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Subsequent Purchasers

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I came across a recent (4.10.2024) Federal Court Judgment, *Malayan Banking Berhad v Mohd Affandi bin Ahmad & Anor* (Civil Appeal No: 02(f)-5-03/2024 (J)) per Zabariah binti Mohd Yusof FCJ, which considered whether financial institutions as subsequent purchasers are obliged to go beyond the land register to investigate the validity or the lawfulness of the underlying documents of completed sale transactions.

The factual background of the case concerns a dispute over 2 lots of land where the deceased had paid the full purchase price 50 years ago. The Plaintiffs are the administrators/executors of the deceased's estate whereas the 1st and 2nd Defendants ("D1" and "D2" respectively) are property developers. Nonetheless, the land remained registered under D1's name. The 2 lots were later sold by D1 to D2, who then registered as the owner and subsequently charged them to the 3rd Defendant ("D3"), a banking financial institution, as security for a term loan (the "Term Loan"). Both the High Court and Court of Appeal held in favour of the Plaintiffs.

Aggrieved, D3 filed an appeal in the Federal Court with the following questions of law:

1. Where there is contractual representation that the chargor is the legal and beneficial owner of the property and there is no notice of any adverse claim to the property, whether it is incumbent on the bank to investigate if there is any illegality attached to the underlying sale and purchase agreement, failing which the bank cannot qualify as a bona fide purchaser under the proviso to Section 340(3) of the National Land Code (NLC) 1965?

Answer: negative, for the following reasons:

- a. It is undisputed that contractually it has been represented that D2 is the legal and beneficial owner of the lots, D2 is the registered owner, and there was no adverse claim to the lots nor caveats before the creation of the charge in favour of D3.
 - b. At all material times, there was no evidence to suggest that D3 possessed or could have reasonably acquired notice of any irregularities in the sale and purchase transaction between D1 and D2. Furthermore, the Plaintiffs' caveat on the land was withdrawn around 4 years before the lots were sold to D2.
 - c. It is not incumbent for D3 to investigate if there is any illegality attached to the sale and purchase agreement between D1 and D2 nor should a duty be imposed on D3 to investigate why the private caveat was withdrawn.
2. In order to qualify as a subsequent purchaser in good faith under the proviso to Section 340(3) of the National Land Code 1965, whether the bank must clearly show that it was impossible for the bank to have known of the unlawfulness of the sale and purchase transaction even after proper examination and verification of the sale and purchase agreement documents between the vendor and chargor?

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Answer: negative, for the following reasons:

- a. In the absence of any notice of actual fraud, deceit or dishonesty, there is no obligation to investigate the underlying sale and purchase transaction given that D2 is the registered proprietor and there are no encumbrances on the land.
 - b. The requirement to show it was impossible to have known of the unlawfulness of a transaction, even after a proper examination and verification of the sale and purchase agreements has been done, would render the registration of title meaningless.
3. In order to qualify as a subsequent purchaser in good faith under the proviso to Section 340(3) of the National Land Code 1965, whether the bank must critically look into the documentation, transactional documents (payments and receipts) leading up to the sale and purchase of the properties even though the sale and purchase transaction has been completed and title transferred and registered in the name of the chargor free from encumbrances prior to the creation of the charge with the consent of the vendor?

Answer: negative, for the following reason:

- a. Given that the Plaintiffs had not registered their interest nor made any attempt to register their interest, which resulted in D3 reliance on the conclusiveness of the register (showing D2 was the registered owner of the land), D3 should not be obligated to further scrutinize the transactional documents to qualify as a subsequent purchaser in good faith under the aforementioned provision.
4. Whether *Bayangan Sepadu Sdn Bhd v Jabatan Pengairan dan Saliran Negeri Selangor & Ors* [2022] 1 MLJ 701 which answered the above questions in the negative as opposed to the case of *Au Meng Nam & Anor v Ung Yak Chew & Ors* [2007] 5 MLJ 136 which answered the above affirmatively should apply when measuring the extent of good faith and/or bona fide required of a purchaser within the meaning of the proviso in 340(3) of the National Land Code 1965? [*paraphrased for brevity*]

Answer: *Bayangan Sepadu Sdn Bhd v Jabatan Pengairan dan Saliran Negeri Selangor & Ors* [2022] is the correct decision in measuring the extent of good faith and/or bona fide required of a purchaser within the meaning of the in 340(3) of the National Land Code 1965, for the following reasons:

- a. On the effect of registration, the conclusiveness of the register document of title does not require any person dealing with land to go behind the register document of title to investigate or to ascertain the validity of the title in line with the Torrens system.
- b. The facts in *Au Meng Nam* should be taken in context, where the courts were trying to dispense justice without going against the decision of *Adorna Properties Sdn Bhd. Boonsom Boonyanit* [2001] 1 MLJ 241 (prior to it being overruled). Furthermore, it concerns an immediate purchaser, and he was a party or privy to the fraud.

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5. Whether the burden of proving valuable consideration of a subsequent purchaser under the proviso to 340(3) of the National Land Code 1965 extends to proving that valuable consideration has passed between the immediate purchaser and the vendor?

Answer: negative, for the following reasons:

- a. D3 should not be required to prove the passage of valuable consideration between the immediate purchaser and the vendor given that D2 is registered as proprietor.
- b. Furthermore, the requirement to seek additional documentations is unnecessary and places an undue burden on bona fide purchasers.

To conclude, a register document of title is conclusive evidence of ownership which defeats all prior unregistered claims thus avoiding the need for subsequent purchasers to go behind the registered document of title to investigate and ascertain the validity of said title. This is the very grain and intent of the Torrens system, which is to provide certainty and security of titles and interests once acquired and registered