

Both the High Court and Court of Appeal found that since the 5th and 6th Respondents did not have any notice of, nor were they involved in, the 1st to 4th Respondents' fraud, their titles were protected by the Proviso to Section 340(3) of the NLC.

The Proviso to Section 340(3), NLC states:-

“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.

The Federal Court reversed such findings of the lower courts. The Federal Court held that in order for the Proviso to Section 340(3) of the NLC to apply, the purchaser must be: a) be a subsequent purchaser, and not an immediate purchaser; and b) the subsequent purchaser must be bona fide and had given valuable consideration. The Federal Court did not consider the 1st to 4th Respondents as the first or immediate purchasers and therefore found that the 5th and 6th Respondents were the immediate purchasers and not subsequent purchasers. It was thus held that the Proviso to Section 340(3) of the NLC was not applicable to them, despite their being bona fide purchasers for valuable consideration. The 5th and 6th Respondents' titles to the said Lots were ordered to be set aside.

The following statement by the Federal Court, rendered as a guide to the trial courts, is useful:

“Whenever a registered title or interest is sought to be set aside under s 340, first ascertain whether the title or interest under challenge is registered in the name of an immediate purchaser or a subsequent purchaser. If the title or interest is registered in the name of an immediate purchaser, the bona fides of the immediate purchaser will not offer a shield of indefeasibility. The title or interest of an immediate purchaser is still liable to be set aside if any of the vitiating elements as set out in s 340(2) has been made out. If the title or interest is registered in the name of a subsequent purchaser, then the vitiating elements in s 340(2) would not affect the title or interest of a bona fide subsequent purchaser.

The title or interest of a subsequent purchaser is only liable to be set aside if the subsequent purchaser is not a bona fide subsequent purchaser. The title or interest acquired by a subsequent purchaser in good faith and for valuable consideration or by any person or body claiming through or under such a subsequent purchaser, is indefeasible.”

Affin Bank Bhd v Damai Freight (M) Sdn Bhd [Federal Court Civil Appeal No. 02(F)-5-02/2013 (B)]

A written absolute assignment of rights has been, and still is, a popular and important security document in lending transactions involving land without an individual issue document of title. Very often a bank would obtain an absolute assignment of rights to the land from the borrower/assignor and when the document of title is subsequently issued, the lender/assignee would have a right to require the assignor to create a legal charge over the land, and to enforce the legal charge in the event of a default under the loan in question.

By the nature of an absolute assignment, the lender would acquire all the rights of the assignor to the land, including the assignor's rights under the agreement he had entered into for the purchase of the land. Notice of such assignment is then given to (or in some cases, the consent obtained of) the developer or party in whose name the master title over the lands (including the assignor's land) is registered. This is to ensure that when the individual title to the land is eventually issued, it will be delivered to the lender, as absolute assignee of the rights to the land.

If there is a default under the loan, the lender would realise such security in the following manner:

- a) if the individual title to the land is not issued yet, the lender may effect a sale, as absolute assignee, of its rights to the land without having to first obtain a court order. This arises from the concept that the lender, as absolute assignee and owner of the rights to the land, may sell such rights on its own. Such sale would effectively be by way of a further assignment of all the rights acquired by the lender, to the successful purchaser.
- b) if the individual title to the land is already issued, the lender has the right to insist on a land charge being created by the assignor over the title, in favour of the lender. The lender would then enforce the land charge pursuant to the terms of the National Land Code, 1965, ie., via a court-conducted auction sale.