

AN EPITAPH FOR AN ERROR: RECLAIMING THE STATUTE FROM THE IMMEDIATE AND DEFERRED INDEFEASIBILITY DEBATE

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ABSTRACT

This article argues that the question whether Section 340 of the National Land Code provides immediate or deferred indefeasibility is misconceived. The statute answers both: subsection (1) grants immediate indefeasibility, subsection (2) identifies exceptions, and subsection (3) restores indefeasibility to bona fide purchasers for value. The immediate/deferred labels have obscured this structure and generated compounding errors. Adorna Properties' decision misinterpreted the proviso by extending it to subsection (2), emptying that provision of effect. Tan Ying Hong's decision corrected the interpretation yet it was also misinterpreted. Kamarulzaman's decision invented a requirement that predecessors in the chain must also be bona fide purchasers. The main provisions of Section 340 apply to any registered proprietor; the concept of "purchaser" enters only at the proviso to subsection (3). Setiakon's decision compounded the error in two ways. First, it imported the section 5 definition of "purchaser" into subsection (3) of Section 340 to disqualify an intermediate transferee who was not a bona fide purchaser. Second, it assessed the final purchaser's good faith not by reference to the vitiating factor under subsection (2), but by reference to the characteristics of that intermediate transferee. The solution is to retire the labels and return to the statute. This article proposes a four-step framework that tracks the statutory sequence: (1) confirm indefeasibility under Section 340(1); (2) identify any vitiating circumstance under subsection (2); (3) determine liability to be set aside under subsection (3); and (4) assess whether the proviso protects the proprietor as a bona fide purchaser for value.

Keywords: section 340 of National Land Code, indefeasibility, bona fide purchaser, Torrens system, statutory interpretation

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INTRODUCTION

The doctrine of indefeasibility under the Torrens system has long occupied a central yet contested place in Malaysian land law, particularly in the interpretation of section 340 of the National Land Code. Judicial and academic discourse has traditionally framed this provision through the binary lens of “immediate” versus “deferred” indefeasibility, treating the statute as though it must exclusively adopt one model over the other. This entrenched dichotomy, however, has generated persistent confusion, leading to inconsistent judicial reasoning and a proliferation of doctrinal errors that obscure, rather than clarify, the statutory scheme.

This article challenges the premise of that debate by arguing that the immediate/deferred distinction is fundamentally misplaced. It contends that section 340, properly construed, does not embody a singular theory of indefeasibility but instead establishes a structured and sequential framework governing the creation, defeasibility, and restoration of title. By returning to the text and disentangling it from judicially imposed labels, the article demonstrates how misinterpretations in leading cases have distorted the provision’s operation. It ultimately advances a coherent four-step analytical approach that realigns judicial reasoning with the statute’s internal logic, thereby restoring clarity and doctrinal integrity to the law.

DISCUSSION

The question whether section 340 of the National Land Code¹ provides immediate or deferred indefeasibility is misconceived. It assumes the statute must choose one or the other. But on a plain reading, section 340 of the National Land Code provides both. Subsection (1) grants indefeasibility to every registered proprietor immediately upon registration. Subsection (2) identifies the circumstances in which that indefeasibility may be displaced. Subsection (3) provides that a title rendered defeasible under subsection (2) remains liable to be set aside in the hands of subsequent transferees, but the proviso restores indefeasibility to any purchaser in good faith and for valuable consideration. The statute does not ask whether indefeasibility is

¹ National Land Code (Act 828), s 340.

immediate or deferred. It tells us when indefeasibility applies, when it may be lost, and when it is restored.

The immediate/deferred question obfuscates the statutory structure. It invites courts to classify the entire section under one label or the other, when the section itself draws distinctions that the labels erase. A direct recipient whose registration is vitiated by fraud or forgery falls under subsection (2); a subsequent purchaser in good faith and for value is protected by the proviso to subsection (3). There are different inquiries to be made in sequence under the subsections. The question whether section 340 provides immediate or deferred indefeasibility collapses them into one.

The error took root in *Adorna Properties Sdn Bhd v Boonsom Boonyanit*.² The Federal Court held that the proviso to subsection (3) applied to protect immediate purchasers under subsection (2). This reading emptied subsection (2) of effect: if the proviso protects bona fide purchasers from the consequences of subsection (2), then subsection (2) has no work to do. The decision was widely criticised and eventually overruled, but not before it had framed the debate in terms that would continue to mislead.

The correction came in *Tan Ying Hong v Tan Sian San & Ors*.³ The Federal Court held that the proviso applies only to subsection (3) and does not extend to subsection (2). The direct recipient of a forged transfer is caught by subsection (2)(b) regardless of good faith, because the question under that provision is simply whether the instrument was forged. This is an objective inquiry. The bank in *Tan Ying Hong* may have acted in perfect good faith, but that was legally irrelevant: registration had been obtained by means of a forged instrument, and the bank's title was therefore defeasible.

Yet *Tan Ying Hong* came to be cited as authority for the proposition that section 340 of the National Land Code adopts deferred indefeasibility. That framing, while understandable as a corrective to *Adorna*, detached the decision from its statutory foundation. What *Tan Ying Hong* actually decided was that subsection (2)(b) applies to direct recipients of forged instruments and that the proviso to subsection (3) does not rescue them. The case did not hold that section 340 of the

² [2001] 1 MLJ 241.

³ [2010] 2 MLJ 1.

National Land Code adopts one theory of indefeasibility over another. It held that subsection (2)(b) means what it says.

The misreading deepened in *Kamarulzaman bin Omar v Yakub bin Husin*.⁴ Jeffrey Tan FCJ, delivering the judgment of the court, held that where predecessors in title were "imposters" with "no title to pass," the subsequent transferees became "immediate purchasers" whose titles were defeasible regardless of their own good faith. The reasoning required both the predecessor and the current claimant to have valid status before the proviso could protect. This requirement finds no support in section 340 of the National Land Code.

The error arose from conflating two separate inquiries. Under subsection (2)(b), when registration is obtained by forgery, the direct recipient's title is defeasible regardless of that person's good faith — the question is simply whether the instrument was forged⁵. Under the proviso to subsection (3), a subsequent purchaser in good faith and for valuable consideration is protected. The proviso asks only whether the purchaser before the court meets the statutory criteria. It does not ask whether that purchaser's predecessor was also bona fide.⁶

By failing to distinguish the objective inquiry under subsection (2)(b) from the subjective inquiry under the proviso, *Kamarulzaman* generated a rule that imposes on purchasers a burden the statute does not contemplate. A purchaser who satisfies the proviso — acting in good faith and paying valuable consideration — is protected. The purchaser is not required to investigate and prove the good faith of those from whom they derive title.

A related error in *Kamarulzaman* was the invocation of the *nemo dat quod non habet* rule to hold that the imposters "had no title to pass"⁷. But the *nemo dat quod non habet* rule is a common law principle that the Torrens system was designed to displace. The whole point of title by registration is that a purchaser may acquire good title from a registered proprietor even if that proprietor's own title was defective. The proviso to subsection (3) is the statutory mechanism by

⁴ [2014] 2 MLJ 768 at [43].

⁵ National Land Code (Act 828), s 340(2)(b).

⁶ National Land Code (Act 828), s 340(3).

⁷ *Kamarulzaman bin Omar v Yakub bin Husin* [2014] 2 MLJ 768 at [7] (trial court) and [43] (Federal Court).

which this occurs. To invoke *nemo dat* is to reason as if the Torrens system did not exist.

He-Con Sdn Bhd v Bulyah bt Ishak illustrates how the confusion spreads. The Federal Court held that "any dealing with a rogue will necessarily vitiate the transaction rendering the title defeasible." But the premise is too broad. Under subsection (2), it is the direct recipient's title that is rendered defeasible by the vitiating circumstance. Under the proviso to subsection (3), a subsequent purchaser in good faith and for value is protected regardless of what the "rogue" did. The decision elides the distinction between the two provisions.⁸

The confusion spawned by *Kamarulzaman* is evident in *Bitara Angkasa Sdn Bhd v Cheok Lam Chuan*.⁹ The Court of Appeal spent considerable effort navigating between conflicting authorities: *He-Con*, which had followed *Kamarulzaman* and Jeffrey Tan FCJ's dissenting judgment in *CIMB Bank*; the majority in *CIMB Bank*, which rejected the double bona fide test; and *Pushpaleela*, which allowed protection despite fraud in the chain. Lim Chong Fong JCA observed that *He-Con*'s dicta on section 340 were strictly obiter. This observation has merit: section 340 was central to the dispute, but the Federal Court's reasoning in *He-Con* was diverted by conflating the bare trustee's breach of equitable duty (enforceable in personam) with vitiating factors under subsection (2) (which render title defeasible in rem). A bare trustee has full legal capacity to deal; the beneficiary's remedy lies against the trustee's conscience, not against the title itself. Because the reasoning was diverted by this conflation, the court's dicta on immediate and subsequent purchasers — which followed Jeffrey Tan FCJ's dissenting judgment rather than the majority judgment in *CIMB Bank* — is properly treated as unreliable.

Had the court in *Bitara Angkasa* simply applied section 340 as it is written, the analysis would have been straightforward. Under subsection (1), Bitara Angkasa was registered proprietor and had indefeasibility. Under subsection (2), there was no fraud or misrepresentation to which Bitara Angkasa was party or privy; the registration was not obtained by forgery or void instrument; and the

⁸ [2020] 4 MLJ 662 at [101].

⁹ [2024] 1 MLJ 541.

title was not unlawfully acquired. Subsection (2) did not apply. Because no vitiating circumstance was established, the inquiry ends at Step 2 — there is no defeasibility to carry into subsection (3), and the proviso does not arise. There was no need to ask whether Bitara Angkasa was an "immediate" or "subsequent" purchaser, no need to trace the chain of transactions, and no need to reconcile conflicting Federal Court dicta. The statute answered the question directly.

The errors that began with *Kamarulzaman* reached their furthest point in *Setiakon Engineering Sdn Bhd v Mak Yan Tai*. There, a fraudster named Chia Moy obtained a judgment in default against the original registered proprietor Wong Soo, used it to register a replacement title in the name of Lim Moy, and acting as Lim Moy's attorney sold the land to Paragon for RM15 million that was never paid. Paragon in turn sold the land to Setiakon for RM17 million. The judgment in default was later set aside. The question was whether Setiakon, as the current registered proprietor, was protected by the proviso to subsection (3)¹⁰.

The majority of the Federal Court held that Setiakon was not protected. Abdul Rahman Sebli CJ (Sabah and Sarawak), delivering the majority judgment, went further than *Kamarulzaman*: by importing the section 5 definition of "purchaser" into section 340(3). Because there was no proof that Paragon had paid the RM15 million purchase price, the majority held that Paragon "was not the purchaser of the land within the meaning of s 5 of the NLC"¹¹. Without a valid immediate purchaser in the chain, Setiakon became the immediate purchaser, "defeasible and liable to be set aside under s 340(2) irrespective of whether it had purchased the land in good faith and for valuable consideration or otherwise"¹².

This reasoning reveals a structural error. The main provisions of section 340 refer to "any person or body for the time being registered as proprietor" not to purchasers. Subsection (1) grants indefeasibility to the registered proprietor. Subsection (2) identifies when that proprietor's title is defeasible. Subsection (3) provides that such defeasible title "shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred." Only the proviso

¹⁰ [2024] 5 MLJ 460.

¹¹ *Setiakon Engineering Sdn Bhd v Mak Yan Tai* [2024] 5 MLJ 460 at [134].

¹² *Setiakon Engineering Sdn Bhd v Mak Yan Tai* [2024] 5 MLJ 460 at [137].

introduces the concept of "purchaser" and it asks only whether the person claiming protection is a purchaser in good faith and for valuable consideration.

The *Setiakon* majority collapsed this distinction. It imported the section 5 definition of "purchaser"¹³ — which requires good faith and valuable consideration — into the chain analysis, using it to determine whether each predecessor qualified as a valid link. But section 340(3) does not ask whether each predecessor was a "purchaser" as defined in section 5. It asks whether the title was transferred. The section 5 definition is relevant only to the proviso's inquiry: is the current claimant a purchaser in good faith and for valuable consideration? The statute draws no requirement that every predecessor in the chain must also satisfy that definition.

The section 5 importation then produced a second error: the misdirection of the good faith inquiry. The fraud that vitiated the chain was Chia Moy's fraud against Wong Soo in procuring the judgment in default. Under the proviso to subsection (3), the relevant question for *Setiakon*'s good faith was therefore: did *Setiakon* know of Chia Moy's fraud against Wong Soo? If so, that would be the vitiating factor. That is what *Setiakon* needed to be ignorant of to qualify as a purchaser in good faith.

But the majority asked a different question. Having disqualified *Paragon* from the chain by importing the section 5 definition, the majority then assessed *Setiakon*'s good faith by reference to *Paragon*'s characteristics — *Paragon*'s thin capitalisation, young directors, short holding period, and apparent inability to pay RM15 million in cash. These were treated as red flags that should have put *Setiakon* on inquiry. Yet *Paragon*'s suspicious characteristics tell us nothing about whether *Setiakon* knew of Chia Moy's fraud against Wong Soo. The majority directed the good faith inquiry at the wrong fraud.

The two errors are connected. By using section 5 to disqualify *Paragon* as a valid purchaser, the majority treated *Paragon*'s characteristics as the relevant subject matter for *Setiakon*'s good faith inquiry. The logic became circular: *Paragon* fails section 5 because no valuable consideration was paid; therefore, *Setiakon* is the immediate

¹³ National Land Code (Act 828), s 5.

purchaser; therefore, Setiakon must prove good faith; but Setiakon's good faith is assessed by reference to what Setiakon should have known about Paragon. The original fraud — Chia Moy's fraud against Wong Soo — disappeared from the analysis entirely.

The correct analysis would have proceeded as follows. Lim Moy's title was defeasible under subsection (2)(a) because Chia Moy, acting as her agent, obtained registration by fraud. That defeasibility transmitted to Paragon under subsection (3). Paragon, having paid no consideration and being connected to the fraud, could not satisfy the proviso. Setiakon then acquired from Paragon. The question was whether Setiakon could satisfy the proviso. Setiakon paid RM17 million — clearly valuable consideration. The good faith question was whether Setiakon knew of Chia Moy's fraud against Wong Soo. There was no evidence that Setiakon knew Wong Soo existed, knew about the judgment in default, or knew anything about Chia Moy's scheme. Setiakon conducted a land search showing Paragon as registered proprietor. On this analysis, Setiakon satisfies the proviso.

Courts would be better served by a four-step framework that tracks the statute. First, registration vests title under section 89 of the National Land Code, rendering the registered proprietor's title *prima facie* indefeasible under section 340(1). Second, the court asks whether any vitiating circumstance under subsection (2) applies to the registration from which the current title derives. Third, if a vitiating circumstance is established, the title is liable to be set aside under subsection (3). Fourth, the court asks whether the current proprietor is protected by the proviso as a purchaser in good faith and for valuable consideration.¹⁴

This framework has several advantages. It follows the statutory sequence. It keeps subsection (2) and the proviso to subsection (3) analytically distinct. It avoids the need to classify the entire section as providing immediate or deferred indefeasibility. And it focuses the court's attention on the questions the statute actually asks: was

¹⁴ The Federal Court's subsequent decision in *Malayan Banking Bhd v Mohd Affandi Ahmad & Anor* [2024] 6 MLJ 220; [2024] 10 CLJ 501 addresses the good faith standard under the proviso to subsection (3). That inquiry — Step 4 of the framework proposed in this article — is beyond the scope of the present discussion.

registration vitiated? If so, is the current proprietor protected by the proviso?

The framework also clarifies the good faith inquiry. Good faith under the proviso means absence of knowledge of the vitiating factor. If the vitiating factor is fraud under subsection (2)(a), the question is whether the purchaser knew of that fraud — not whether the purchaser knew of suspicious circumstances about an intermediate transferee. If the vitiating factor is a void instrument under subsection (2)(b), the question is whether the purchaser knew the instrument was void. The good faith inquiry must be tethered to the specific ground of defeasibility, not to extraneous matters in the chain.

The framework further clarifies the burden of proof. Once the claimant establishes a vitiating circumstance under subsection (2), the burden shifts to the current proprietor to bring itself within the proviso. The current proprietor must prove that it purchased in good faith and for valuable consideration. It does not need to prove — and should not be required to prove — that every predecessor in the chain also satisfied those criteria. That requirement is a judicial invention with no foothold in the statutory text.

CONCLUSION

Section 340 does not ask the courts to choose between immediate and deferred indefeasibility. It provides a framework: subsection (1) grants immediate indefeasibility upon registration; subsection (2) identifies exceptions; subsection (3) makes defeasible titles liable to be set aside but the proviso restores indefeasibility to bona fide purchasers for value. The immediate/deferred labels obscure this structure, invite category errors, and have produced conflicting lines of authority that courts must now labour to reconcile. The solution is to retire the labels and return to the statute. When a registered proprietor's title is challenged, the inquiry is simple: does subsection (2) apply? If not, the title is indefeasible. If it applies, does the proviso to subsection (3) apply? The statute provides the framework; the labels do not. It is time to write the epitaph for the misconceived question: the debate whether section 340 provides immediate or deferred indefeasibility served only to distract the courts from reading the statute, and it should trouble us no more.