the original proprietor. The ... authorities clearly show that fraud must be actual. It must involve dishonesty of some sort. Thus fraud may occur where the designed object of a transfer is to cheat a person of an existing right or where by a deliberate and dishonest act a person is deprived of his existing right.

The intention to cheat is a significant factor in determining whether fraud has been perpetrated in the transaction. Without such an intention it may be held that there is really no fraud. Furthermore, fraud, as required to defeat

36 Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng [2001] 1 MLJ 241, FC.
37 Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd [1923] NZLR 1137. See also Loke Yew v Port Swettenham Rubber Co Ltd [1913] AC 491, PC, a case concerning misrepresentation, where the purchaser of the land, who knew of the existence of an unregistered interest on the land, represented to the vendor that it (the purchaser) would make its own arrangements with the unregistered holder, and then after the transfer was executed, gave a notice to quit to the unregistered holder. This was a clear case of misrepresentation to the vendor, who without the assurance of the purchaser, would not have left the unregistered interest holder without taking more concrete steps to ensure that the unregistered interest would not be affected by the subsequent sale.
38 Loi Hieng Chiong v Kon Tek Shin [1983] 1 MLJ 31, FC. The Federal Court held that the evidence that had been adduced in the case showed that the appellant had not been honest in the transaction with the respondent. The Federal Court at 35 referred to Derry v Peek (1889) 14 App Cas 337, HL, at 374, where the court in that case held that to establish fraud, there was a need to prove the absence of an honest belief in the truth of that which had been stated. As per Lord Herschell, “Fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth; or (3) recklessly, careless whether it be true or false”. See also Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd [1926] AC 101, PC, at 106–107, where Lord Buckmaster said: “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”.
39 Per Knox CJ in Stuart v Kingston (1923) 32 CLR 309.
40 [1983] 2 MLJ 196, FC.
41 It is a difficult task to define fraud and it has been held that the existence of fraud is a question of fact: PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd [1980] 2 MLJ 136, FC.
42 Ibid, at 201.
43 Per Edgar Joseph Jr J in Goh Hooi Yin v Teing Ghee & Ors [1990] 3 MLJ 23 at 34, where his Lordship said that the facts in the case did: “... not justify a finding that the designed
a person’s title, has to be the fraud that was committed in the act of acquiring a registered title. Actual fraud as opposed to imputed or constructive fraud is the requirement to defeat a person’s title or registered interest. What then is actual fraud? It is an act or omission to act, and it can be said that the particular act or omission to act had caused another person to suffer pecuniary injury. The act can be either an intentional act to mislead, or misrepresent, or concealment of a material fact that was within the knowledge of the perpetrator. Such fraud must have resulted in the registration of the title or interest in the name of the perpetrator or his agent, except where the agent had acted outside his authority.

Another ground for setting aside a title under s 340(2)(a) is misrepresentation by the person or an agent of the person or body who had been a party in the transaction. The courts have construed misrepresentation to mean fraudulent misrepresentation and not innocent or negligent misrepresentation. Fraudulent misrepresentation has to be proved by the person alleging it as otherwise the title will not be set aside.

44 Loke Yew v Port Swettenham Rubber Co Ltd [1913] AC 491, PC. In Bahr v Nicolay (No 2) (1988) 62 ALR 268 at 279, the High Court of Australia noted that s 119 of the Land Transfer Act 1893 WA, which protects a registered proprietor against ejectment except in: “… the case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud or as against a person deriving otherwise than as a transferee bona fide for value from or through such a person so registered through fraud”. See also Breskvar v Wall (1971) 126 CLR 376 at 384.


49 Mohd Nasir bin Moidu v Lee Swee Kim [2011] 7 MLJ 606. There has to be intentional misrepresentation or concealment of a material fact peculiarly within the knowledge of the perpetrator that had induced another to enter into a contract, a conveyance or some similar transaction, which he would not have entered into if he had known the truth. Such is a fraudulent misrepresentation. The misrepresentation or fraud must be that of the owner himself or his agent: Loke Yew v Port Swettenham Rubber Co Ltd [1913] AC 491, PC.
We will now consider the role of forgery and insufficient or void instruments where the same had been used in the registration process.

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

To begin the discussion on forgery, there is no better beginning than that propounded by the learned author Dr David Wong in *Tenure and Land Dealings in the Malay States*, where he said:50

Forgery as a ground for vitiating a registered title, as set out in s 340(2)(b) of the Malaysian National Land Code, marks a focal point of difference between the Malaysian Torrens system and those where *Frazer v Walker* [1967] 1 AC 56951 applies.

A forged instrument per se is an insufficient or void instrument.52 Under s 340(2)(b), there is no requirement that the person who now was registered as the owner had to be party or privy to the forgery. This brings an important fact to the fore, namely that the very act of registration, i.e. where registration was obtained by forgery or by means of an insufficient or void instrument, was sufficient to set aside the title. Arguably, it may be said that under a strictly applied Torrens system, registration should cure all defects. But if a particular statute should deny this right to cure, as is the case in s 340(2)(b), then the courts cannot cure the defect of a void instrument and nothing is achieved except deferred indefeasibility.53 The primacy of the register is to ensure certainty of title in the registered proprietor, even sometimes at the expense of innocent persons. But such can only be the situation where the wording of the governing statute is unclear, or ambiguous, or does not make provision for such a situation. Under the NLC 1965, however, the wording of the relevant subsection does not leave any room for doubt. The subsection states three instances where registration is not to be sufficient to confer an indefeasible title, and those are forgery, or insufficient or void instrument. Applying the statement that the court cannot cure the defect in the instance

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50 Supra, n 4, at p 361.
51 *Frazer v Walker* [1967] AC 569, PC, was decided on the basis of the provisions of the Land Transfer Act 1952.
52 See Gopal Sri Ram JCA in *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62, CA, at 85 where he clearly observed: “it is axiomatic that a forged instrument is null and void and of no effect (see *Kreditbank Cassel GmbH v Schenkers Ltd* [1927] 1 KB 826 at p 834 per Bankes LJ). It is not merely voidable. In the absence of an express statutory direction to the contrary, no rights whatsoever arise in favour of one who acquires title under a void instrument …” Further down on the same page, the learned JCA added: “… Defeasibility is occasioned in this instance because a forged instrument is a nullity, incapable of conferring any right, interest of [sic] title in favour of the acquirer of immovable property”.
of a void instrument, likewise the court cannot cure the defect in the case of a forged document and recognise the registration of the owner.\textsuperscript{54}

Forgery had never operated to give a good title or interest. In \textit{Ong Lock Cho v Quek Shin and Sons Ltd}\textsuperscript{55} it was held that where a person had given the authority to another to execute a charge, his authority was limited to the preparation of the documents only and did not extend to the charge being subsequently created due to the forgery of the latter. Such a charge, created by forgery of an agent, was a nullity and liable to be set aside. Accordingly the registration was cancelled.

In \textit{Kreditbank Cassel GmbH v Schenkers Ltd}\textsuperscript{56} Bankes LJ stated: “... it is axiomatic that a forged instrument is null and void and of no effect.” A forged document is not voidable, and no rights can accrue to a person who tries to obtain any form of title or interest under such an instrument, whether acting bona fide or otherwise.\textsuperscript{57}

The Federal Court’s recent landmark decision in \textit{Tan Ying Hong v Tan Sian San & Ors}\textsuperscript{58} was a decision that was long awaited and welcomed after almost a decade of uncertainty surrounding forgery used in transferring titles, and such tainted titles had become “cured” by way of registration under the guise of immediate indefeasibility. The damage caused by the decision of the Federal Court in \textit{Adorna Properties v Boonsom Boonyanit @ Sun Yok Eng}\textsuperscript{59} cannot be undone, however, the position has now been determined in that the Torrens system in Malaysia recognises deferred indefeasibility and not immediate indefeasibility.\textsuperscript{60}

\textsuperscript{54} Unfortunately, in the case of \textit{Adorna Properties v Boonsom Boonyanit} [2001] 1 MLJ 241; [2001] 1 AMR 665, FC, the court held that the forged instrument had given an indefeasible title as the owner had acted bona fide and had paid valuable consideration. Such a recognition of a forgery being cured by registration was perpetrated over 12 years until the case of \textit{Tan Ying Hong v Tan Sian San & Ors} [2010] 2 MLJ 1, FC, early in 2010 which turned the tables and put the position as it should be, i.e. that a forged document cannot confer indefeasibility where such a document had been used for registration.

\textsuperscript{55} (1941) 10 MLJ (JR) 88.

\textsuperscript{56} [1927] 1 KB 826, CA, at 834.

\textsuperscript{57} Elizabeth Chiew Yee Fung & Ors v Leong Fook Ngen & Ors [2001] 6 MLJ 403.

\textsuperscript{58} [2010] 2 MLJ 1, FC.

\textsuperscript{59} [2001] 1 MLJ 241, FC. The unfortunate decision in \textit{Adorna Properties} was followed, albeit reluctantly, in a number of subsequent cases. See Ismail bin Mohamed & Anor v Ismail bin Husin & Ors [2005] 7 MLJ 103; Mok Yong Chuan v Mok Yong Kong & Anor [2006] 7 MLJ 526; Liew Yok Yin v AGS Harta Sdn Bhd [2006] 7 MLJ 49. However in this case, the court held that the purchaser had not proved that he had acted in good faith. But good faith does not apply to an immediate purchaser: NLC 1965, s 340(3)(a), (b).

\textsuperscript{60} Mohd Nasir bin Moidu v Lee Suvee Kim [2011] 7 MLJ 606 at 613, where the court outlined the following principles that were gleaned from the case of \textit{Tan Ying Hong}: “(a) Indefeasibility of title or interest in land can be immediate or deferred; (b) s 340 of the NLC conferred deferred indefeasibility as opposed to immediate indefeasibility; (c) the indefeasibility of any immediate transferee whose registered interest or title was obtained by fraud, fraudulent misrepresentation and or forgery is deferred; (d) subsection (3) of s 340 of the NLC did not apply to an immediate transferee of any title or interest in land. It is only applicable to a holder of a subsequent interest or title, i.e. a subsequent transferee claiming through or under the immediate transferee whose interest or title is defeasible.”
Deferred indefeasibility resuscitated and s 340(3)—the proviso!

In Tan Ying Hong v Tan Sian San & Ors the owner of the land, the appellant, became aware that his land had been charged to the bank, but he had not authorised or conducted any such transaction. The charge had been created by the first respondent, who had purportedly been acting under a power of attorney. The appellant denied executing any such document and asserted that, if any such document existed, it was a forged document. The loans were granted to the first respondent in favour of a company, the second respondent. The issue was whether the bank, as the third respondent, had an indefeasible charge as it was the holder of a registered interest. The bank was the immediate party and not a subsequent party. Can such an immediate registered proprietor or interest holder be entitled to a good title by way of registration? The question was answered by Judith Sihombing in her book, The National Land Code, A Commentary (Vol 2) as follows:

There are two types of indefeasibility: immediate and deferred. The factor which distinguishes the two is the common law effect given to the instrument even after registration; in addition; in a regime of deferred indefeasibility, the role of registered volunteer might be more relevant than under an immediate indefeasibility system. If, after registration has occurred, the system then ignores the substance, form and probity of the instrument used to support the registration, the system is likely that of immediate indefeasibility. Thus, registration has cured any defect in the instrument being registered. If the instrument, despite registration, still has the power to affect the registered interest or estate, the system will probably be that of deferred indefeasibility.

The concept of deferred indefeasibility is provided for under the provisions of the NLC 1965. We are not looking at the common law effect given to the instrument, but at a statutory provision regarding registration that has been done pursuant to any instrument that had been obtained pursuant to the scenarios stated in s 340(2)(a), (b) or (c).

Forgery—is it fraud?

In Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd fraud was defined as dishonesty of some sort and implied a dishonest intention to deprive a person

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61 [2010] 2 MLJ 1, FC.
62 OCBC Bank (M) Bhd v Pendaftar Hakmilik, Negeri Johor [1999] 2 MLJ 511 clearly defines that the protection offered to a purchaser under s 340(3), proviso, is only meant to be used by the subsequent purchaser and not an immediate purchaser. Even if the immediate purchaser had been an innocent purchaser for value, the proviso in s 340(3) is not applicable to a situation arising under the circumstances mentioned in s 340(2). The words in s 340(2) are meant to defeat the title or interest of any person who is an immediate acquirer of the land or the interest in the land. See also the Court of Appeal decision of Boonsom Boonyanit v Adorna Properties Sdn Bhd [1997] 2 MLJ 310, Chiew Lip Seng v Pereira Habib Bank (M) Bhd [1999] 1 MLJ 310.
63 [1926] AC 101, PC.
of a known existing right. Keeping silent, when questions should have been asked, and when the silence had been observed in order to keep the truth from being known, has been equated to fraud, especially if questions would have revealed the true position. With all due respect to the learned judge, all the more since he was convinced that fraud had been committed, albeit in the forgery affected, since the registration of the title in favour of the defendant had been obtained pursuant to a forged instrument, the title was defeasible. The plaintiff had, by the evidence adduced, satisfied his Lordship that she was indeed the proprietor of the property. It is immaterial that the defendant should have been party or privy to the fraud of forgery. If forgery was meant to be a species of the fraud as intended by s 340(2)(a), then, it is observed that it would not have been singled out for mention in s 340(2)(b). This gives the connotation that forgery is a species to stand by itself, and not to be equated with fraud, whereby where a person had committed a fraud, and had transferred the title to himself or anyone else connected with him, then the title would be defeasible.

In a forgery situation, the person who had received the title from another person, and it had been a forged instrument that had been used in the registration process, then even if the person had not known about the forgery it would not matter. The title would still be defeasible. Even where an owner had lawfully parted with her title deeds to a third person, a subsequent charge created by forgery was nullified unless the owner herself had done with a fraudulent intention. Under such circumstances, then, a security created without the authority of the owner of the title deeds, would be a valid one. The mere conduct of an owner in handing over her title deeds to a third person, would not, per se, amount to negligence and if a third party had suffered loss based on the conduct of the former, then the latter had to bear the loss.

In M & J Frozen Food Sdn Bhd v Siland Sdn Bhd & Anor the Supreme Court held that indefeasibility can be rebutted not only by fraud but also in cases where registration is obtained by the use of an insufficient or void instrument or where the title or interest is unlawfully acquired. The failure of the senior assistant registrar in that case to comply with the statutory requirements of ss 258 and 261 of the NLC 1965 was not an irregularity but an illegality. The certificate that was issued subsequently was, therefore, ultra vires the statutory provisions of the NLC 1965 and the title was unlawfully acquired by the first appellant in that case, and was therefore defeasible under the provisions of s 340(2)(c) of the NLC 1965.

64 NLC 1965, s 340(2)(b). To note and compare the wording used in s 340(2)(a).
66 Choo Loong v Lip Kwai Kow (1933) 7 FMSLR 213, SC.
Burden and standard of proof

However, what has to be always borne in mind is the standard of proof required to constitute forgery. The standard of proof to be applied in civil forgery suits is the balance of probabilities\(^{68}\) and not the standard of beyond reasonable doubt. On the contrary, the standard of proof for fraud, in civil cases, still remains at a higher level, i.e. that of beyond reasonable doubt.\(^{69}\) However, proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The degree of proof has to carry with it a high degree of probability. A distinction had to be drawn between a high degree of possibility (which fell short of expectation) and a high degree of probability (which would show that the facts alleged had in fact occurred). The proof for fraud cannot be based on suspicion and conjecture.\(^{70}\) The burden of proof on the plaintiff is twofold: (1) the burden of establishing a case; and (2) the burden of introducing evidence.\(^{71}\) The plaintiff bears the evidential burden throughout the case until he discharges his burden, then the evidential burden shifts to the defendant. The plaintiff has to discharge the burden, and not merely establish a prima facie case.

We now move on to the circumstances whereby a person may be able to save his title or interest even though the original title or interest was tainted under the circumstances mentioned in s 340(2).

\(^{(3)}\) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-s(2)—

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

\(\text{(b)}\) any interest subsequently granted there out shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

\(^{68}\) Doe D Devine v Wilson (1855) 14 ER 581, PC, at 592. See also United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd [1993] 1 MLJ 182, SC.

\(^{69}\) See the Court of Appeal decision in Chong Song @ Chong Sum & Anor v Uma Devi a/p V Kandiah [2011] 2 MLJ 585. The appellate court distinguished the standard of proof in forgery cases from that alleged in cases involving fraud. In doing so, the learned judges referred to Saminathan v Pappa [1981] 1 MLJ 121; Chu Choon Moi v Ngan Siew Tin [1986] 1 MLJ 34; Yong Tom v Hoo Kok Chong & Anor [2005] 3 CLJ 229. See also the case of Mohd Nasir bin Moidu v Lee Swee Kim [2011] 7 MLJ 606, where the High Court arrived at a converse decision where the plaintiff had failed to prove the allegations of fraud regarding the land transfer and therefore the defendant’s title could not be set aside.

\(^{70}\) Narayanan Chettiyar v Official Assignee, Rangoon, AIR 1941 PC 93. The standard of proof must be such that the evidence adduced should be such that the court believes in its existence or a prudent man considers its existence probable in the circumstances of the particular case: Chu Choon Moi v Ngan Siew Tin [1986] 1 MLJ 34. See also Elizabeth Chiew Yee Fung & Ors v Leong Fook Ngen & Ors [2001] 6 MLJ 403, where the court reiterated that the standard of proof between fraud and forgery had to be distinguished.

\(^{71}\) Mohd Nasir bin Moidu v Lee Swee Kim [2011] 7 MLJ 606 at 616.
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.\textsuperscript{72}

\textbf{Proviso to s 340(3)}

The proviso in s 340(3) does not apply to s 340(2). The proviso applies exclusively to those circumstances covered by s 340(3).\textsuperscript{73} The argument that can be raised is as follows. Under s 340(1) a person who is registered, under the aims and objectives of the Torrens system, and recognising that registration is fundamental, will be given an indefeasible title or if it is an interest, then that interest becomes indefeasible. However, a former registered proprietor, or any unregistered holder, may decide to challenge this title or interest. The person who is challenging will then have to prove any of the circumstances in s 340(2). Once he proves it, then his burden is discharged. Then the statute takes over, and under s 340(3)(a) or (b), the person whose title has been challenged, if he had created a subsequent registered interest on the land e.g. a charge, or if he had sold the land to a third party, the registered chargee or the new owner still do not possess indefeasibility. The title or interest can still be set aside.\textsuperscript{74} The statute clearly states that fact, that they still have a defeasible or tainted title or interest. Then, the chargee or the new owner will have the burden of proving that they had in fact acted bona fide and had paid valuable consideration for the interest or the title. And these are the group of purchasers who will be protected by the proviso, and may, depending on whether they are able to prove that they acted bona fide and had paid valuable consideration, get their tainted title or interest restored.\textsuperscript{75}

There are similarities between the effects of s 340(2) and 340(3). Under both subsections, the persons who are registered but whose title or interest has been challenged may have the title or interest set aside. But this will be where the similarity ends. The persons who had taken the title subsequently, from the persons who had had their interests or titles challenged and defeated under

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\item\textsuperscript{72} This subsection provides for the application of the doctrine of deferred indefeasibility. Only a subsequent purchaser may claim indefeasibility of title if the person had acted in good faith and paid valuable consideration for the land in question. See \textit{Muhammad bin Buyong v Pemangut Hasil Tanah Gombak & Ors} [1982] 2 MLJ 53.
\item\textsuperscript{73} \textit{OCBC Bank (M) Bhd v Pendaftar Hakmilik, Negeri Johor} [1999] 2 MLJ 511, CA, at 517.
\item\textsuperscript{74} NLC 1965, s 340(3)(a), (b). But the saving provision is the proviso: Provided that nothing in this subsection 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.)
\item\textsuperscript{75} The Court of Appeal was definite in its views when it stated: “We must reiterate that the proviso to s 340(3) applies exclusively to those situations which are covered by sub-s(3) which is that s 340(3) will only take effect after the immediate registered proprietor or holder in s 340(2) has transferred his defeasible title or interest to someone else (see s 340(3)(a))”:\textit{OCBC Bank (M) Bhd v Pendaftar Hakmilik, Negeri Johor} [1999] 2 MLJ 511, CA, at 523.
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s 340(2), this category of persons, the subsequent purchasers, will now have the chance to avail themselves of the proviso.

**Good faith in land transactions**

The Federal Court in the case of *Adorna Properties Sdn Bhd v Boonsom Boonyanit@ Sun Yok Eng*\(^{76}\) interpreted good faith, but in an inaccurate context. The learned apex court held that good faith mentioned in the proviso to s 340(3) was to be used by all purchasers who had acted in good faith in the transaction. However, it has been clarified, subsequent to the *Adorna* case that the proviso in s 340(3) does not apply to s 340(2). The wording is clear in that regard. The person who is intended to take advantage of the proviso is the subsequent purchaser\(^{77}\) and not the immediate purchaser. This makes sense as the objective of the Torrens system of conveyancing is not to go behind the curtain to see how the previous transactions had taken place. The buyer was only to act on the faith of the register, and if X is the person who was registered and who was the person the buyer was dealing with, then the transaction was entered into in good faith. The buyer is not to go behind the curtain to see if X had come into possession of the title by fraud or by forgery or by any of the circumstances mentioned in s 340(2). Sadly though, in some of the later cases, although the courts recognised this principle, the courts found their hands tied, as they could not depart from the decision of the apex court which held otherwise.\(^{78}\)

The lower court was hesitant to depart from the decision of the apex court of the land. The lower court was bound by the doctrine of binding precedent. But even in the case of binding precedents, there are different categories of

\(^{76}\) [2001] 1 MLJ 241; [2001] 1 AMR 665, FC.

\(^{77}\) The subsequent purchaser is the one who has the benefit of proving that he acted in good faith and had paid valuable consideration: *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.

\(^{78}\) In *Au Meng Nam & Anor v Ung Yak Chew & Ors* [2007] 5 MLJ 136, the Court of Appeal held at 137: “… Thus the plaintiffs would have succeeded in this appeal if not for the Federal Court interpretation of s 340 of the NLC 1965 in *Adorna Properties Sdn Bhd.* But this court is not ready to ignore or disregard the Federal Court’s decision in *Adorna Properties Sdn Bhd.* However, the dissenting decision of Gopal Sri Ram JCA, is worth noting as the learned JCA said at 138: “… The decision in *Adorna Properties Sdn Bhd* is not to be treated as binding precedent because it was decided per incuriam (see para 13). It is central to the doctrine of indefeasibility housed in s 340 that the issue document of title must itself be genuine. In *Adorna Properties Sdn Bhd,* the instrument of transfer and other attendant documents were forged. But the title was genuine. In the present appeal there was cogent evidence going to show that the issue document of title used to effect the transaction here was itself a forgery. Hence *Adorna Properties Sdn Bhd* was clearly distinguishable from the facts of this case. The learned judge misdirected himself in not holding for the appellants on this ground. The appellant’s case must succeed because the vendors had no title to pass. And the only exception is in favour of a bona fide purchaser for value. In this case, the evidence conclusively pointed against the respondent on this issue. The burden of proving that he was a bona fide purchaser lay on the respondent and he plainly failed to discharge it (see para 17) …”
precedents. Some decisions of the highest courts lay down a principle of common law that alters the position prevailing earlier.\(^79\) According to the learned JCA Gopal Sri Ram, the principle of common law that altered the position prevailing prior to it, was a true precedent.\(^80\) The learned JCA then distinguished another type of precedent, that which involved the interpretation of a section in an Act of Parliament. He said that such a precedent had a lesser effect\(^81\) and ended his views on precedents by quoting Sir John Salmond from his book *Treatise on Jurisprudence* (12th edn), at pp 151–215, where Sir John Salmond had stated:

A precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of statute, i.e. delegated legislation. This rule was laid down for the House of Lords by Lord Halsbury in the leading case (London Street Tramways v LCC [1898] AC 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 p 729 (CA)). 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.)

The decision in *Adorna Properties* had gone beyond the intention of Parliament, which enacted the NLC 1965, containing the provision on indefeasibility of

\(^79\) In *Donoghue v Stevenson* [1932] AC 562, HL, the common law that was before the case was decided, did not recognise the neighbour principle as clearly expounded in that case. Ultimately, the case became the law for the neighbour principle, and established the law that a manufacturer of a product owed a duty of care to the ultimate consumer. Prior to the case of *Donoghue* the law did not allow such flexibility. In *Winterbottom v Wright* (1842) 152 ER 402, the driver of a coach met with a misfortune, due to the coach being in disrepair, but the court held that the contract was made with the coach owner and the person who had hired the coach, not with the driver who was hired in turn by the person who had hired the coach. Lord Abinger was of the view that to allow such an action would open up an infinity of actions. “Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue”. The House of Lords in *Donoghue* altered this position and came out with the neighbour principle.

\(^80\) Au Meng Nam & Anor v Ung Yak Chew & Ors [2007] 5 MLJ 136, CA, at 144.

\(^81\) The learned judge referred to *Carter v Bradbeer* [1975] 1 WLR 1204. See also *Brennan v Comcare* (1994) 122 ALR 615, where Gummow J explained the difference between the interpretation of a statute and that of a judgment of a court: “The judicial technique involved in construing a statutory text is different from that required in applying previous decisions expounding the common law. In the latter class of case, the task is to interpret the legal concepts which find expression in the various language used in the relevant judgments. The frequently repeated caution is against construing the terms of those judgments as if they were the words of a statute. The concern is not with the ascertainment of the meaning and the application of particular words used by previous judges, so much as with gaining an understanding of the concepts to which expression was sought to be given”. 

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Indefeasibility of Title in Malaysia—The Revivification of Deferred Indefeasibility under the Torrens System—Focus on Fraudulently Obtained and Forged Titles

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title or registered interests, as a primary safeguard for purchasers. According to the learned JCA, it was unthinkable that Parliament would have intended for the provision to be used to come to an unfair and unjust result, i.e. an owner being deprived of his land due to the “machinations of a rogue”. An interpretation should not be put onto a statute that would produce a manifestly unjust result as was achieved in the Adorna case.

Conclusion

Land is an inviolate right of an individual, body or corporation. No one person or organisation or government institution may take away that right unless in accordance with due process of law. Here the administrative law principles of natural justice and the right to be heard will play a vital role in keeping the inviolate nature of the right to land a constitutional right, and one that is not to be taken lightly. The above discussion clearly states that a person’s title or interest may only be defeated where there is sufficient proof to determine that a fraud had been perpetrated or that the registration had been carried out pursuant to an insufficient, void or forged document. The meaning of “defeasible” as stated in the Oxford Dictionary is that it is “liable to forfeiture” and “to forfeit” in turn has been defined as “to lose the right to” or “to be deprived of”. “Void” is defined “invalid, or not binding”. Looking at these definitions and applying them to the two sections in question, it appears that they mean the same thing.

It therefore appears that Parliament clearly provided that a person who had obtained registration of a title by forgery was meant to be deprived of the said title. Parliament had intended to protect bona fide purchasers, and these are subsequent purchasers, purchasers who had bought the property or financiers who had taken such property as collateral for loans, from a person whose title was defeasible under any of the circumstances mentioned in s 340(2). Such an interpretation would in fact, reflect the concept of deferred indefeasibility under the Torrens system of conveyancing. There can therefore be no circumstances to allow for immediate indefeasibility under the provisions of the National Land Code 1965 as it presently stands. The concept of indefeasibility of title enshrined in the Torrens system and embodied in the National Land Code 1965 is a concept not to be taken lightly by the administrators or by the courts. Parliament has to ensure that all of its provisions are interpreted in accordance with the principles of justice and fairness and where there is room for any ambiguity, legislators have to address the ambiguities expeditiously in order that the common man in the street is not deprived, or prejudiced.

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83 Ibid.