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Financial Institution as A Bona Fide Purchaser for Value: Scratch Beneath the Surface

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Abstract

The Malaysian Government incorporated into the Malaysian primary land law statute, the National Land Code 1965 (NLC), the computerized land database. It is known as the Computerized Land Registration System (CLRS) in 2001. The main purpose of the CLRS is to provide a more efficient land database that replaced the manual Register Document of Titles (RDT). It is a commendable effort but the conversion process of the original titles placed at the land registry gives rise to an adverse implication on the registered proprietor. Land fraud scam deprived the legitimate ownership and interest in land. The implication of land fraud scam is like a double edge sword. The illegal activities affect the registered proprietor who lost his ownership of the land without any compensation accorded to him when the land is transferred to a bona fide purchaser for value as provided under the proviso of Section 340(3) of the NLC. The ownership or interest of the new proprietor or interest holder who obtained registration through land fraud scam is liable to be set aside. Registration offers certainty in the title. However, the security of tenure will remain at stake when the rightful and lawful claimant over the land is deprived of the land. The loss is compounded when no avenue for compensation is accorded for him under the NLC. Land fraud scam caused untold misery to these affected parties. There is no means to verify the authenticity of the parties and documents. The Australian conveyancing system is analyzed to review the legal measures used to reduce land fraud scam. This paper aims to evaluate the extent of a legal duty that needs to be imposed before any financial institution commits itself by accepting land as security for the approved loan.

Introduction

In the Peninsular Malaysia, the statute that regulates land law is the National Land Code 1965 (NLC). It was introduced by the Parliament in 1965 that is based on the Torrens System promulgated by Sir Robert Torrens in 1857.¹ The core principle under the Torrens System is the registration system,

¹ Torrens, R.R., *The South Australian System of Conveyancing by Registration of Title, with Instructions for the Guidance of Parties dealing, illustrated by Copies of the Books and Forms in use in the Lands Titles Office (1859)* 4 retrieved online at nla.gov.au/nla.obj-477

where upon registration of the prescribed form provided under the law, the title or interest in land shall be vested to the new proprietor or interest holder of the land.² Besides ascertaining the rights certainty of title and interest in land, the registration system has evolved its function to a more prominent role, that is, to safeguard against any risk of fraud in land dealings by preventing secret and fraudulent transfer of property.³ Accordingly, the registration system requires a lengthy process before the relevant documents could be safely registered.⁴ Unlike Australia, a nation where the Torrens System was earlier adopted, the Peninsular Malaysia has no specific statute that regulates the process of registration.⁵ However, the NLC provides the type of land transactions that are recognized as land dealings that must be go through the registration process before the ownership or interest is vested to the oncoming party. The relevant land transactions are:

- i. Transfer of land under Section 215(1) of the NLC where the prescribed form is called Form 14A;
- ii. Lease under Section 224(1) of the NLC where the prescribed form is called Form 15A;
- iii. Creation of a charge under Section 242(1) of the NLC where the prescribed form is called Form 16A; and
- iv. Easement under Section 286(1) of the NLC where the prescribed form is called Form 17A.

Since land is invaluable asset to a registered proprietor and could be exclusively used by him to generate income, it may also attract fraudsters to manipulate the registration process for their own advantage and cause the registered proprietor to suffer loss. Among the four types of dealings, a charge is the most vulnerable dealing that has been manipulated by fraudsters to gain illegal proceeds. A charge is a dealing where the registered proprietor or with his authority allows a third

3427321/view?partid=nla.obj-721488168#page/n2/mode/lyn on 1 January 2019.

- ² Salleh, B., (2010), *Malaysian Torrens System*, Dewan Bahasa dan Pustaka, Kuala Lumpur, ISBN 978-983-62-9465-4 at page 13-14; Ng, K.W., (2010), *Conveyancing in Malaysia Law and Practice* Sweet & Maxwell Asia, Kuala Lumpur, ISBN 978-967-5040-49-8 at page 24; Teo, K.S., (2012), *Land Law in Malaysia Cases and Commentary Third Edition*, Lexis Nexis Malaysia Sdn Bhd, Kuala Lumpur, ISBN 978-967-400-085-1 at page 124. Simpson, S.R., (1976), *Land Law and Registration*, Cambridge University Press, Australia, ISBN 0-521-20628-6 at page 3-10, Wong, D.S.Y., (1972), *Tenure and Land Dealings in the Malay States*, Singapore University Press at page 108; Francis, E.A., (1972), *The Law and Practice Relating to Torrens Title in Australasia Volume 1*, Butterworth & Co (Australia) Limited, ISBN 0-409-36511-4 at page 3-8
- ³ Maxwell, W.E., (1883), *Present and Future Land Systems*. Retrieved January 1, 2010, from <http://www.jstor.org/stable/60230894> assessed on 12/12/2016
- ⁴ Hamed, S., (2019), *Janab`S Key To Practical Conveyancing & Islamic Banking 2ed.*, Janab (M) Sdn Bhd, 9789671199206. Ng, K. W. (2010) *Conveyancing in malaysia: Law and practice*, (Sweet and Maxwell Asia); Lainah, Y., (2014), *Conveyancing Practice and Procedure in West Malaysia*, LexisNexis (M) Sdn Bhd, ISBN : 9789674002305.
- ⁵ Noraziah, A.B., (2019), "The Implication of Fraud on Security of Tenure under the Conveyancing Law and Practices in West Malaysia". PhD, Universiti Teknologi Mara, Malaysia.

party to apply for a loan from any financial institution and use a land as security for the loan. The land scam is made possible by using a forged title deed or a forged power of attorney to apply for a loan with a financial institution.

A financial institution may fall into the scam through a direct contact with the fraudster when he personally applied for a loan giving false documents or impersonation of the actual registered proprietor. This situation is reflected in the case of *Tan Ying Hong v Tan Sian San & Anor*⁶ where in this case the actual proprietor has no knowledge about the creation of a charge in favour of a financial institution because the creation of a charge was done by a holder of a forged power of attorney. A financial institution may also be affected through its panel solicitors who have corroborated with fraudsters to forge the signature of the registered proprietor during the preparation of a charge document. In the case of *T Sivam a/l Tharmalingam (sebagai wakil pentadbir kepada harta pusaka mendiang Nagamuthu a/l Periasamy) v Public Bank Berhad*⁷, the son of the deceased had committed land fraud by forging the signature of the late father in a Memorandum of Transfer and transferred the land to himself. The late father subsequently filed a court proceeding to recover the land but died before full disposal of the case. The son, Nagarajan a/l Nagamuthu, proceeded with obtaining a bank loan and using the said land as the collateral. Subsequently, the Administrator of the estate of the deceased claimed for the recovery of the land free from the charge created in favour of the chargee. The court found that the bank is the subsequent party to land fraud but it failed the test of bona fide purchaser since it appointed the same solicitor who assisted the forger to commit the fraudulent land transaction. Both cases indicated that being an artificial person, a financial institution has to make sure rigorous guidelines to be in place before granting any facilities using land as the collateral and registering any charge in its favour. A financial institution is vulnerable to fraudulent activities because the approval of loan could be easily manipulated by its employees at the credit and loan facilities department. Being an immediate party to the forged charge inevitably will cause the charge created and registered in its favour shall be declared as defeasible and liable to be set aside under section 340(3) of the NLC.

In 2010, this issue was discussed and clarified by the Federal Court. In the case of *Tan Ying Hong v Tan Sian San & Anor*⁸, a forged power of attorney was used by one of the defendants to create a charge over the plaintiff's land. The plaintiff brought the case to court claiming for a declaration that the power of attorney together with the charge is void ab initio and for the cancellation of the said charge in the issue document of title. At the court of the first instance in *Tan Ying Hong*, it was argued by the counsel for the plaintiff who is registered as the proprietor of the land that his client does not know as to how his name is registered as proprietor of the land. In addition to that he alleged that he has never signed any power of attorney in favour of the defendant. Therefore, it was contended that the charge created in favour of the defendant bank was not valid since it was executed by using a forged power of attorney.

6 [2010] MLJ 1

7 [2018] MLJU 580.

8 [2010] MLJ 1

On appeal, the Appellate Court judges were of the view that the third respondent's (the bank) interest in the charge was indefeasible except if there was evidence to prove that they know the fraudulent conduct or the charge was obtained by forgery or the title was unlawfully acquired. The interest of the chargee is protected under the proviso under Section 340(3) of the NLC. It is further decided by the honourable judges that the chargee who was a bona fide purchaser and acquired the interest in good faith with consideration obtained an immediate indefeasibility of interest following the case of *Adorna Properties Sdn Bhd v Bonsoom Boonyanit*. The appellant's appeal was dismissed with cost.

On appeal to the Federal Court, it was decided by the judges:

"...we hold that the Federal Court in Adorna Properties had misconstrued Section 340(1)(2) and (3) and came to the erroneous conclusion that the proviso appearing in sub-section (3) equally applies to sub-section (2). By so doing the Federal Court gave recognition to the concept of immediate indefeasibility under the National Land Code 1965 which we think is contrary to the provision of Section 340 of the National Land Code."

In brief, the decision of *Tan Ying Hong* by the Federal Court provides certainty to the status of an immediate party to the transaction tainted with forgery as void ab initio and will not be conferred with indefeasibility of title. The court adopted the deferred indefeasibility of title in deriving to this decision. However, the deferred indefeasibility principle will be able to safeguard the property rights of the former registered proprietor but not any incoming interest holder such as a chargee who intends to secure its interest to land by creating a charge.

Financial Institution as a Bona Fide Purchaser

The proviso of section 340(3) provides that the title or interest shall be indefeasible if it is acquired by any purchaser in good faith and for valuable consideration or any person or body claiming through the purchaser. It is crucial to determine as to whether a chargee may be included within the term "Bona Fide Purchaser" to invoke the proviso of Section 340(3) of the NLC. Lord Diplock who delivered judgment in the case of *T Damodaran v Choe Kuan Him*⁹ stated that interest in land, short of proprietorship which are capable of being registered are leases, charges and easements. It was observed by Arifin Zakaria CJ (Malaya)(as he then was) in the case of *Tan Ying Hong v Tan Sian San & Ors*¹⁰ where the appellant bank which is a chargee being the holder of subsequent interest in the land is protected by the proviso of Section 340(3) of the NLC. It is also in line with the definition of "Purchaser" provided in Section 5 of the NLC as a person or body who in good faith and for valuable consideration acquires title to or any interest in land.

Even if a chargee is protected as a Bona Fide Purchaser but the position of a financial institution is at risk when it appoints a solicitor on its behalf in the preparation of loan documentation and registration of a charge. As the principal that appoints a solicitor as an agent, a financial

⁹ [1972] MLJ 267

¹⁰ [2010]

institution will still be liable under the agency principle for its agent's delinquent conduct. In the case of *Abu Bakar Ismail & Anor v Ismail bin Hussin & Ors*¹¹, the court decided that the master is liable for his agent's fraud perpetrated in the course of the master's business even without its knowledge. To implicate the bank as the chargee who happened to engage the service of a panel solicitor that turned out to be the mastermind in the fraudulent transaction might erode the level of business efficacy. Without any clear guidelines, financial institutions are left in the dark as to the standard of care or minimum duty required in the preparation or completion of dealing documents.¹²

The abovementioned risk became apparent and raised an issue in a recent case of *Malayan Banking Berhad & Ors v Tho Siew Wah & Anor*¹³ where the forger executed Form 14A but the charge was executed by the new proprietor who used the said loan to part-finance the purchase of the property. The Court accepted the fact that the chargee was a subsequent party and was protected under the proviso of Section 340(3) of the NLC as a Bona Fide Purchaser. However, the court decided that Malayan Banking Berhad was not a Bona Fide Purchaser for Value due to the negligent conduct of its agent (the panel solicitor appointed by the bank) that was imputed on the bank as the principal. The said panel solicitor breaches her duty to verify the authenticity of the stamp certificate that turned out that the certificate number assigned was a fake number and the ad voleram stamp duty had not been paid at all for the transfer. Had the solicitor conducted an online check, the inevitable red flag surrounding the transaction would have been raised and the registration would have been aborted pending further inquiry. It may seem within the reasonable foresight but the solicitor appointed by the bank was only concerned with the security documents and was only responsible for registering the transfer form together with the charge instrument.

In the recent case, *Chan Kwai Fong v Dato' Captain Mohd Najib bin Abdullah*,¹⁴ where even though it was established by the Defendant (Purchaser of the land) that the Vendor is the registered proprietor of the strata title, he failed to give a valid reason as to why he managed to purchase the property lower than the original owner 20 years back. Therefore, he failed to discharge the burden of proof to establish that he is a bona fide purchaser for value. It was observed by the court that since the said property was being offered for sale at a suspiciously low price, there was a duty on the part of the defendant to make the necessary inquiries and to investigate all matters relating to the sale. The duty to make inquiries and the necessary investigation relating to the dealing as to the particular circumstances of the case demands to inquire knowledge of the improper conduct was stated in the case of *Overseas Realty Sdn Bhd v Wong Yau Choy & Ors; Tetuan Tay Ibrahim & Partners (Third*

11 [2007]4 MLJ 489 at page 491. The same principle was applied in the case of *T Sivam a/l Tharmalingam (sebagai wakil pentadbir kepada harta pusaka mendiang Nagamuthu a/l Periasamy) v Public Bank Berhad* [2018] MLJU 580.

12 Noraziah, A.B, Habibah, K., H., "The Aftermath of *Tan Ying Hong v Tan Sian San & Anor: Issues and Challenges Relating to Bona Fide Purchaser for Value*" *International Real Estate Conference, 27-29th April 2010, PWTC Kuala Lumpur*

13 [2017] MLJU 119

14 [2017] MLJU 15

Party¹⁵). Besides inquiries and investigations, in the case of *State Tailor Sdn Bhd v Nallapan*,¹⁶ the Court of Appeal decided that the basic element of good faith is the absence of fraud, deceit or dishonesty and the knowledge or means of knowledge at the time of entering into a transaction. In another Court of Appeal, in the case of *Au Meng Nam & Anor v Ung Yak Chiew & Ors*¹⁷ it was stressed by the Court that a Bona Fide Purchaser does not include a purchaser who is careless or who had been negligent.

The NLC merely provides the process for the preparation of dealing documents¹⁸, execution of dealing documents¹⁹ and registration of dealing documents²⁰. The provisions merely prescribe the process without providing for detailed and comprehensive procedures to guarantee that upon completion of the conveyancing process, a bona fide purchaser for value will obtain indefeasibility of title or interest upon registration of the same. The absence of such minimum requirement or guidelines could result in unfairness towards a bona fide purchaser such as the financial institution since his title or interest would be rendered defeasible even if he is not a party to any land fraud scam.

There are no guidelines as to the minimum requirement on due diligence and/or verifications procedures provided under the law that needs to be adhered to by anyone who intends to enter into land dealing. Salleh Buang²¹ posed a question as to whether the NLC gives adequate safeguard to an innocent party in a land transaction. Generally, a purchaser²² will usually appoint a solicitor to act on his behalf and relied solely on the expertise or honesty of the solicitor to obtain registration and guaranteed with the security of tenure.²³ Despite evaluation and interviewing being conducted on any applicants for loans, the fate of a financial institution will be affected if the charge transaction is

15 [2014]8 CLJ 107

16 [2005] 2 CLJ 167

17 [2007]4 CLJ 526

18 See Section 208, 209 and Schedule 10 of the National Land Code 1965 that provide for the preparation of dealing documents.

19 See Section 210 read together with Section 211 and Fifth Schedule of the National Land Code 1965.

20 See Section 292 to 306 of the National Land Code 1965.

21 Buang, S., "Security of Tenure Under the Malaysian Torrens System: What next after Boonsom Boonyanit?" International Real Estate Conference, PWTC, Kuala Lumpur.2006.

22 Section 5 of the National Land Code 1965 defined purchaser as person who is in good faith and pays valuable consideration for example a purchaser who intends to purchase a land or a lender who intends to use the borrower's land as security upon disbursement of loan by registering a charge document.

23 Section 340(1) of the National Land Code 1965 provides that upon registration the title or interest shall be indefeasible. However, it shall not be indefeasible if the instances under Section 340(2) of the NLC could be proven.

carried out and perfected by a solicitor who has collaborated with fraudsters without the knowledge of the financial institutions.²⁴

Another issue worth discussing is on the duty to investigate the authenticity or genuineness of the parties entering into land dealing. The NLC is silent on this issue. However, the NLC does provide for land search²⁵ which can be conducted at any land office, but it does not specify the importance of conducting land search neither does it states the effect of not conducting a land search. Therefore, it may lead to inconsistency in judicial decisions that could jeopardize the right of bona fide purchaser for value who without notice that the land dealing was tainted with fraud or forgery. This was evident from judicial decisions²⁶ where the court imposed a duty on the purchaser to investigate as to whether the proprietor is genuine as required by the court seems to be highly improbable because there is nowhere in the Torrens System that requires the parties in land dealing to investigate the register.

The nature of conveyancing procedures as practiced in West Malaysia does not provide an opportunity to a bona fide purchaser for value to investigate the authenticity of the proprietor. Execution of instruments is attested by the respective solicitor and after that, registration is presented by the relevant solicitor who from the very beginning has undertaken the duty to prepare and perfect the relevant documents until registration is done. It is to be observed that the process of perfecting land dealing such as sale and purchase of the property may not only involve the vendor and purchaser but may also involve other parties as well and each has a role to play. It requires all the relevant parties to understand and play their roles accordingly.²⁷ There is no means for a bona fide purchaser for value to check the identity of the registered proprietor since execution is done before his solicitor.²⁸

Lastly, a monitoring mechanism to detect irregular documents (for example forgery documents) is not available in the National Land Code 1965. The lack of such provision could lead to documents tainted with forgery or fraud be registered without being detected. What is provided for under the National Land Code 1965 is a presentation for registration that is done by two methods: personal and by prepaid post²⁹. So, there is no means for the land registry to check the authenticity of the signature of the parties involved in the land dealing. Even if the dealing documents are presented manually over the counter, there is no means to inquire into its authenticity.

²⁴ Noraziah,A.B, Suleiman,M.B, *"Indefeasibility of Title Under the National Land Code 1965:A Myth or Reality, as against Registered Proprietor vis a vis Bona Fide Purchaser For Value"* International Real Estate Symposium (IRERS),PWTC,Kuala Lumpur,2008.

²⁵ Section 384 of National Land Code 1965.

²⁶ See Au Meng Nam v Ung Yak Chiew [2007] 5 MLJ 136 and Liew Yok Lin v AGS Harta Sdn Bhd [2006] 7 MLJ 49.

²⁷ See Oi Lin, L.Y.,*Conveyancing Practice and Procedure in West Malaysia*(Malayan Law Journal Sdn Bhd,2003) at page 1-2.

²⁸ Note 5.

²⁹ Section 292(2) of the National Land Code 1965.

Joyce Palomar³⁰ in an article by Salleh Buang³¹ stated that security of tenure is crucial to the development of land and if land tenure is not secure, domestic or foreign investors will be hesitant to invest in land development. Security of tenure will become the basic foundation of a market economy and the catalyst for sustainable economic growth³². Such uncertainty in regulation will ultimately shake the confidence of domestic or foreign investors since they are not guaranteed with the security of tenure even if they have complied with the relevant conveyancing procedures and obtain registration of the title or interest.

Legal Due Diligence in the Chain of Conveyancing Process

In West Malaysia, there is no statute about conveyancing procedures to be relied upon by solicitors. To prepare and perfect any conveyancing transaction a solicitor has to adopt the procedures practiced by other Commonwealth countries such as the Australian conveyancers. As noted by P.H Kenny and C.M Bevan³³, the law of conveyancing is concerned with the legal mechanism whereby the ownership of land or interest in land is transferred from one person to another. In West Malaysia, the procedures can be simplified into four steps:

The first step, a solicitor needs to prepare the relevant dealing documents and contracts. The contracts are based on the law of contracts and the relevant statutes are Contracts Act 1950 and Specific Relief Act 1949. In order to prepare the documents, a solicitor must comply with the provisions of the NLC if the property has been issued with a separate issue document of title or strata title. The second step is to ensure that the execution of the contracts and dealing documents be carried out following the provisions of the NLC. A solicitor needs to comply with the said provisions to avoid any documents presented for registration being rejected by the land registry during registration. For the execution of dealing documents, Section 210 of the NLC must be read together with Section 211 of the NLC where it provides the need for execution to be attested before qualified officers. There is no means to check the other party's identity since execution is done before his solicitor. Both parties will execute the dealing document before their solicitors. In addition to the above, it is to be noted that the purpose of attestation is to prevent fraud and forgery.³⁴ However, it depends on the solicitors of both parties in the land transaction as emphasized in *Hickey v Powershift Tractors Pty Ltd*.³⁵

³⁰ Palomar, J., "Land Tenure Security as a Market Stimulator in china", available at <http://www.law.duke.edu/journals/djcl/articles/djclip7/htm> on 10 May 2010.

³¹ Buang, S., "Security of Tenure under the Malaysian Torrens System: What nest after Boonsom Boonyanit?", *International Real Estate Conference, PWTC, 2006*.

³² Apiyo, L., "Land Grabbing and Eviction in Kenya" at <http://www.unhabitat.org/HD/hdmar98/forum2.htm> on 10 May 2010.

³³ P.H Kenny and C.M Bevan, *Conveyancing Law*, Macdonald and Evans Ltd, Great Britain, 1983.

³⁴ Sharon Rodrick, Forgeries, False Attestations and Impostors: Torrens System Mortgages and the Fraud Exception to Indefeasibility, *Deakin Law Review* at <http://www.auslii.edu.au/au/journals/DeakinL.Rev/2002/5.html> on 5 February 2010.

³⁵ (1999) NSW Conv R 55-889.

The third step is to send the documents for stamping under the Stamp Act 1949. The final step is to present the documents for registration at the appropriate land registry. Presentation for registration is done by two methods: personal and by prepaid post. So, there is no means for the land registry to check the authenticity of the signature. Even if the dealing documents are presented manually over the counter, there is no means to inquire into its authenticity. The system provided by the land registry itself must be reliable and able to detect any discrepancy such as a biometric system is installed and before a presentation, each party is required to use the biometric system or technology for confirmation or scrutiny.

This biometric technology will be able to detect physical or behavioural traits for verification. It works based on enrollment where data will be captured based on specific trait or identity, later the data will store and when the next time the system is used, to identify whether the person is genuine it will compare the trait presented with the information on file, it either accepts or rejects that you are what you claim to be³⁶ For transactions which involve foreigners, it would be best to revert to the traditional or conventional method of affixing thumbprints (also by using biometrics technology) as well as signatures.

Any solicitor who acts for a client in a conveyancing transaction is prohibited from acting for both parties, such as in a transfer of land, the same solicitor cannot act for both the vendor and the purchaser.³⁷ In such a situation, it is therefore not within the scope of the duty of the solicitor to investigate into the authenticity of the vendor if he acts for the purchaser especially if the vendor has appointed his solicitor to act on his behalf. The issue that can be raised here is whose responsibility is it to investigate whether the purported vendor in the transaction is the genuine registered proprietor or he is just an impostor?

In view of the above procedures, there is nowhere in the process that requires investigation to be done by a solicitor especially with regards to the authenticity of parties or documents from the other solicitor. It is normal procedures for solicitors in West Malaysia to conduct a land search before embarking into the conveyancing procedures.³⁸ The purpose of conducting land search amongst other is to determine the latest status of the land and it will not be able to determine as to whether the purported vendor is the actual registered proprietor of the land. An advocate and solicitor are prohibited from communicating with anyone who is being represented by another advocate and solicitor except with the other's express consent.³⁹ Therefore as a solicitor acting for the purchaser, it will be considered 'unethical' to investigate or communicate with the client of the other solicitor. The real issue here is that even though the purchaser's solicitor has done his level best to ensure that the procedural aspect is complied with before registration is obtained, his client's interest will still be adversely affected if the purported vendor turns out to be an impostor.

³⁶ Wilson, V, Tracy: How Biometrics Works at
<http://computer.howstuffworks.com/fingerprintsscanner4.htm> on 2 March 2010.

³⁷ Rule 7(1) Solicitors Remuneration Order 2005.

³⁸ See Section 384 of the National Land Code 1965.

³⁹ See Rule 42 of the Legal Profession (Practice and Etiquette) Rules 1978.

In the case of *Au Meng Nam v Ung Yak Chew*,⁴⁰ the judges noted that having paid the full purchase price is not the sole indicator to be used as a criterion as a bona fide purchaser for value. In that case, the court ruled that if he disregards his obligation to investigate the alleged proprietors and the authenticity of the documents, he will be considered as negligent and therefore not entitled to be considered as a bona fide purchaser for value. However, this judgment can create more confusion as to what exactly is the purchaser supposed to do in order to be considered as a bona fide purchaser and therefore assured of an indefeasibility of title. As pointed out by Jerald Gomez⁴¹

“Exactly what must a purchaser do to receive protection under Section 340(3)? What searches must be done? If it is a good deal, must a purchaser wait to pay the balance purchase price? Will a purchaser who attempts to sell the property he bought at a higher price lose the protection? It may be a question of degrees.”

If that is the case, is it the prerequisite condition for anyone entered into land dealing to conduct an investigation or consult any private investigator to ensure that the proprietor is genuine and not an impostor. What then would be the extent of the duty of a financial institution before creating and registering a charge?

Australian’s Safeguard Measures Against Fraudster in Land Dealing

In Queensland, under the Land Transaction Act (LTA) and the Land Act 1994 which were amended in 2005 to provide for safeguard against identity fraud in the mortgaging of land. It was provided by these two statutes that a mortgagee is under an obligation to take reasonable steps to ascertain the true identity of the mortgagor and to compile a written record of the steps taken before the mortgage is lodged for registration and retain same for seven years. The record must be produced to the Registrar if requested.⁴²In order to verify the reasonable steps that should be taken by the mortgagee, a sample from the guidelines under the Financial Transaction Reports Act 1988 and the Financial Transaction Reports Regulations 1990 were used. The guidelines also provide for completion and execution of a certificate of a witness by the mortgagee’s agent before any mortgage can be accepted for registration and obtained an indefeasibility of title upon presentation of the same at the relevant land registry.

In order to reduce land fraud transaction, the Land and Property Management Authority of New South Wales amended its law by the introduction of verification procedures included in the Real Property Act 1900. It is required that before presenting a charge, the chargee must take reasonable steps to ensure that the person who executed the charge is or to become the registered proprietor of the land to be charged.⁴³ It is also required that the witness to a land dealing or caveat must have known the testator for more than 12 months or must have taken reasonable steps to ensure the

⁴⁰ (2007) 5 MLJ 136

⁴¹ Jerald Gomez, Section 340 of the National Land Code – Before and after Bonsoom Boonyanit, (2008) 1 MLJ 1xxii. See also comments made by Ahmad Mosdeen, On the proviso in Section 340(3) of the National Land Code 1965, (2002) 2 MLJ lxvi.

⁴² Section 11A of the Queensland Land Transfer Act 1994.

⁴³ Section 56C Real Property Act 1900.

identity of the person⁴⁴. Reasonable steps that will satisfy the verification requirements of the sections are to be prescribed by the Regulations since its verification procedure is an important safeguard to reduce fraud in conveyancing procedures.⁴⁵ The verification procedures incorporated into the new law set the minimum legal requirement to the mortgagee (Chargee) in the preparation and registration of charge which should be based upon face to face interview with the mortgagor, document-based verification, a minimum of two, preferably three, identification documents, at least one of which should include a photograph and original documents should be sighted, rather than certified copies.

Findings and Recommendations

Recent judicial decisions have shown the tendency of the courts to move away from the principles of the Torrens system. These cases have shown that it is no longer safe to rely on the Register book (see decisions starting with Adorna) without providing additional safeguard to ensure that the person claims to the registered proprietor of the land is genuine. Hence the alternative to such problems could be ratified by providing legal due diligence within the conveyancing practices. Perhaps, financial institutions should take proactive action by introducing stringent procedures or guidelines which can help reduce issues relating to fraud or forgery. For example, the measures taken by Queensland where the guidelines were incorporated into the Financial Transaction Act 1998. In addition to this requirement, amendments were made to include the obligations of the mortgagee. In the guidelines, the verification procedure, in brief, requires the mortgagee to verify the authenticity of the person including the photograph. It also includes execution of the certificate of witness that need to be executed by the mortgagor before a Commissioner for declarations or Justice of the Peace or solicitor to confirm that he is the same person as named in the loan document.

Conclusion

If the chargee such as in *Tan Ying Hong's* case was to be made liable for any form of fraud, forgery or misrepresentation not committed by them, the whole conveyancing practice would be slowed down in such a way that the bank would now need to conduct extensive or further investigation to determine the actual registered proprietor of the land in question. This lengthy and tedious process of verification will affect for instance the disbursement of loans. This would inevitably affect the whole process of the economic system. It slows down investments procedures because of such requirement to conduct extensive search and this will become a vicious cycle and could drive away potential investors. On the other hand, it is also vital to bring up the issue of registration. The Torrens system (a system of registration) which is supposed to provide certainty now no longer seems to be the case because as indicated by the judicial decisions it is not safe to place reliance on the Register book since we are required to probe or investigate beyond the Register. This defeats the purpose of registration which is the cardinal principle of the Torrens system. In the ultimatum, legal due diligence as introduced in Australia on financial institutions is worth to be considered and adopted by the Malaysian land law and conveyancing.

⁴⁴ Section 117 Real Property Act 1900.

⁴⁵ Land and Management Property New South Wales, Australia, "Consultation Paper on Confirmation of Identity Section 56C and 117 of the Real Property Act 1900" accessed at http://www.lands.nsw.gov.au/data/assets/pdf_file as at 23/4/2020.

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