

LAND LAW

DOES A CHARGE COME WITHIN THE DEFINITION OF A PURCHASER UNDER SECTION 340(3) OF THE NLC?

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Introduction

The Federal Court in *Cimb Bank Berhad v Ambank (M) Berhad & Ors*, Civil Appeal No. 01(f)-20-06-2016(B) ("**CIMB Case**") engaged with the issue of, inter alia, whether a chargee comes within the meaning of 'purchaser' under section 340(3) of the National Land Code (NLC).

This article discusses the facts, issues and judgment of the case.

Brief Facts

Two individuals, Chin Ting Seng and Chin Chong Lup ("**the Chins**") were owners of a piece of land situated in Klang ("**the Property**"). The Chins had executed a charge on the Property in favour of Southern Bank Berhad which was later vested with CIMB ("**CIMB Charge**").

An individual, Wong Chee Keong ("**Wong**") then applied for a loan from the 1st Respondent, AmBank, to finance the purchase of the Property which would be used as a security for the loan ("**AmBank Charge**").

AmBank's solicitors received from Wong's solicitors the original deed of the Property, the stamped Memorandum of Transfer ("**MOT**") and the discharge of charge of the CIMB Charge ("**the Documents**").

After preparing the necessary documentations, AmBank's solicitors presented the Documents for registration. The Land Office effected the discharge of CIMB's Charge and registered Wong as the registered proprietor of the Property. Thereupon, AmBank was registered as the chargee of the Property under the AmBank Charge.

It was discovered later that the discharge of the CIMB's Charge was forged, effecting two titles over the Property. The claims by CIMB and AmBank as chargees over the Property became the core of the dispute.

The High Court decided in favour of Appellant, i.e. CIMB, where the trial judge ruled that AmBank was an immediate purchaser that was not entitled to the protection of section 340(3) of the National Land Code ("**NLC**"). On appeal to the Court of Appeal, the decision was reversed. Being dissatisfied with the decision of the Court of Appeal, the Appellant then appealed against the decision to the Federal Court.

Decision

1. Whether a chargee comes within the meaning of 'purchaser' under section 340(3) of the NLC?

The Federal Court ("FC") held that a chargee is a 'purchaser' under the provision of section 340(3) of the NLC. The court held that the definition of a purchaser in section 5 of the NLC is not limited to the purchaser who acquires the title to land but also includes those who acquires an **interest** in land such as a chargee. The FC relied on several cases, including *T Damordaran v Choe Kuan Him* [1972] MLJ 267 (Privy Council) and *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1 (Federal Court), to support the proposition that a chargee is regarded as a purchaser and is therefore protected under the provisions of section 340(3) of the NLC.

2. Whether AmBank / 1st Respondent was an immediate or a subsequent purchaser?

The FC also further elaborated on the position of whether the 1st Respondent was an immediate or a subsequent purchaser. Under section 340(3) of the NLC, a purchaser in good faith and for valuable consideration, who derives title or interest in land at the first instance as a result of a fraud or forgery of another party is known as an **immediate purchaser**. A purchaser who in turn derives title or interest in the land from the immediate purchaser is known as the **subsequent purchaser**. The title or interest of an immediate purchaser is defeasible notwithstanding that the transaction was done in good faith and for valuable consideration. However, the title or interest of the subsequent purchaser is indefeasible if done in good faith and for valuable consideration.

As a chargee was held to also fall under the meaning of 'purchaser', AmBank was a subsequent purchaser, and thus was protected by the provisions of section 340(3) of the NLC. The FC held that the AmBank Charge which is the second charge created after the CIMB Charge, created in good faith and for valuable consideration was indefeasible even though the AmBank Charge was created by using a forged instrument.

Analysis

The approach taken by the FC in the case has settled and put a rest to the question of whether a party who holds a registered interest in land (as opposed to just a title) falls under the definition of the word 'purchaser' under section 340(3) of the NLC.

The FC also took the opportunity to affirm the principle of deferred indefeasibility in Malaysia under section 340(3) of the NLC as held in *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 CLJ 269 which overruled the earlier Federal Court decision in *Adorna Properties Sdn Bhd v Boonsom Boonyanit* [2001] 2 CLJ 133.

The principle in the CIMB Case has since been referred to in the recent Federal Court decision in *He-Con Sdn Bhd v Bulyah bt Ishak & Anor (as administrators for the estate of Nor Zainir bin Rahmat, the deceased)* and another appeal [2020] 4 MLJ 662.

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