MALAYSIAN JUDGMENTS

IN THE COURT OF APPEAL OF MALAYSIA

Coram: Tengku Maimun Tuan Mat, JCA; Nallini Pathmanathan, JCA; Zabariah Yusof, JCA

Yee Poh Nyen v Raji Bin Kasan and 8 Others

Citation: [2018] MYCA 279 **Suit Number:** Civil Appeal No. J-02(NCVC)(W)-1991-10/2016

Date of Judgment: 15 August 2018

Contracts & commercial – Sale and purchase agreement – Transfer of land – Approval from the State authority for the transfer of land – Whether the first sale and purchase agreement between the appellant and the first respondent valid and enforceable – Whether the sale and purchase agreement between the second respondent and the first respondent tainted with forgery, fraud or illegality and hence invalid

JUDGMENT

Introduction

[1] This is an appeal by the appellant/ plaintiff against the decision of the High Court at Muar in dismissing his claim against all the respondents/ defendants.

Background facts

[2] The first respondent, 90 years of age, is the owner of a land described as HS(M) 4872, Lot 991, Mukim Ulu Benut, District of Kluang, Johor ("the land"). The title of the land contains a restriction in interest, i.e. that the land shall not be sold, charged or transferred without the consent of the State Authority.

[3] The first respondent gave the third respondent, a broker, an option for the third respondent to find purchasers for the land. The first respondent agreed that he will take only up to RM520,000.00 from the sale. The option states that a 2% commission is payable to Tan Poi Meng, the third respondent's partner.

[4] On 18.11.2009, the third respondent brought the appellant to the office of the law firm of Haris Azmi & Associates ("HAA") where the fifth, the sixth, the seventh and the eight respondents are the solicitors practicing thereat. The third respondent was no stranger to HAA. He had been going to

HAA for many previous transactions. The appellant was attended to by HAA's employee by the name of KN Wong. An agreement was entered into between the appellant and the first respondent where the first respondent agreed to sell and the appellant agreed to purchase the land for RM612,560.00 ("the first SPA").

[5] On execution of the first SPA, the appellant paid a deposit of RM61,256.00. Payment was made via a cheque in the name of HAA. HAA issued a receipt for the deposit. The receipt was signed by the seventh respondent. The first respondent did not sign the agreement at this point. He signed the agreement by way of a thumb print two or three days later. By clause 1 of the first SPA, the first respondent acknowledged receipt of the deposit. The first SPA was stamped on 23.11.2009.

[6] On 30.11.2009, HAA informed the appellant to collect the signed SPA from its office. The appellant was also asked by HAA to attend the office to sign the consent application form for the transfer of the land and also to sign Form 14A. For purposes of transferring the land from the first respondent to the appellant, HAA prepared a Statutory Declaration to be affirmed by the appellant. The first respondent too affirmed a *Surat Akuan* on 1.12.2009 to apply for consent of State Authority for his land to be transferred to the appellant.

[7] The application for consent was forwarded by the Land Office, Kluang ("the Land Office") to the Menteri Besar's Office on 20.1.2010. Consent for transfer of the land from the first respondent to the appellant was granted by the State Authority on 8.2.2010. The decision granting consent was communicated by the Menteri Besar's Office to the Land Office vide a letter dated 19.2.2010 which was received by the Land Office on 24.2.2010. The Land Office in turn, by a letter dated 2.3.2010 communicated the approval for consent to HAA.

[8] On 2.2.2010, unknown to the appellant, the first respondent entered into a sale and purchase agreement with the second respondent in respect of the same land ("the second SPA"). The purchase price under the second SPA is RM796,250.00 which is RM183,690.00 more than the purchase price under the first SPA. The purchase was partly financed by a loan granted by the ninth respondent to the second respondent.

[9] Pursuant to a *Surat Akujanji* also dated 2.2.2010, the first respondent agreed that he would only accept RM520,000.00 for the purchase of the land and that he would not claim whatever difference in price sold by the broker. The second SPA was stamped on 8.2.2010.

[10] On 24.8.2010, a memorandum of transfer was executed and the land was registered in the name of the second respondent. A charge by the ninth respondent was also registered on the same day. The second SPA, the loan documentation, the memorandum of transfer and the documentation for the charge were all handled by HAA.

[11] Around April 2010, the appellant and his wife called HAA as to the status of the application for consent. KN Wong informed them that the application has been rejected by the Menteri Besar and that HAA had appealed against the decision or had made a second application. Around August 2010, the appellant and his wife again enquired about the application for consent and they were again

informed by KN Wong that the application was being processed. Similar enquiry was again made by the appellant's wife on 20.10.2010. KN Wong informed her that the application was still awaiting approval.

[12] On 21.10.2010, the appellant's wife called the Land Office and she was informed for the first time that:

(i) consent to transfer the land from the first respondent to the appellant was granted by the State Authority since March 2010;

(ii) a letter informing the same was issued on 2.3.2010;

(iii) the land had been transferred to the second respondent on 24.8.2010; and

(iv) a charge by the ninth respondent was registered on 24.8.2010.

[13] Upon enquiries by the appellant's wife, HAA/KN Wong claimed that they had no knowledge of the above matters.

[14] On 22.10.2010, the appellant went to the Land Office to do a search. The search confirmed what the appellant's wife learnt through her enquiries on 21.10.2010. Thereafter, on the same day, the appellant and his wife went to HAA's office to seek an explanation. KN Wong was not in the office but suggested a meeting between the appellant and the third respondent on 25.10.2010. The appellant requested to have a look at his file. He was informed that KN Wong had taken the file to Kuala Lumpur. Suspecting something amiss, the appellant immediately lodged a police report.

[15] On 25.10.2010, during a telephone conference with the appellant and the third respondent, KN Wong, for the first time told the appellant that the first respondent had terminated the first SPA on 19.1.2010.

[16] The appellant highlighted to the Land Office that he had a valid SPA with the first respondent for the purchase of the land. The appellant was advised to lodge a caveat. Investigations by the Land Office ensued, which led to the discovery that HAA had used the letter of approval in favour of the appellant to conjure the letter of approval for the second respondent. The appellant's name in the letter of approval dated 2.3.2010 issued by the Land Office was deleted and replaced with the second respondent's name.

Proceedings in the High Court

[17] The appellant filed a claim against the respondents seeking for inter alia a declaration that the transfer of the land to the second respondent and the registration of the charge in favour of the ninth respondent is null and void; for specific performance of the first SPA and for damages to be assessed.

[18] It was the first respondent's case that he had terminated the first SPA on 19.1.2010 due to the appellant's failure to pay him the 10% deposit and that the termination letter was handed to HAA as

the appellant's solicitors.

[19] As for the second respondent, he stated that he was not involved in the application for transfer of the land. He saw the advertisement for the sale of the land in *Sin Chew Jit Poh* and on 26.1.2010, the third respondent brought him to the office of HAA. The second respondent gave a bank draft of RM80,000.00 to HAA as deposit. KN Wong informed him that the purchase price was RM796,250.00. KN Wong also informed him that the land could only be transferred to him upon consent by the State Authority and that the completion date for the purchase is three months from the date of consent and that the second respondent has to pay the full purchase price before that date. On 2.2.2010, he went to the office of HAA to sign the second SPA and on 29.7.2010 and 17.8.2010, he signed Form 14A and Form 16A for the transfer and charge, respectively. The second respondent paid the full purchase price, of which RM495,000.00 was paid through a loan obtained from the ninth respondent.

[20] It was the second respondent's case that he is a bona fide purchaser having indefeasible title to the land as he obtained the approval for the transfer on 2.3.2010 vide a letter received by HAA in May 2010.

[21] The third respondent broker denied any involvement in the application for consent. He stated that he had no knowledge as to who attended to the application. He further stated that Tan Poi Meng had informed him of the termination of the first SPA by the first respondent as the first respondent had not obtained the 10% deposit as promised and that after a few days, he was informed by KN Wong that HAA had issued a letter terminating the first SPA.

[22] The fourth respondent (the third respondent's wife) also denied any involvement in the transaction. She testified that she is the sole proprietor of Sok Eng Enterprise and that she had no knowledge of the appellant's claim.

[23] As regards the fifth to the eight respondents (collectively referred to as HAA), they admitted that the seventh respondent prepared the first SPA and that the seventh respondent was the solicitor responsible for handling the first SPA. However, they pleaded that the third respondent, from whom they received instructions as regards the first SPA, was responsible for the application for consent.

[24] HAA denied any knowledge that the application for consent to transfer the land from the first respondent to the appellant was approved by the State Authority. It was their case that after the first SPA was signed, the appellant through his wife instructed the firm orally not to release the deposit to the first respondent until the approval or consent for transfer has been obtained. The first respondent however was not agreeable, hence the termination of the first SPA.

[25] It was further the case of HAA that the firm had informed the appellant of the termination. This according to HAA, was communicated to the appellant through telephone and a letter dated 20.1.2010 which was hand delivered to the appellant through the third respondent. HAA further stated that the appellant was asked to collect the deposit but the appellant had instead told HAA to hold on to the deposit for a new purchase. When the new purchase did not materialize and the

appellant failed to collect the deposit, HAA issued a letter dated 1.2.2011, enclosing a cheque to return the deposit to the appellant. The appellant refused to accept the deposit. The cheque was returned to HAA.

[26] It was also the case for HAA that at about May 2010, the third respondent told HAA that the first respondent had obtained the consent to transfer the land to the second respondent and that HAA was given a copy of the letter of approval dated 2.3.2010. Based on the approval letter dated 2.3.2010, HAA prepared the documentation for the transfer of land from the first respondent to the second respondent. HAA maintained that they were not involved in the application to the State Authority for consent to transfer the land and that the application was handled by the third respondent and/or his agent.

[27] As for the ninth respondent, its defence is simply that it had no knowledge of any fraud alleged by the appellant; that it is a subsequent bona fide purchaser for valuable consideration in good faith and that the charge registered in its name is valid and indefeasible.

Findings of the High Court

[28] The learned judge considered the following issues:

(i) whether the appellant failed to pay the 10% deposit to the first respondent and if so, the consequence of such failure; and

(ii) whether the appellant failed to prove the allegations of forgery or fraud against the respondents.

[29] Broadly, the learned judge accepted the respondents' version that the appellant had instructed HAA not to pay the 10% deposit of the first SPA to the first respondent because of the first respondent's old age and hence the condition precedent of the first SPA was not fulfilled.

[30] The learned judge accepted the letter of approval for the second respondent over the letter of approval for the appellant. The learned judge held that the appellant has failed to prove the elements of fraud against all the respondents. His Lordship made a finding that all the signatures on the transfer form and the charge were not obtained through fraud or forgery. The learned judge further made a finding that the appellant failed to prove fraud or forgery because there was no evidence from an expert, namely a chemist from *Jabatan Kimia*.

The Appeal

[31] The appellant canvassed two issues before us, namely:

(i) Whether the first SPA dated 18.11.2009 between the appellant and the first respondent was valid and enforceable; and

(ii) Whether the second SPA between the second respondent and the first respondent dated

2.2.2010 in respect of the same land was tainted with forgery, fraud and illegality and hence invalid.

[32] In essence, learned counsel for the appellant submitted that the first SPA was valid as the appellant had fulfilled all the requirements of the agreement and the approval for the transfer of the land from the State Authority was secured. It was further submitted for the appellant that the alleged termination of the first SPA was invalid and fraudulent and the requisite mandatory consent from the State Authority for the transfer of the land from the first respondent to the second respondent was forged.

[33] The appellant argued that there was fraud and forgery by the second to the eight respondents as there were two identical letters from the Land Office dated 2.3.2010 on the consent to transfer the land, one in favour of the appellant (exhibit P4) and the other in favour of the second respondent (exhibit P5). The appellant contended that the learned judge erred when he accepted the letter of approval for the second respondent over the letter of approval for the appellant despite overwhelming evidence to the contrary.

[34] The respondents took a common stand in opposing the appeal. They basically argued that the learned judge was correct in his findings that the first SPA was validly terminated by the first respondent on the ground of non-payment of 10% deposit; that the findings of the learned judge was supported by overwhelming evidence, in particular that the appellant admitted that he did not instruct HAA to release the 10% deposit to the first respondent; that the first respondent was thus free to enter into the second SPA and that there was no evidence adduced to prove the allegations of fraud or forgery as the appellant failed to specify who erased the appellant's name in exhibit P4 and substituted it with the second respondent's name in exhibit P5.

Our Findings

Whether the first SPA is valid and enforceable

[35] The answer to the first issue depends on whether there was in fact a termination of the first SPA by the first respondent on 19.1.2010.

[36] It is not a disputed fact that upon signing of the first SPA on 18.11.2009, the appellant paid the 10% deposit of the purchase price, by way of a cheque in the name of HAA. The said cheque was cashed by HAA on the next day, 19.11.2009.

[37] The respondents highlighted clause 1 of the first SPA which provides for the deposit to be paid by the purchaser to the vendor. It was contended by the respondents that since the first SPA did not provide for payment of deposit to HAA, the appellant breached the first SPA in making payment to HAA, which entitles the first respondent to terminate the first SPA.

[38] The appellant's contention is that HAA is a common solicitor acting for both the appellant and the first respondent. In this regard, it was put to the appellant during cross-examination that HAA was only acting for the appellant. Consistent with his evidence in chief, the appellant stated that he was

informed by the third respondent and KN Wong that HAA was also the solicitor for the first respondent. Hence the appellant argued that any payment made to HAA was payment made to the first respondent.

[39] The first respondent in his evidence stated that the main term and condition of the first SPA was that the appellant must pay the 10% deposit to him in cash and that he terminated the first SPA because the appellant did not pay him the 10% deposit. The first respondent further testified that he did not agree to sign and did not sign any document for purposes of transfer of the land to the appellant until the 10% deposit was paid to him in cash.

[40] We find that the oral evidence of the first respondent contradicts the contemporaneous documentary evidence. Firstly, nowhere in the first SPA is there a clause for payment of 10% deposit to be paid to the first respondent in cash. Secondly, the first respondent did sign a document on 1.12.2009, i.e. a *Surat Akuan* agreeing to transfer the land to the appellant.

[41] As stated earlier, it is not in dispute that the appellant did pay the 10% deposit via cheque which was cashed by HAA. HAA did not remit the deposit to the first respondent, purportedly on the oral instruction of the appellant's wife that the deposit should not be paid to the first respondent until consent for transfer is obtained. For reasons which we will set out later, we find this purported instruction not probable. In any event, we accept the evidence of the appellant that he was informed by the third respondent and KN Wong that HAA was acting for both the appellant and the first respondent. Hence we agreed with the appellant that payment to HAA is effectively payment to the first respondent. We do not think that it necessitates another express specific instruction from the appellant to HAA to release the deposit to the first respondent. Thus, if at all the 10% deposit which was already paid by the appellant to HAA under the first SPA was not paid to the first respondent, then the fault in our view, should lay with HAA. In fact we noted that the second SPA had the same terms and conditions as the first SPA as regards the deposit where the second respondent had similarly paid deposit to the first respondent vide cheque to HAA.

[42] It was the respondents' version of events that the first SPA was terminated due to non-payment of deposit by the appellant; that the appellant knew about the termination and that the appellant accepted the termination. The only evidence supporting the respondents' version is the oral testimony of KN Wong. According to KN Wong, after the first SPA was terminated, he called the appellant's wife to collect the deposit but the wife requested that the deposit be held by HAA for subsequent purchase. For the reasons that follow, we are of the view that the evidence of KN Wong is unreliable.

[43] KN Wong was asked whether he ever told the appellant's wife that the consent or approval from the State Authority has yet to be obtained. He admitted that the appellant's wife did call and that he asked her to check with the third respondent. Now, if there was in fact a termination of the first SPA due to the non-payment of the 10% deposit to the first respondent; that the appellant knew about it; that the appellant agreed to the termination and that the appellant or his wife had requested that the deposit be kept by HAA for future purchase, why the need for KN Wong to ask the appellant's wife to check with the third respondent on the status of the application for consent? Surely, the need to

check with the third respondent on the status of the application did not arise if the respondents' version on the termination of the first SPA and on the appellant's knowledge and agreement of the same is indeed true.

[44] The respondents relied on a letter dated 19.1.2010 purportedly from the first respondent terminating the first SPA for the reason that the first respondent did not receive payment of the 10% deposit from the appellant. In this regard, it is pertinent to note that the letter was not addressed to the appellant but addressed to HAA.

[45] The seventh respondent testified that HAA wrote a letter dated 20.1.2010 to the appellant informing the appellant of the termination by the first respondent. According to the seventh respondent, the letter was delivered to the appellant through the third respondent. It was also the evidence of the seventh respondent that the third respondent told him that the appellant accepted the termination and that the appellant had asked the third respondent to look for other land to be purchased and for that purpose, HAA was to hold on to the deposit.

[46] This part of the seventh respondent's testimony, in our judgment is inherently improbable and if accepted, defies common sense and logic, because having known and accepted the termination by the first respondent in January 2010, the appellant would not be making enquiries about the status of the application for consent. But not only did the appellant make enquiries with HAA, he also enquired directly with the Land Office. The conduct of the appellant is not consistent with the respondents' version that the appellant knew and accepted the termination. Rather, the appellant's conduct reflects his intention to proceed with the first SPA. The evidence was overwhelming that the appellant was waiting for the consent, hence the various calls to HAA, the call to the Land Office and the search at the Land Office, all to check on the status of the consent application.

[47] Further, HAA's letter dated 20.1.2010 to the appellant states inter alia "...we have been informed by the Vendor that he had terminated the Sale & Purchase ... A photocopy of the said letter enclosed herewith, ... kindly let us have your further instruction in this matter within seven (7) days from the date of this letter, failing which we shall not proceed further with the purchase and the ten (10%) per cent deposit ... shall be return (*sic*) to you and the above sale & purchase shall be considered null and void".

[48] The appellant contended that the letter dated 20.1.2010 from HAA which was never received by him was an afterthought and was created by HAA after fraud or forgery was discovered by the appellant. We pause to observe that ordinarily there would have been an acknowledgement of receipt by a client of such an important and crucial letter from a solicitor, but in this case we find no acknowledgement whatsoever by the appellant of the letter dated 20.1.2010.

[49] The second SPA was entered into on 2.2.2010 at the office of HAA which means as at 2.2.2010, HAA very well knew that there was a sale and purchase of the same land between the first respondent and the second respondent. However, when the appellant called HAA between April 2010 and October 2010 to enquire on the status of the application for consent, HAA/KN Wong kept telling the appellant and his wife that the application was still awaiting approval. HAA/KN Wong did not

inform the appellant and/or his wife of the termination letter dated 19.1.2010 neither did HAA/KN Wong disclose to the appellant/his wife of the second SPA dated 2.2.2010.

[50] The reasonable inference to be drawn from the fact that KN Wong kept telling the appellant/his wife that consent for transfer is pending and from the fact that KN Wong asked the appellant's wife to check with the third respondent as regards the status of the application for consent is that there could not have been any termination of the first SPA on 19.1.2010 as contended by the respondents.

[51] HAA, by its letter dated 1.2.2011 which is almost thirteen (13) months after the purported termination by the first respondent, sought to return the deposit to the appellant vide a PBB cheque No. 487946. The cheque was similarly dated 1.2.2011.

[52] The seventh respondent explained that HAA's letter dated 1.2.2011 was issued because the appellant did not collect the deposit and did not give instructions for the new purchase of land. Nevertheless, no evidence was led that the third respondent had shown other properties to the appellant which the appellant rejected such that there was no longer any need for HAA to hold on to the deposit.

[53] More importantly, the fact that HAA was returning the deposit to the appellant because there was no new purchase by the appellant was conspicuously absent in the letter dated 1.2.2011. The letter simply refers to the termination by the first respondent of the first SPA. And in this respect, we opine that if the appellant had been notified to collect the deposit upon the purported termination by the first respondent, the cheque for the return of the deposit would have been dated much earlier and not on 1.2.2011, after the fraud or forgery came to light. In short, the contemporaneous document does not support the evidence of the seventh respondent nor the case advanced by HAA (see **Tindok Besar Estate Sdn Bhd v Tinjar Co** [1979] 2 MLJ 229).

[54] Having perused the records of appeal, except for the evidence of KN Wong, we found no other evidence that the appellant instructed HAA not to pay the 10% deposit to the first respondent due to the first respondent's old age. And as per our analysis of the evidence above, to hold that the appellant had knowledge of the termination and had accepted the termination would not accord well with the probabilities of the case. The appellant's contemporaneous conduct in regularly making enquiries as to the status of the application for consent, checking with the Land Office, lodging a caveat and a police report was simply not consistent with someone having knowledge that the first SPA had been terminated and that he was waiting for another purchase.

[55] Looking at the whole circumstances of the case, we conclude that the termination letter dated 19.1.2010 is not a bona fide contemporaneous document but a document created much later to cover up the fraud. In that sense, the termination letter dated 19.1.2010 is fictitious. It is our view that the first respondent was used by HAA to thumb print the purported letter of termination dated 19.1.2010. It follows that there was no termination of the first SPA and the first SPA remains valid and enforceable.

Whether the second SPA is tainted with forgery, fraud and illegality and hence invalid

[56] HAA's letter dated 20.1.2010 purportedly informing the appellant of the termination of the first SPA by the first respondent requires the appellant to revert within seven days. However, on 26.1.2010 HAA issued a receipt to the second respondent for the sum of RM80,000.00 being payment of deposit for the purchase of the land by the second respondent. In other words, before the expiry of the seven days and without waiting for the appellant's instruction, HAA had accepted the deposit from the second respondent for the second SPA. This effectively renders HAA's letter dated 20.1.2010 to the appellant redundant and illusory and raises doubts as to the bona fide of the termination letter and consequently, the second SPA.

[57] The Land Office issued a letter on 2.3.2010 addressed to the first respondent stating that the application for transfer to the appellant has been approved. HAA denied any knowledge of the approval. However, as established through the evidence of the Land Administrator, Abdul Malik bin Haji Ismail (SP1), it was the practice of the Land Office to send the letter to the solicitor who forwarded the application for consent. At this juncture, we entertain no doubt that the application for consent was made by HAA given the fact that HAA had, on 30.11.2009 asked the appellant to attend the office to sign the consent application form and other documents pertaining to the transfer of the land from the first respondent to the appellant.

[58] The letter dated 2.3.2010 issued by the Land Office on the consent granted for the transfer of the land from the first respondent to the appellant bears the Land Administrator's reference number PTDKPM 4/01/03/01/679/2009 (exhibit P4). The purported approval for the second respondent carries the same reference number (exhibit P5). All the particulars or contents of exhibits P4 and P5 are the same, except for the name of the transferee. Exhibit P4 has the name of the appellant as the transferee while exhibit P5 has the name of the second respondent. Common sense dictates that there could not have been two approvals dated the same day in respect of the same land from the same transferor to two different transferees. This indicates that one of these documents is not genuine.

[59] It is worthy to note that in exhibit P4, there is an endorsement of the Land Office whereas exhibit P5 had no such endorsement. The *Surat Akuan* signed by the first respondent to transfer the land to the appellant (exhibit P21) also contained similar endorsement. The endorsement in exhibits P4 and P21 signed and sealed by the Land Office reads:

> "Dikeluarkan di bawah peruntukan Seksyen 383 Kanun Tanah Negara 1965 dan disahkan sebagai Salinan Sah ...".

[60] Section 383 of the **NLC** provides:

> "(1) The Registrar shall, upon payment of the prescribed fee, furnish to any person or body applying therefor a certified copy of any register document of title or registered instrument of dealing which is in his custody.
>
> (2) Every such certified copy ... shall be received by any Court or Judge, and any other person or body having authority under this Act or any other written law for the time being in force to enquire into or adjudicate on any matter, as *prima facie* evidence of all matters contained therein

or endorsed thereon.".

[61] Applying the above provision, we hold that exhibit P4 which shows approval for the transfer of the land from the first respondent to the appellant, is the genuine document, not exhibit P5.

[62] In addition, KN Wong, in his police report lodged on 21.1.2011 stated that the letter of approval for the second respondent was forged but that he was not responsible for it. Significantly, the fact that the approval letter for the transfer to the second respondent was forged is confirmed by the independent evidence of the officers from the Land Office.

[63] SP1 and Khairulfaezin bin Abu Kassim (SP2) testified that there was never an approval to transfer the land from the first respondent to the second respondent. As a matter of fact, there could not have been any approval without an application. SP1 and SP2 maintained that the Land Office does not have the records relating to any application made for the transfer of the land from the first respondent to the second respondent. Neither did the Land Office issue the letter of approval for the second respondent. On the contrary, SP1 and SP2 testified that there was only one approval i.e. for the transfer from the first respondent to the appellant. The oral evidence of SP1 and SP2 is fortified by the contemporaneous conduct of SP2. Having advised the appellant to lodge a caveat, SP2 has also lodged a registrar's caveat over the land on 3.5.2011.

[64] Another independent source of evidence came from the Menteri Besar's Office on the very approval by the State Authority dated 8.2.2010 for the transfer of the land from the first respondent to the appellant (exhibit P3).

[65] Whilst the appellant furnished complete documents leading to the letter of approval issued by the Land Office dated 2.3.2010 for the transfer in his favour, we find no documentary trail of evidence produced by the second respondent which led to the letter of approval in the second respondent's favour. To recap, the second respondent stated that he went to HAA's office on 2.2.2010 to sign the second SPA. He also signed the transfer form, Form 14A and Form 16A for the charge to the ninth respondent on 29.7.2010 and 17.8.2010, respectively. The second respondent knew that consent of the State Authority was needed for the transfer of the land to him, but he led no evidence that he ever signed any document for purposes of application for consent of the State Authority.

[66] What is more telling is the fact that the second SPA was stamped on 8.2.2010, the same date on which the purported approval for the transfer from the first respondent to the second respondent was granted. Contrast this with the approval in favour of the appellant which had taken some time from the date of the first SPA in November 2009 to the approval by the State Authority in February 2010, and the notification by the Land Office of the consent by the State Authority to HAA in March 2010.

[67] On the balance of probabilities, we find that the appellant has proved that the transfer of the land from the first respondent to the second respondent was effected through a forged document.

[68] So who forged the document granting approval to the appellant to create a document granting approval to the second respondent? Put another way, who deleted the appellant's name in exhibit P4

and inserted the second respondent's name in exhibit P5. All the respondents denied having anything to do with P5. In denying responsibility, HAA through the seventh respondent and KN Wong stated that it was the third respondent who was responsible for the application for consent. The third respondent on the other hand stated that the application for consent was handled by his partner, Tan Poi Meng.

[69] The learned trial judge found that the appellant failed to prove his case inter alia because the signatures on the transfer form and the charge were not obtained through fraud or forgery; because the appellant failed to prove who amongst the respondents had changed the name of the transferee in the approval letter dated 2.3.2010 and because the appellant failed to call expert evidence.

[70] With utmost respect to the learned judge, the dispute between the parties was not whether the signatures on the transfer form and the charge were forged but the dispute concerns the forgery of the letter of approval for the transfer of the land, issued by the Land Office dated 2.3.2010.

[71] We accept that there was no direct evidence on who amongst the respondents had deleted the appellant's name and substituted it with the second respondent's name in the letter of approval dated 2.3.2010. The law however does not require direct evidence, but recognizes that frauds are commonly proved on the basis of inviting the fact-finder to draw proper inferences from primary facts (see **Dadourian Group International Inc v Simms and Ors** [2009] 1 Lloyds Rep 601). In the instant appeal, inferences drawn from primary and established facts point to the second respondent, the third respondent and HAA.

[72] The first respondent testified that the transaction with the second respondent was handled by HAA and the third respondent. Likewise, the second respondent stated that the second SPA and the documentation for the transfer of land from the first respondent to the second respondent were prepared by HAA. The witnesses from the ninth respondent also confirmed that HAA was responsible for preparing the documentation for the loan and the charge in relation to the second SPA.

[73] As testified by the second respondent, it was KN Wong who told him about the need to apply for consent, yet HAA did not make such application. This was established through the evidence of SP1 and SP2 who stated that there never was any application for consent to transfer the land from the first respondent to the second respondent. And despite knowing that he needed the State Authority's consent for the land to be transferred to him, the second respondent did not sign the necessary documents to apply for consent.

[74] As alluded to earlier, it was KN Wong of HAA who told the appellant that the application for consent to transfer the land from the first respondent to the appellant was awaiting approval when in fact approval had been granted. And when confronted with the fact that consent had been granted and the land had been transferred to the second respondent, KN Wong/HAA denied any knowledge notwithstanding that KN Wong knew of the second SPA; notwithstanding that HAA was responsible for the application for consent under the first SPA; and notwithstanding that HAA was also responsible for the registration of the transfer to the second respondent under the second SPA, in spite of not making any application for consent for the said transfer.

[75] The third respondent admitted in evidence that he and his partner will share RM276,250.00 in profits from the second SPA as opposed to only RM92,560.00 from the first SPA. The evidence of KN Wong revealed that on the instructions of the third respondent, out of the purchase price of RM796,250.00 under the second SPA, RM276,250.00 was deducted and paid to the third respondent, the third respondent's wife and Tan Poi Meng. The first respondent was only paid RM520,000.00.

[76] With respect, the learned judge erred in holding that the appellant failed to prove his case because the appellant did not adduce any expert evidence. Even without the evidence of the chemist, we find the oral and documentary evidence sufficient to support the appellant's allegation of fraud and forgery in relation to the approval of consent to transfer the land from the first respondent to the second respondent (see **Nik Abd Rahim bin Abdul Jalil v Suhaili bin Abdul Halim dan lain-lain** [2014] 5 MLJ 114).

[77] Fraud in actions seeking to affect a registered title means actual fraud or dishonesty of some sort and not what is called constructive or equitable fraud (see **Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors** [1983] 1 MLJ 81). Whether fraud exist is a question of fact which is to be determined in the light of the facts and circumstances surrounding each particular case (see **P.J.T.V. Denson (M) Sdn Bhd v Roxy (Malaysia) Sdn Bhd** [1980] 2 MLJ 137; **Suratmin Othman v Yusof Omar & Ors** [1988] 2 CLJ Supp 380). Fraud may occur where the designed object of a transfer is to cheat a person of any existing right or where by a deliberate and dishonest act a person is deprived of his existing right (see **Datuk Jagindar Singh & Ors v Tara Rajaratnam** [1983] 2 MLJ 196). As for the standard of proof, it is now settled that in a civil claim, the standard of proof when fraud is alleged is on the balance of probabilities (see **Sinnaiyah & Sons v Damai Setia Sdn Bhd** [2015] 5 MLJ 1).

[78] There is more than ample evidence to show that the third respondent and HAA, had conducted themselves dishonestly by the following acts: in informing the appellant and his wife that the application for consent for transfer was pending approval when approval had in fact been obtained; in forging the approval letter for the transfer from the first respondent to the appellant; in submitting the documents for the transfer of the land from the first respondent to the second respondent knowing that there was never an application for consent to the State Authority for such transfer; in not disclosing the existence of the second SPA when the appellant and his wife enquired on the status of the application for consent and in informing the appellant that the first respondent had terminated the first SPA by a letter dated 19.1.2010 which was fictitious. The withholding of the above information by the third respondent and HAA are affirmative acts designed to cheat the appellant of his existing right under the first SPA.

[79] Viewed against the contemporaneous events, the appellant's case is supported by credible evidence, not merely on suspicion. The learned judge however failed to judicially consider the totality of the evidence. His Lordship made no reference to the Land Administrator's letter dated 5.10.2011 to the Menteri Besar's Office (exhibit P1) which states:

> "2. Bagi makluman tuan, Pentadbiran ini telah menerima permohonan kebenaran pindahmilik atas fail PTDKPM 4/01/03/01/679/2009 bertarikh 7.12.2009. Pemohon adalah tuantanah yang

bernama Raji bin Kasan telah menjual tanah kepunyaannya kepada Yee Poh Nyen ...

3. ...

4. Pada 24hb Februari 2010, pentadbiran ini telah menerima surat keputusan daripada Y.A.B. Menteri Besar Johor mengenai permohonan tersebut atas rujukan fail ... bertarikh 19hb Februari 2010 dan Menteri Besar telah meluluskan permohonan tersebut atas nama Yee Poh Nyen. ...

5. Pentadbiran ini telah mengeluarkan satu surat kelulusan kepada pemohon dan penerima pada 2hb. Mac 2010 ...

6. ... pembeli iaitu Yee Poh Nyen hadir ke Pejabat Tanah Kluang bagi bertanyakan status permohonan kebenaran pindahmilik tersebut adakah ianya diluluskan atau belum. Dari situlah pihak kami di pendaftaran mendapati tanah tersebut telah dipindahmilik pada 24hb Ogos 2010 melalui peguam Haris Azmi & Associates ... kepada nama Bon Sim ... Setelah disemak borang pindahmilik 14A, didapati pihak peguam memasukkan salinan surat kelulusan pindahmilik atas nama Bon Sim dengan menggunakan no. fail dan surat kelulusan pembeli pertama iaitu Yee Poh Nyen dan salinan surat tersebut diakui sah oleh peguam Haris Azmi & Associates. Di sini barulah pentadbiran ini mendapat tahu terdapat penipuan pada surat kelulusan pindahmilik asal yang telah dikeluarkan dan (*sic*) Pejabat Tanah Kluang. Pentadbiran ini telah membuat semakan dalam buku permohonan kebenaran dan tidak pernah menerima permohonan kebenaran pindahmilik daripada Raji bin Kasan kepada Bon Sim ...".

[80] In the light of all the above, we hold that the second SPA is tainted with forgery, fraud and illegality and hence invalid.

[81] What then is the effect of fraud and forgery on the second respondent's title and the charge in favour of the ninth respondent?

[82] Section 340 of the **NLC** provides:

"**340. Registration to confer indefeasible title or interest, except in certain circumstances**.

(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.

(2) The title or interest of any such person or body shall not be indefeasible-

(a) in any case of fraud, 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.

(3) 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 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.".

[83] Given the express restriction in interest on the document of title to the land, it is clear that the transfer to the second respondent could not have been registered without the consent of the State Authority and undeniably, the second respondent had never obtained such consent. Since there was no approval by the State Authority for the transfer from the first respondent to the second respondent, such transfer is contrary to the NLC, illegal and liable to be set aside. The transfer to the second respondent who is an immediate purchaser was made possible only because the document signifying consent to the second respondent was forged from the document originally issued in favour of the appellant where the appellant's name was deleted and substituted with the second respondent's name. The instant appeal falls squarely within section 340(2)(a) and (b) of the **NLC** which renders the second respondent's title to the land defeasible (see **Tan Ying Hong v Tan Sian San & Ors** [2010] 2 MLJ 1).

[84] As for the ninth respondent, there was no allegation that it was a party or privy to the fraud and forgery. Nevertheless the appellant contended that the charge is invalid and the interest of the ninth respondent is defeasible for two reasons: (i) there was no consent of the State Authority for the land to be charged and (ii) HAA's knowledge of the fraud and forgery is imputed to the knowledge of the ninth respondent.

[85] For the first reason, the appellant relied on **UMBC v Syarikat Perumahan Luas Sdn Bhd (No. 2)** [1988] 3 MLJ 352 wherein it was held that the charge having been registered in breach of an explicit statutory prohibition imposed on the title to the charged land, rendered the title or interest of the chargee defeasible. In support of his second reason, the appellant relied on **T. Sivam a/l Tharamalingam v Public Bank Berhad** [2018] MYFC 11 for the proposition that the ninth respondent is not entitled to the statutory defence of being a subsequent purchaser in good faith under the proviso to section 340(3) of the **NLC**.

[86] In **T Sivam**, one Nagarajan had fraudulently transferred the land from the original owner, the deceased. After the land was transferred and registered in Nagarajan's name, the defendant granted a loan to Nagarajan and Sithra who then created a charge in favour of the defendant over the land. The

solicitor who acted for the defendant also acted for Nagarajan in the dispute as to the ownership of land between Nagarajan and the deceased. Hence, the solicitor had knowledge of the dispute as to the ownership of the land. Nonetheless, despite having such knowledge, the solicitor prepared and attested to the facilities agreement between the defendant and Nagarajan as common solicitor and advised the defendant to release the loan to Nagarajan. When the deceased discovered the charge, he filed a suit against the defendant, inter alia for a declaration that the charge created by Nagarajan in favour of the defendant was defeasible and liable to be set aside. The defendant relied upon the proviso to section 340(3) to avail itself of a deferred indefeasibility of title on the charge.

[87] The High Court allowed the claim by the deceased. The Court of Appeal reversed the decision of the High Court. On appeal to the Federal Court, the appeal was allowed.

[88] The bone of contention between the parties was on the issue of good faith and the central question for determination by the Federal Court in relation to that issue was to what extent would the solicitor's knowledge be imputed to the defendant? Applying the general law of principal and agent, the Federal Court ruled that the knowledge of a solicitor would be imputed to the defendant and that like all general rules there are exceptions. An exception to the principle that the knowledge of a solicitor is the knowledge of the client is only admitted where the solicitor is complicit in the fraud. On the facts, the Federal Court found that good faith of the defendant was lacking thereby defeating its statutory defence of being a purchaser in good faith under the proviso to section 340(3) of the **NLC**.

[89] Reverting to the instant appeal, the appellant contended that knowledge of HAA of the fraud is knowledge of the ninth respondent. However, unlike the case of **T Sivam** where there was no allegation of fraud against the solicitor, here, it is the very case of the appellant that HAA committed fraud on the appellant. Therefore this is an exception to the principle that knowledge of a solicitor is knowledge of the client. On that ground, we are unable to treat knowledge of HAA of the fraud and forgery as knowledge of the ninth respondent. The ninth respondent, as a subsequent bona fide holder of interest in good faith for valuable consideration is thus entitled to the protection under the proviso to section 340(3) of the **NLC** (see **Tan Ying Hong** (supra); **Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors** [2014] 2 MLJ 768).

[90] We are also unable to sustain the appellant's argument that the charge is defeasible because it was created and registered without the consent of the State Authority, given the fact that by *Pekeliling PTG Johor Bil. 10/86*, the State Authority had given a blanket approval for consent to charge lands with restrictions in interest. Clause 1.1 of the *Pekeliling* reads:

> "1.1 Pekeliling ini dikeluarkan untuk memaklumkan Pentadbir-Pentadbir Tanah Daerah dan Pendaftar Hakmilik mengenai Keputusan Kerajaan yang bersetuju memberikan kebenaran menyeluruh untuk cagar/ gadaian bagi semua jenis tanah yang mempunyai sekatan kepentingan.".

[91] Consequently, we hold that the charge in favour of the ninth respondent is indefeasible and it follows that the charge remains on the title. The appellant is entitled to specific performance and we further hold that the second, the third, the fifth to the eight respondents are jointly and severally liable

for payment of the redemption sum to the ninth respondent such that the appellant acquires a clean title.

Conclusion

[92] The facts and circumstances of the case and the evidence in totality support the appellant's case. The evidence of fraud, forgery and illegality is overwhelming. The learned judge had committed material errors in evaluating the oral and documentary evidence and in failing to draw proper inferences. His Lordship failed to assess the evidence with the documents at hand and his findings do not accord well with the probabilities of the case, which warrants appellate intervention (see **Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors** [2005] 2 MLJ 1; **Loo Hon Kong v Loo Kim Lim @ Loo Kim Leong** [2004] 4 AMR 591).

[93] On the balance of probabilities, we find that the appellant has proved his case against the second, the third and the fifth to the eight respondents. We allow the appeal against the second, the third and the fifth to the eight respondents and we set aside the order of the High Court.

[94] Having perused the notes of proceedings, from the manner the first respondent answered the questions posed, it appears to us that except for the fact that he wanted to sell the land, the first respondent did not know much about what happened. And apart from the letter of termination which was prepared by the fifth to the eight respondents after the appellant discovered the fraud and forgery, there is no other evidence to establish that the first respondent was privy to the fraud and forgery. Likewise the fourth respondent, we find no evidence that she was involved or had anything to do with the fraud and forgery. We therefore dismissed the appeal against the first, the fourth and the ninth respondents.

[95] Judgment is entered against the second, third and fifth to eight respondents as prayed for in paragraph 40(a), (c) and (d) of the statement of claim in the following terms:

(i) that the registration of transfer of the land to the second respondent be declared null and void;

(ii) that the Land Administrator cancel the registration of the transfer in the second respondent's name;

(iii) that specific performance of the first SPA dated 18.11.2009 between the appellant and the first respondent be granted subject to payment of the balance purchase price; and

(iv) that damages equivalent to the redemption sum be paid by the second, third and the fifth to the eight respondents to the ninth respondent.

[96] We award costs to the appellant against the second, third and the fifth to the eight respondents and to the ninth respondent against the appellant. We made no order as to costs in respect of the first and the fourth respondents.

Dated: 15th August 2018

signed

TENGKU MAIMUN BINTI TUAN MAT
Judge
Court of Appeal

COUNSEL

For the Appellant: G S Nijar (Lim Wei Jiet, Julie Lim, Abraham AU with him), Messrs. Manian K. Marappan & Co

For the 1st Respondent: Mohd Radzi b Yatiman, Messrs. Rahim & Lawrnee

For the 2nd Respondent: Wong Kim Fatt, K H Tan, Wong Boon Chong with him Messrs. K H Tan & Co

For the 3rd and 4th Respondents: Noorul Ameen b Abdul Salam, Messrs. Rodziah & Co

For the 5th to 8th Respondents: Chok Chin You, Phang Ja Mein, Gun Huei Shi with him Messrs. Yeo Chambers

For the 9th Respondent: Saw Lay See, Kwang Jia Shing with him Messrs. Azizuddin Kwang & Co

LEGISLATION REFERRED TO:

National Land Code 1965, Sections 340, 340(2)(a), 340(2)(b), 340(3), 383

JUDGMENTS REFERRED TO:

Dadourian Group International Inc v Simms and Ors [2009] 1 Lloyds Rep 601

Datuk Jagindar Singh & Ors v Tara Rajaratnam [1983] 2 MLJ 196

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1

Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors [2014] 2 MLJ 768

Loo Hon Kong v Loo Kim Lim @ Loo Kim Leong [2004] 4 AMR 591

Nik Abd Rahim bin Abdul Jalil v Suhaili bin Abdul Halim dan lain-lain [2014] 5 MLJ 114

P.J.T.V. Denson (M) Sdn Bhd v Roxy (Malaysia) Sdn Bhd [1980] 2 MLJ 137

Sinnaiyah & Sons v Damai Setia Sdn Bhd [2015] 5 MLJ 1

Suratmin Othman v Yusof Omar & Ors [1988] 2 CLJ Supp 380

T. Sivam a/l Tharamalingam v Public Bank Berhad [2018] MYFC 11

Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors [1983] 1 MLJ 81

Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1

Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229

UMBC v Syarikat Perumahan Luas Sdn Bhd (No. 2) [1988] 3 MLJ 352