



IN THE HIGH COURT OF MALAYA

AT SHAH ALAM

[CIVIL SUIT NO. 21-136-2007]

BETWEEN

RAJAMANI MEYAPPA CHETTIAR

... PLAINTIFF

AND

1. ENG BENG DEVELOPMENT SDN BHD

2. INFINITE INCOME SDN BHD

3. PUSHPALEELA R. SELVARAJAH

4. MESSRS MY CHOONG, PUSHPA & CO

5. PENTADBIR TANAH DAERAH KLANG

6. PENDAFTAR HAKMILIK NEGERI SELANGOR DARUL EHSAN

7. SHEELAN ARJUNAN

... DEFENDANTS



CIVIL PROCEDURE: *Locus standi - Registered proprietor - Recovery of land - Land transferred by fraudulent means - Plaintiff in possession of original manual issue document of title and quit rent - Plaintiff in intitlement of cause paper and person who came to court to testify for the plaintiff bore different names - Whether person named in intitlement and witness who testified for plaintiff was same person - Whether plaintiff had locus standi*

LAND LAW: *Recovery of land - Fraudulent transfer of land - Bona fide purchaser for value - Whether subsequent transfer of land was valid - Whether plaintiff was able to recover land - Whether plaintiff entitled to damages from fraudster*

LAND LAW: *Transfer - Validity of - Fraud - Fraudulent transfer of land - Transfer of land done using duplicate title - Land scam - Forgery - Presentation for transfer of land by bogus individual using plaintiff's name - Sale and purchase agreement was entered with new purchaser in attempt to legitimize transaction in order to conceal fraud - Whether plaintiff was true registered proprietor of land - Whether sale and purchase agreement entered was a sham - Whether immediate transfer was indefeasible*

LEGAL PROFESSION: *Solicitors - Duty of care - Conveyancing transaction - Duty of care to real owner of land - Solicitors representing fraudster - Whether solicitors who acted for fraudster owed a duty of care to real owner of land*

[Plaintiff's claim allowed partially. First defendant's counterclaim allowed.]

Case(s) referred to:

Al-Sabah v. Ali [1999] 3 EGCS 11 (refd)

Ahmad Shazilly Ismail Bakti v. Nik Salma Zaidah Hj Wan Mohd Zaid [2014] 5 CLJ 817 CA (refd)

Assets Company Ltd v. Mere Roihi [1905] AC 76 (refd)

Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd [2007] 2 CLJ 1 FC (refd)



Au Meng Nam & Anor v. Ung Yak Chew & Ors [2007] 4 CLJ 526 CA (**refd**)

Boonsom Boonyanit v. Adorna Properties Sdn Bhd [1995] 4 CLJ 45 HC (**refd**)

Chan Chwen Kong v. Public Prosecutor [1962] 1 LNS 22 CA (**refd**)

Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v. Capital Insurance Bhd [2004] 1 CLJ 357 CA (**refd**)

Chu Choon Moi v. Ngan Sew Tin [1985] 1 LNS 134 FC (**refd**)

Damodaran v. Vasudeva [1973] 1 LNS 19 HC (**refd**)

Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin [1997] 2 CLJ 248 CA (**refd**)

Goh Hooi Yin v. Lim Theong Ghee & Ors [1990] 2 CLJ Rep 48 HC (**refd**)

Government of the State of Sabah v. Syarikat Raspond [2010] 7 CLJ 945 CA (**refd**)

Government of the State of Negeri Sembilan v. Yap Chong Lan & Anor Case [1984] 1 CLJ Rep 144 FC (**refd**)

Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors [2009] 1 CLJ 663 FC (**refd**)

Malaysia Building Society Bhd v. Dato' Yusuf Sudin [2014] 10 CLJ 64 CA (**refd**)

Neogh Soo Oh & Ors v. G Rethinasamy [1983] CLJ Rep 663 HC (**not foll**)

Ng Pak Cheong v. Global Insurance Co Sdn Bhd [1995] 1 CLJ 223 HC (**refd**)

Ong Ban Chai & Ors v. Seah Siang Mong [1998] 3 CLJ 637 CA (**refd**)

Overseas Realty Sdn Bhd v. Wong Yau Choy & Ors [2014] 8 CLJ 107 HC (**refd**)



Penn v. Bristol & West Building Society [1987] 3 AER 470 (**refd**)

Pendaftar dan Pemeriksa Kereta-Kereta Motor, Melaka & Ors v. KS South Motor Sdn Bhd [2000] 2 CLJ 573 CA (**refd**)

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC (**refd**)

Rabiah Lip & Ors v. Bukit Lenang Development Sdn Bhd & Other Appeals [2008] 3 CLJ 69 CA (**refd**)

Rosazanam Khalid v. Tri-Prestige Sdn Bhd & Other Appeals [2013] 1 LNS 1514 CA (**refd**)

Robin Van Beurle & Anor v. Le Reve (Malaysia) Sdn Bhd [2012] 5 CLJ 61 CA (**refd**)

Shayo (M) Sdn Bhd v. Nurlieda Sidek & Ors [2013] 1 CLJ 153 HC (**refd**)

Selvaraju Velasamy & Anor v. Abdullah Ali Kutty & Ors [2009] 2 CLJ 753 HC (**refd**)

Soon Poy Yong v. Westport Properties Sdn Bhd & Ors [2014] 10 CLJ 686 HC (**refd**)

State Tailor Sdn Bhd v. Nallapan [2005] 2 CLJ 167 CA (**refd**)

Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC (**refd**)

Tai Lee Finance Co Sdn Bhd v. Official Assignee of The Property of Ngan Kim Yong & Ors [1983] CLJ Rep 387 FC (**refd**)

Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC (**foll**)

Teoh Kim Heng v. Tan Ong Ban [2014] 8 CLJ 316 CA (**refd**)

Tsoi Ping Kwan v. Medan Juta Sdn Bhd & Ors [1996] 4 CLJ 553 CA (**foll**)

Uptown Properties Sdn Bhd v. Pentadbir Tanah Wilayah Persekutuan & Ors [2012] 83 CLJ 271 HC (**refd**)



[2015] 1 LNS 529

Legal Network Series

Version Buy Sdn Bhd v. Thong Wee Kee & Anor [2014] 8 CLJ 840 FC (refd)

Yap Ham Seow v. Fatimawati Ismail & Ors And Another Appeal [2013] 9 CLJ 577 CA (refd)

Yew Foo Chun v. Wong Nye Keong & Ors [2014] 1 LNS 189 HC (refd)

Yong Tim v. Hoo Kok Chong & Anor [2005] 3 CLJ 229 FC (refd)

Legislation referred to:

Contracts Act 1950, s. 179 - 191

Evidence Act 1950, s. 114(g)

Government Proceedings Act 1956, ss. 5, 6

National Land Code 1965, ss. 5A, 16, 22, 85(2), 166(c)(d), 167, 168(b), 170(2)(c), 297, 298, 299(1)(a), 300, 301, 322(5), 324, 326, 327, 329(2), 340(1), (2)(a), (b), (c), (3), (4), 433, Fourteen Schedule, rr. 8(9), 8(9)(c), 16

Real Property Gains Tax Act 1976, s. 21B(1)(a)

Rules of Court 2012, O. 15 r. 6

Other source(s) referred to:

The Concise Oxford English Dictionary

GROUND OF JUDGMENT



Introduction

1. This is another and the second land scam case after *Soon Poy Yong @ Soon Puey Yong v. Westport Properties Sdn Bhd & 18 Ors* [2014] AMEJ 1360 that came before me.
2. The Plaintiff herein was the registered proprietor of the piece of land - Lot 4965 Mukim Kapar, 5th Mile Sungai Binjai Road, Daerah Klang Selangor Darul Ehsan (“Land”) and claims in this suit that unknowing to her, she was swindled of the Land by various persons including a woman who purported to be her (“bogus Plaintiff”).
3. The First Defendant is the present registered proprietor and is in possession of the Land bought from the Second Defendant.
4. The Second Defendant purchased the Land from the bogus Plaintiff and thereafter sold the Land to the First Defendant.
5. The Third Defendant is an advocate and solicitor, then practicing in the Fourth Defendant firm as partner who handled the conveyancing transaction of the Land for the bogus Plaintiff.



6. The Fifth Defendant and Sixth Defendant are state agencies involved in land administration.

7. The Seventh Defendant is an advocate and solicitor, then practicing in the firm Omar Hussein & Co as legal assistant who handled the conveyancing transaction for the Second Defendant.

The Trial Process

8. The trial of this case took 8 days on 17 and 18 April, 30 June, 21 July, 7 August, 8 September and 7 and 8 October 2014.

9. The trial documents are marked as bundles A to V including documentary evidence in bundles B1 to B4 and C1 to C6. In addition, there were exhibits P1 to D19 admitted in evidence.

10. The following witnesses testified for the respective parties:

Plaintiff

i) Muthuraman Chettiar Rajamani (PW1), the Plaintiff herself;



- ii) Sithambaram a/l Muthiah (PW2), the Plaintiff's family friend and runner;
- iii) Palaniappan a/l Muthumaran Chettiar (PW3), the Plaintiff's youngest son; and
- iv) Senthil a/l Muthumaran Chettiar (PW4), the Plaintiff's eldest son.

First Defendant

- i) Sang Chong @ Liang Sang Chong (DW4), a registered valuer;
- ii) Mohd Kamil Bin Yahya (DW5), an officer from CIMB Bank Bhd (formerly known as Bumiputra-Commerce bank Bhd);
- iii) Zainal Abidin Bin Hamzah (DW6), an officer from RHB Bank Bhd; and
- iv) Ng Sea Yong (DW7), a director of the First Defendant company.

Third and Fourth Defendants

- i) Pushpaleela a/p R. Selvarajah (DW9), the Third Defendant herself.



Fifth and Sixth Defendants

i) Siti Nadirah Binti Mohd Nor (DW8), a deputy administrator of the Fifth Defendant.

Seventh Defendant

i) Lechumanan a/l Elangowan (DW1), a former employee of Galaxy Properties Management Sdn Bhd;

ii) Ravi Chandran a/l Poonkavanam (DW2), a former clerk of Omar Hussein & Co;

iii) Sheelan Arjunan (DW3), the Seventh Defendant himself.

11. After the conclusion of the trial, the parties submitted their respective written closing submissions in chief and in reply. Oral clarification was held with counsel on 5 December 2014 and 14 January 2015.

Background Facts

12. The Plaintiff who once held Indian Passport no. X205536 was registered as the proprietor of the Land on 25 May 1988 after purchasing it



for valuable consideration of RM12,000 from a Karuppiah Chettiar @ PL. Karuppiah Chettiar s/o Murugappa Chettiar. She presently and at all other material times holds the original manual issue document of title EMR 6527 of the Land (“IDT1”) which is exhibited in bundle B1 pages 85-88/ exhibit P4. She has never parted with the possession of IDT1 and never appointed any real estate agent or solicitor to sell or deal with the Land in any way.

13. The Plaintiff’s son, PW3 on 1 March 2001 lodged a private caveat on the Land by reason that his father who was the closest beneficiary of the Plaintiff’s property passed away.

14. From 1988 to 2006, the Plaintiff paid the quit rent payable in respect of the Land based on the annual quit rent statement received by the Plaintiff from the Fifth Defendant in January/February of each of those years.

15. In the meantime, the Fifth/Sixth Defendant on 24 May 2002 in the nationwide exercise of computerization of land titles generated a new computerized register and issue document of title GM 5066 of the Land in the name of the Plaintiff (“IDT2”). Photocopies of the certified true copy of IDT2 is exhibited in bundle 1 pages 173-174 and 276 -277.



16. Also in the meantime, the Second Defendant by a written sale and purchase agreement dated 20 October 2005 purchased the Land from the bogus Plaintiff for the sum of RM1,200,000.

17. Accordingly, the transfer of ownership of the Land was presented on 12 April 2006 and the Land was registered in the name of the Second Defendant on 16 May 2006. A photocopy of the computerized issue document of title GM 9890 in the name of the Second Defendant is exhibited in bundle B1 pages 74-75 (“IDT3”).

18. By another written sale and purchase agreement dated 18 August 2006, the First Defendant purchased the Land from the Second Defendant for the sum of RM1,800,000.

19. The transfer of ownership of the Land was registered in the name of the First Defendant and charged to CIMB Bank Bhd who financed the First Defendant’s purchase of the Land on 14 December 2006. A photocopy of the computerized issue document of title GM 9890 in the name of the First Defendant and CIMB Bank Bhd as chargee is exhibited in bundle B1 pages 227-228 (“IDT4”).

20. By March 2007, the Plaintiff did not receive the quit rent statement in respect of the Land for 2007 but only the statement of rates payable from



the Klang Municipal Council. PW2 on 26 March 2007 paid the rates on behalf of the Plaintiff and also enquired from the Fifth Defendant as to why the Plaintiff did not receive the quit rent statement for 2007.

PW2 was informed by the Fifth Defendant that the Land was already registered in the name of the First Defendant.

Accordingly PW2 there and then conducted a title search on the Land and discovered that the Land had been transferred to the Second Defendant on or about 25 October 2005 and thereafter by the Second Defendant to the First Defendant on or about 20 September 2006.

21. The Plaintiff on 28 March 2007 lodged a private caveat to protect her interest in the Land as well as appointed K Nadarajah & Partners, Advocates and Solicitors to recover the Land.

22. The Plaintiff also lodged a police report no KLANG/0122457/07 on 30 March 2007 and the Fifth Defendant thereafter on 3 July 2007 also entered a registrar's caveat on the Land.

23. Consequently this suit was filed on 27 June 2007.



Contentions and Findings

24. From the pleadings, the Plaintiff contended that the transfer of the Land to the Second Defendant was procured fraudulently and/or through forgery as particularized in paragraph 19 of her re-amended statement of claim. In gist the Plaintiff neither knew nor dealt with the Second Defendant at all. Further in this connection, the Plaintiff contended that she never engaged the services of the Third Defendant and/or the Fourth Defendant. She also contended that the Seventh Defendant acted fraudulently in concert with the Third and/or Fourth Defendant for having facilitated and caused the transfer of the Land to the Second Defendant.

Alternatively, the Plaintiff contended that the Third Defendant and/or the Fourth Defendant acted in breach of warranty of authority to act or negligently in failing to discover the bogus Plaintiff was an impostor.

The Plaintiff also contended that the transfer of the Land to the Second Defendant was facilitated and effected by way of a duplicate title to the Land wrongly issued by the Fifth Defendant or Sixth Defendant through acts of fraud or deception of others but without prior proper inquiry by the Fifth Defendant or Sixth Defendant to determine the authenticity of the application for the duplicate title and the proper identity of the applicant.



25. The Plaintiff further contended that the First Defendant was not a *bona fide* purchaser of the Land for valuable consideration from the Second Defendant.

26. Finally, the Plaintiff contended that the Fifth Defendant and Sixth Defendants were negligent in breach of the National Land Code 1965 by having registered the transfer of the Land to the Second Defendant and then to the First Defendant notwithstanding that the Land was encumbered by the private caveat lodged by the Plaintiff's son in 2001.

27. Accordingly the Plaintiff in paragraph 27 of the re-amended statement of claim sought and prayed for the following declarations and orders:

- i) that the Plaintiff is the registered proprietor of the Land and the true lawful owner thereof;
- ii) that the transfer in favour of the Second Defendant and the Second Defendant's purported title to or interest in the Land was *void ab initio*;
- iii) that the transfer in favour of the First Defendant and the First Defendant's purported title to or interest in the land is *void ab initio*;
- iv) that the Land was transferred from the Plaintiff to the Second Defendant and ultimately to the First Defendant by means of fraud and/or by forgery and/or by means of insufficient instrument or void instrument;
- v) that the Second Defendant is not a *bona fide* purchaser of the land for valuable consideration;



- vi) that the First Defendant is not a *bona fide* purchaser of the land for valuable consideration;
- vii) that the duplicate title to the land is a nullity and/or *void ab initio*; and accordingly
- viii) that the purported title and interest of the First Defendant and Second Defendant in the Land be set aside;
- ix) that the Fifth Defendant and Sixth Defendant cancel the entries or memorials in the register of land titles in favour of the First Defendant and Second Defendant and restore the Plaintiff as the registered owner of the Land.

Moreover the Plaintiff sought damages against the Defendants as well as interests and costs.

28. Generally all the Defendants denied the Plaintiff's claims and put her to strict proof.

29. The First Defendant further contended that the First Defendant was the *bona fide* purchaser of the Land from the Second Defendant for valuable consideration of RM1,800,000 and hence the Land that was registered in the name of the First Defendant was indefeasible.



30. The First Defendant also counterclaimed against the Plaintiff for the wrongful lodgment of the private caveat on the Land on 28 March 2007 and an order for the removal thereof as well as compensation of damages together with interests and costs against the Plaintiff.

31. The Second Defendant similarly contended that the Second Defendant was the *bona fide* purchaser of the Land from the Plaintiff for valuable consideration and hence the title to the Land that was registered in the name of the Second Defendant was indefeasible.

32. The Third Defendant and Fourth Defendant contended that they did not owe a duty of care to the Plaintiff. In any event, they have at all material times acted in accordance with the general and accepted practice of Advocates and Solicitors of the High Court of Malaya.

33. The Fifth and Sixth Defendants contended that they were not the correct parties to be sued in this suit. In any event, the Fifth Defendant contended that the Fifth Defendant had conducted all the dealings in relation to the Land with due care in accordance with land administration provisions in the National Land Code 1965 and normal practice to avoid public complaints of delay. The Fifth and Sixth Defendants emphasized that they were only tasked with administrative duties that did not involve any investigative function.



As to the Fifth Defendant effecting the transfers of the Land to the Second Defendant followed by the First Defendant in spite of the private caveat lodged in 2001, it was contended that that the transfer was not restrained by reason that the caveat was lodged by the Plaintiff's own son. In addition, it was contended that the caveat was invalid by reason that the Plaintiff's son had no caveatable interest.

34. The Seventh Defendant contended that the Seventh Defendant had at all material times acted in good faith, diligently with due care in respect of the Land dealings between the Plaintiff and the Second Defendant and thereafter the Second Defendant and the First Defendant.

35. From the pleadings, list of issues and closing submissions of the parties, the following principal issues can be distilled and I will deal with them *seriatim*:

- i) I will firstly determine as to who was at all material times the Plaintiff who has *locus standi* to maintain this suit and claim to be the registered owner of the Land;
- ii) Next, I will consider whether the duplicate title produced by the Fifth Defendant and used for the transfer of the Land from the Plaintiff to the Second Defendant was invalid or in other words *void ab initio*, and if so whether this and the subsequent transfer of the Land to the First Defendant were nullities;



- iii) I will then determine whether the transfer of the Land to the Second Defendant was fraudulent and the registration thereof in the name of the Second Defendant was indefeasible by reason that the Second Defendant claimed to be the *bona fide* purchaser for valuable consideration;
- iv) Simultaneously with (iii), I will also determine whether the Seventh Defendant fraudulently acted in concert with Third and Fourth Defendants in the transfer of the Land to the Second Defendant;
- v) Thereafter I will determine whether the subsequent transfer of the Land to the First Defendant and the registration thereof in the name of the First Defendant was indefeasible by reason that the First Defendant also claimed to be the *bona fide* purchaser for valuable consideration;
- vi) Accordingly, I will determine whether the private caveat lodged by the Plaintiff and the registrar's caveat entered on the Land in 2007 ought to be removed including the compensation in damages be made by the Plaintiff to the First Defendant;
- vii) I will then consider whether the Third and Fourth Defendant acted without authority or negligently *vis a vis* the Plaintiff;
- viii) Finally, I will determine whether the Fifth and Sixth Defendants were correctly enjoined in the suit and if so, whether they were negligent in effecting the transfer and registration of the Land notwithstanding that there was a subsisting private caveat lodged on the Land by the Plaintiff's son in 2001.

The Plaintiff's *Locus Standi*

36. PW1, the Plaintiff maintained that she is at all material times the registered proprietor Rajamani d/o Meyappa Chettiar with Indian passport no. X205536 as seen in IDT1 as well as the register document of title (“RDT1”) of the Land, a photocopy of which is found in bundle B1 page 308. This is confirmed by the fact that she is presently still in possession of the original IDT1. She also produced the original quit rents receipts of the Land in court.

37. The Second Defendant and the Seventh Defendant have however raised that the Plaintiff in the intitulement to the cause papers is Rajamani a/p Meyappa Chettiar but PW1 who attended and testified in court for the Plaintiff bore a different name, Muthuraman Chettiar Rajamani and carried Malaysian permanent resident identity card in that name which is exhibit P7. It was further pointed out that there was no documentary evidence such as an official instrument or court order to establish that PW1, Muthraman Chettiar Rajamani is Rajamani a/p Meyappa Chettiar. PW1 was only able to produce her current original Indian passport no. E8742969 in the name of Muthumaran Chettiar Rajamani found in bundle B1 pages 151-154 but not the earlier original Indian passport no. X205536 contained in bundle B1 pages 144-146.

Accordingly, it was submitted that the Plaintiff did not have the required *locus standi* to maintain or even commence this suit.



38. From the examination in court, PW1 explained that Rajamani a/p Meyappa Chettiar and Muthuraman Chettiar Rajamani is the same person. Muthuraman Chettiar and Meyappa Chettiar were her husband and father respectively. I have no reason to disbelieve her.

39. Furthermore, I observe that the photograph of the bearer of both Indian passports no. X205536 and E8742969 resemble PW1. The signatures on both the passports also look similar and they resemble that signed by PW1 in her witness statement (exhibit P3). Very importantly, PW1 is in possession of the original IDT1 and “*possession is nine-tenths of the law*”.

40. Consequently I find and hold that Rajamani a/p Meyappa Chettiar and Muthuraman Chettiar Rajamani is one and the same person on the balance of probabilities. It follows that the Plaintiff had *locus standi* to bring and maintain this suit. Also I find and hold that the PW1, the Plaintiff was the registered proprietor of the Land as at 25 May 1988 evidenced by IDT1.

Transfer of Land *void ab initio*

41. In this regard, the Plaintiff submitted that the Land comprised of one lot, hence there ought to have been only one title to the Land as provided in s. 85(2) of the National Land Code which reads;

“85. Register and issue documents of title



(1) For the purpose of the alienation of land under this Act under final title, there shall be prepared in accordance with section 86 or, as the case may be, 87:-

(a) a register document of title, on the registration of which in accordance with the provisions of section 88 the alienation shall take effect, and

(b) an issue document of title, which shall be issued to the proprietor of the land in accordance with the provisions of section 90.

(2) The documents referred to in sub-section (1) shall be prepared:-

(a) in the case of land to be alienated under Registry title, by the Registrar, and

(b) in the case of land to be alienated under Land Office title, by the Land Administrator; and (except where it relates to a rural holding under the Land (Group Settlement Areas) Act, 13 of 1960) each such document shall relate to one lot. ”

Accordingly since there were several titles issued in respect of the Land, the later titles were invalid and defeasible pursuant s. 340(2)(c) of the National Land Code.

42. Unknown to the Plaintiff, besides IDT1 which was in her possession, there were however two other titles to the Land prepared by the Fifth Defendant, to wit IDT2 and IDT3 on 24 May 2002 and 16 May 2006 respectively.

43. According to the Plaintiff, DW8 the sole witness for the Fifth and Sixth Defendants confirmed that IDT2 had never been issued but remained in the



computer system of the Fifth Defendant and would only be issued when the landowner surrendered the original manual issue document of title of the Land.

44. Thus the Plaintiff argued that the IDT2 was invalid because it had not been properly issued for the following reasons:

i) Computerized titles that replace manual titles are titles in continuation. There was no notice of intention to issue a title in continuation that was served on the Plaintiff pursuant to s. 168(b) and 433 of the National Land Code which read:

“168. Preliminary procedure in circumstances described in section 166(1)(c) or (d)

Before issuing title in continuation in the circumstances described in paragraph (c) or (d) of sub-section (1) of section 166, the Registrar or Land Administration shall:-

(a) cause notice of his intention to do so to be published in the Gazette in Form 10D, and

(b) cause copies of the notice to be served on every person or body having a registered interest in the land, and to be published in accordance with the provisions of section 433.

433. Publication of certain notices and notifications

Any provision of this Act requiring a copy of a notice or notification affecting land to be published in accordance with the provisions of this section shall be construed as requiring a copy of the notice or notification to be:-

(a) affixed in a conspicuous position:-



(i) *on the land and on the penghulu's office or balai in the area in which the land is situated; and*

(ii) *in that area, on such court-houses and mosques (if any) and in such markets and other public places (if any) as the State Director thinks fit; and*

(b) *where the State Authority considers that publication in a newspaper is desirable, published in such newspapers circulating in the State as the State Director thinks fit.”;*

ii) The Fifth or Sixth Defendant did not give notice to the Plaintiff to handover the original manual title and to take delivery of the computerized title pursuant to rule 8(9) of the Fourteenth Schedule (section 5A) to the National Land Code;

iii) The Plaintiff had not surrendered the original manual title as required by rule 8(9)(c) of the Fourteenth Schedule (section 5A) to the National Land Code; and

iv) The Fifth or Sixth Defendant did not comply with s. 170(2)(a) of the National Land Code that requires a title in continuation be prepared in the name of the person last registered as proprietor in the subsisting register document of title as well as s. 170(2)(c) that requires the title in continuation to contain like memorials, endorsements and other entries as contained in the subsisting registered document of title. S. 170 of the National Land Code reads:



“170. Form and contents of documents in continuation of title to land as a whole

(1) For the purpose of the issue of title in continuation under this Chapter to any land as a whole:-

(a) the register document of title to be prepared shall consist:-

(i) in the case of land held under Registry title, of a grant or State lease, according as the land is held in perpetuity or for a term of years,

(ii) in the case of land held under Land Office title, of a Mukim grant or Mukim lease, according as the land is held in perpetuity or for a term of years, and

(iii) in the case of any parcel of a building held under subsidiary title, of a document in Form 4 in the First Schedule to the Strata Titles, Act 1985; and

(b) the issue document of title to be prepared shall be in the form appropriate under this Act to the register document in question.

(2) Every such document of title:-

(a) shall be prepared in the name of the person or body last registered as proprietor in the subsisting register document of title;

(b) shall specify:-

(i) in the case of land held under Registry or Land Office title, the date on which it was first alienated, the title number originally allotted thereto and (if different) the number of the subsisting register document; and

(ii) in the case of any parcel of a building held under subsidiary title, the number of the subsisting register document; and

(c) shall contain, except in so far as they relate to matters which have ceased to be effective, the like memorials, endorsements and other entries as are contained in the subsisting register document (but, where that document is a certificate of title issued under any previous land law, setting out in full any conditions and restrictions in interest therein referred to).”



The Plaintiff argued that IDT2 was prepared in the name of the Second Defendant and not the Plaintiff who was the last registered proprietor of the Land and did not contain the private caveat which was still effective and endorsed on the subsisting title.

45. In respect of IDT3, the Plaintiff further submitted it was plainly invalid as the IDT3 was the replacement title for IDT2 which had not been issued at all by the Fifth or Sixth Defendant. The Plaintiff also pointed out that DW8 had conceded that the Fifth Defendant should not have entertained the application for the replacement title, let alone process and approve it. The replacement application was based on the police report made on 27 October 2005 which stated that IDT2 was lost on 27 October 2005.

46. I have noted that the Plaintiff has included in her contention that the title was invalid or *void ab initio* because IDT 2 was wrongly issued by the Fifth and Sixth Defendant. This is in expansion to her original stance that the duplicate title was wrongly issued to replace the allegedly lost title as pleaded which resulted in the annulment of all subsequent dealings. The First Defendant further pointed out that this was not even in the agreed issues between them and hence ought to be discarded following *Malaysia Building Society Berhad v. Dato Yusuf Sudin* [2013] 1 LNS 1284. I am of the view that the lists of agreed issues in this case was not plainly stated to be exhaustive and therefore understood as such. Furthermore, it seems to be captured in the first item of the list of agreed issues between the Plaintiff and the Second Defendant which if decided might at law have an impact on

the First Defendant. Consequently I am of the view that justice and fairness require this contention of the Plaintiff be addressed.

47. As to the law, I have earlier in *Soon Poy Yong @ Soon Puey Yong v. Westport Properties Sdn Bhd (supra)* similarly been faced with the contention that the land title therein was *void ab initio*. After analyzing and reconciling the cases of *Shayo (M) Sdn Bhd v. Nurlieda Binti Sidek & Ors* [2013] 7 MLJ 555, *Uptown Properties Sdn Bhd v. Pentadbir Tanah Wilayah Persekutuan & Ors* [2012] 8 MLJ 713, *Yap Ham Seow v. Fatimawati Ismail & Ors* [2013] 9 CLJ 577 and *Overseas Realty Sdn Bhd v. Wong Yau Choy* [2014] 3 AMR 703, I came to the view that the land title would be *void ab initio*, if and only if, the land registry had in blatant breach of its duty under the National Land Code wrongfully registered any land in the register document of title and issued the replacement issue document of title in the name of a third party. The title would not however be *void ab initio* if the land registry had been duped into issuing a replacement title in continuation as happened in the court of appeal case of *Yap Ham Seow (supra)* where the title was issued pursuant to a crafty scheme by fraudsters claiming that the original title was lost. And in *Overseas Realty Sdn Bhd (supra)*, it did not matter so long the impugned title was issued by the land registry in the name of the original owner.

48. The parties here also pointed to the case of *Yew Foo Chun v. Wong Nye Keong & Ors* [2014] 1 LNS 189 which was decided shortly after but



did not refer to *Yap Ham Seow (supra)* where *Shayo (M) Sdn Bhd (supra)* and *Uptown Properties Sdn Bhd (supra)* were also distinguished in that the title in continuation were issued in the registered proprietor's name and not a third party's name and hence not *void ab initio*.

49. On the facts herein and as submitted by the Fifth and Sixth Defendant, ss. 166 to 168 and s. 5A of the National Land Code are to be read together in harmony with the latter taking precedence in the event of conflict with respect to computerized land titles. IDT2 was generated when the computerized land registration system was implemented. The new computerized issue document of title need not be issued to the registered proprietor so long the old manual issue document of title was not surrendered to the land registry. The Fourteenth Schedule (section 5A) to the National Land Code provides:

“8. Conversion to computer register document of title.

(1) Upon the coming into force of the Computerized Land Registration System in a land Registry, the Registrar shall convert the existing register documents of title to the computer printed register documents of title and shall sign and seal the same.

(2) An existing register document of title shall continue to be in force and valid for all purposes of this Act until a computer printed register document of title is prepared and signed and sealed by the Registrar.

(3) After the conversion of an existing register document of title, the existing issue document of title in respect thereof shall continue to be in force and valid for all purposes of this Act until the relevant



computer printed issue document of title is prepared and issued to the proprietor.

(4) *Any registered proprietor whose land comes within the jurisdiction of a land Registry in which the Computerized Land Registration System is implemented may at any time apply for conversion of an existing issue document of title to a computer printed issue document of title by lodging the existing issue document of title at the said land Registry.*

(5) *The Registrar may on his own accord convert any existing issue document of title without there being an application made under subparagraph (4).*

(6) *In respect of an existing document of title prepared under the National Land Code, the computer printed document of title shall be prepared as in Form 5BK, 5CK, 5DK, 5EK, 11AK or 11BK, as the case may be, with the plan of the land in Form B1 or B2, as the case may be.*

(7) *In respect of an existing document of title prepared under the previous land law, the computer printed document of title shall bear the like title with the plan of the land in Form B1 or B2, as the case may be.*

(8) *The title to be issued under subparagraph (7) shall be deemed to be a title in continuation.*

(9) *Upon the conversion of an existing document of title to a computer printed document of title under the preceding subparagraphs, the Registrar shall:-*

(a) *make two copies of the plan from the existing register document of title, where in the case of final title, from the copy as approved by the Director of Survey and Mapping under paragraph 396(1)(e), in Form B1 or B2, as the case may be, and shall be duly authenticated under his hand and seal;*

(b) *endorse across the face of the existing register document of title to the effect that the title in question had been converted to the computer printed register document of title; and on the making of such endorsement the existing register document of title shall be deemed to have been cancelled;*

(c) ***call upon the proprietor to take delivery of the computer printed issue document of title and the plan of the land; provided that where***



the conversion is effected by the Registrar on his own accord under subparagraph (5), he shall not be obliged to deliver to the proprietor the computer printed issue document of title unless the existing issue document of title is produced to him; and

(d) cancel and destroy the existing document of title when submitted to him.”

It can therefore be surmised that pursuant to the provisions in the National Land Code, the registrar of land titles is required to convert the manual land titles to computerized land titles. The registrar is empowered to do so on his own initiative even though there is no prior application by the registered proprietor and the registrar is not obliged to hand the computerized land title to the registered proprietor until the original manual land title is surrendered to him.

50. DW8 testified that IDT2 was in the computer system. Nonetheless, it is my view that DW8 was not in the position to confirm the true status of IDT 2 including whether it was issued at the material time in 2002 as she was not then attached to the Fifth Defendant. In other words, she had no personal knowledge of it: see *Datuk Bandar Kuala Lumpur v. Zain Azahari Bin Zainal Abidin* [1997] 2 MLJ 17. The registrar or the deputy district officer Azlina Binti Aziz was however not called by any of the parties to testify in court.

51. From the documentary evidence adduced, IDT2 was produced by the Fifth Defendant on 24 May 2002. There is the certified true copy of IDT2 (bundle B1 pages 173-174). By s. 383(2) of the National Land Code, I am



entitled to receive it as *prima facie* evidence of all matters contained or endorsed therein. Furthermore, the preparation of IDT2 is corroborated by the cancellation of the original manual register document of title of the Land with the imprinted phrase “*telah dibuat data entry*” (bundle B1 pages 308-309). I consequently find and hold that the IDT2 was produced as the result of the computerized land registration system. More importantly, it is plain that IDT2 was prepared in the name of the Plaintiff, whether produced in the soft and/or hard version(s).

52. I have no qualms with the Plaintiff that there can only be a title to a single lot of land as provided in s. 85(2) of the National Land Code. However the Plaintiff’s contention that the preparation of IDT2 was made without prior notification to the Plaintiff and thereby contravened ss. 168 and 433 of the National Land Code is in my view misconceived. S. 168 is only applicable if the circumstance in s. 166(c) or (d) is invoked which was not the case. S 166 provides:

“The circumstances in which title in continuation may be issued under this Chapter to any land as a whole are as follows:-

...(c) where, by a notice or notices under section 15, the Registrar or Land Administrator had called upon the proprietor and any chargee, lienholder or other person or body whom he may have reason to believe to be in possession thereof, to produce the issue document of title, and notice or notices have not been complied with;

(d) where an application therefor had been made by any person or body in accordance with the provisions of sub-sections (2) and (3), on the grounds that the issue document of title had been lost, or wholly or partially destroyed, or is being improperly or wrongfully withheld; ...”



The computerization of titles is wholly governed by s. 5A and the provisions in the Fourteenth Schedule and they override s. 166 of the National Land Code.

53. As to the Plaintiff's contention that the IDT1 had never been surrendered to the Fifth Defendant, it is in my view clear from rule 9(c) of the Fourteenth Schedule (section 5A) of the National Land Code that the surrender of the title would only be required if IDT2 was to be given to the Plaintiff in exchange. Nevertheless it is plain from rule 5 that the Fifth or Sixth Defendant could on its own volition produce IDT2 prior thereto. There is no evidence that IDT2 was issued or given to anyone including the Plaintiff.

54. In respect of the alleged contravention of s. 170 of the National Land Code that IDT2 was issued in the name of the Second Defendant and without the private caveat endorsed therein, I am of the view that s. 170 is inapplicable for the same reason stated in paragraph 50 above. In any event, the Plaintiff is mistaken as to the name because the Plaintiff is clearly stated as the registered proprietor in IDT2. It is only in IDT3 that the Second Defendant was named as the registered proprietor. I am also doubtful if the lodgement of any private caveat is required to be stated in the issue document of title as it is impracticable to do so by reason that the title is not normally in the possession of the land registry. Furthermore by s. 324 of the National Land Code, it seems that the registrar is only required to endorse it on the register document of title.



55. In the circumstances, I find and hold that the Fifth and Sixth Defendants have not contravened the National Land Code in any way in respect of the preparation of IDT2.

56. As for the Plaintiff's allegation that IDT3 was wrongly issued as the replacement title for IDT2 which had not been issued at all by the Fifth or Sixth Defendant, I find as a matter of fact that there was an application to the Fifth Defendant for the issuance of a replacement title on 6 January 2006 on the ground that the original title was lost. The bogus Plaintiff further on 25 May 2006 authorized Omar Hussein & Co in writing to collect the replacement title on her behalf.

There is however no evidence before the court as to whether the replacement title as applied was issued. Likewise there is no evidence of collection of that title too.

Nevertheless in the meantime, there was the presentation for transfer of the Land by the bogus Plaintiff to the Second Defendant. The transfer was registered on 16 May 2006.

57. I find and hold in the circumstances that there was no replacement title issued for the purportedly lost title. IDT3 was instead a new issue document of title prepared pursuant to rule 16 of the Fourteenth Schedule (section 5A) of the National Land Code. In this process, the registrar by s. 299 (1)(a) of the National Land Code was empowered to register the transfer by dispensing with the preparation of the original document of title



which I so find and hold by inference to have occurred because the original title was lost as claimed and pending replacement at that material time. There was no other more cogent explanation to the contrary.

58. Consequently, I again find that that the Fifth and Sixth Defendants have not contravened the National Land Code in any way in respect of the preparation and issuance of IDT3.

59. Accordingly and from the case authorities, I find and hold that the titles prepared and/or issued by the Fifth Defendant were not invalid or *void ab initio* because there was no contravention of the National Land Code contrary to the allegations of the Plaintiff. Hence IDT3 in particular is not defeasible pursuant to s. 340(2)(c) of the National Land Code as argued by the Plaintiff. Furthermore the titles in issue were prepared in the names of the correct parties, to wit the Plaintiff and the Second Defendant for IDT2 and IDT3 respectively.

Fraudulent transfer of the Land to the Second Defendant

60. The transfer of the Land here to the Second Defendant was pursuant to another crafty scheme analogous to that in *Boonsom Boonyanit @ Sum Yok Eng v. Adorna Properties Sdn Bhd* [1995] 2 AMR 1828 and *Yap Ham Seow v. Fatimawati Ismail & Ors* (*supra*).

61. As found in paragraphs 36 to 40 above, I am satisfied that the Plaintiff was the true registered proprietor of the Land at the material time.

62. The burden of proof that the Land was fraudulently transferred lies on the Plaintiff and the standard of proof is beyond reasonable doubt. This is made clear by Steve Shim CJ (Sabah & Sarawak) in the Federal Court case of *Yong Tim v. Hoo Kok Chong & Anor* [2005] 3 CLJ 229 at 233-235:

“With regard to the standard of proof to be applied to civil proceedings, a clear distinction must be drawn as between ‘forgery’ and ‘fraud’. The general rule is that proof in civil proceedings of facts amounting to the commission of a crime (including forgery) need only be on a balance of probabilities. However the common law of Malaysia had developed an exception to this general rule; hence, where fraud (as opposed) to forgery is alleged in civil proceedings, it (alleged fraud) had to be proved beyond a reasonable doubt.” (emphasis added)

This position on the standard of proof is again affirmed by the Federal Court in *Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd* [2007] 2 CLJ 1.

63. Earlier in the federal court case of *Tai Lee Finance Co Sdn Bhd v. Official Assignee & Ors* [1983] 1 MLJ 81, Abdul Hamid FJ (as he then was) explained at 83 and 85 that:

“...It would seem to us that their case depended on whether there was fraud within the meaning of subsection (2) of section 340 of the National Land Code. It was founded on the basis of constructive fraud alleging that the appellant had constructive notice of their prior interests. On the material before the court the learned judge did conclude that the appellant had



*constructive notice of the respondents' interest in the land. **The appellant's contention, however, is that mere constructive notice is insufficient. There must be actual fraud to defeat the person of his title or interest...**In light of the circumstances of this case we are of the view that if the learned judge properly considered whether there was fraud to which the appellant was a party or privy and whether such fraud resulted in the registration of the chargee it is improbable that he would have come to the conclusion that the designed object of the charge was to defeat the prior beneficial interest of the respondents. As we stated earlier, **the essential question that must be determined is whether the appellant was a party or privy to any fraud the charger was guilty of. And the question is one of fact. The law is clear that the onus is upon the respondents to prove beyond any reasonable doubt that there was fraud, not constructive or equitable fraud but actual fraud. The appellant must be shown to be guilty of an act involving dishonesty - a wilful conscious disregard and violation of the right of other persons.**" (emphasis added)*

Furthermore, Syed Agil Barakbah SCJ in the Supreme Court case of *Chu Choon Moi v. Ngan Sew Tin* [1986] 1 MLJ 34 at 38 clarified as follows:

*"We agree that fraud whether made in civil or criminal proceedings must be proved beyond reasonable doubt and cannot be based on suspicion and conjecture (Narayanan v. Official Assignee, Rangoon; Saminathan v. Pappa). **Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The degree of proof need not reach certainty but it must carry a high degree of probability.** What it means is that the evidence adduced is such that the **Court believes its existence** or **a prudent man considers its existence probable in the circumstances of the particular case.** If such proof extends only to a possibility but not in the least a probability, then it falls short of proving beyond reasonable doubt. (See "proved" at section 3 of the Evidence Act, 1950 and *Liew Kaling & Ors. v. Public Prosecutor*) In the present appeal before us, the facts and circumstances of the case in relation to the part played by the*

respondent point to the probability that any prudent man would under the circumstances accept it to be fraudulent.” (emphasis added)

64. The adduction of direct evidence of fraud is often difficult and not practicably procured. Nevertheless circumstantial evidence may suffice and in *Ng Pak Cheong v. Global Insurance Co Sdn Bhd* [1994] 3 AMR 50, Mohamed Dzaidin bin Haji Abdullah J (as he then was) dealt with the reception of circumstantial evidence at 2673:

*“In the famous Singapore case of *Sumitomo Bank Ltd v. Kartika Ratna Thahir* [1993] 1 SLR 735, Lai Kew Chai J, in dealing with the burden of proof for allegations of fraudulent or criminal nature in civil cases, held, allowing a substantial part of Pertamina's claim, that the legal and evidential burden of proof that Pertamina had paid Siemens and Klockner rests with Pertamina. Whilst it is necessary for Pertamina to prove their case to a higher standard than that required in a non-fraud case (there being allegations of a fraudulent or criminal nature), it is not the law of evidence that every step in the allegation of fraud had to be proved by calling live and admissible evidence nor is it the law that fraud cannot be inferred in the appropriate case. The inference, however, should not be made lightly; the circumstantial evidence must be so compelling and convincing that bearing in mind the high standard of proof the inference is nevertheless justified...” (emphasis added)*

65. From the evidence adduced by the Plaintiff, she is able to satisfy me that she was in possession of the original manual issue document of title, to wit IDT1 at the material time when the transfer of the Land took place. She did not have the intention to sell and never dealt with anyone for the sale or transfer of the Land including with solicitors.



66. From the Defendants' witnesses, the Plaintiff established that she was not the person represented by the Third and Fourth Defendants. DW9, the Third Defendant unmistakably confirmed the fact that PW1, the Plaintiff was not the person she dealt with during the transaction of the Land. I am satisfied from the evidence adduced before me and find that the Plaintiff did not execute the sale and purchase agreement dated 20 October 2005 or the instrument of transfer (form 14A) of the Land before her. They were instead executed by another lady, the bogus Plaintiff in the name of Meyappa Chettiar Rajamani, the bearer of Indian passport no. F4495077 (bundle B1 pages 156-161) who impersonated the Plaintiff.

67. The conveyance of real property in Malaysia is not a straight forward matter to a lay person even though simplified by the Torrens system as embodied in the National Land Code. I am convinced that the unauthorized transfer of the Land to the Second Defendant could not have been conceived and implemented by the bogus Plaintiff, a foreigner alone. Unless she is very conversant with the intricacies of the National Land Code, it is also extremely difficult, if not impossible to implement the transfer of land due to the non-possession of the original issue document of title. The transfer of the Land must consequently have been a scheme involving other persons familiar with land dealings and conveyancing. In other words, the bogus Plaintiff must have been a mere puppet and accessory to the puppeteer who was the mastermind to get enriched from the scheme. According to the Plaintiff, this involved the Second Defendant as well as the Seventh Defendant who acted in concert with the Third and Fourth Defendants.



68. Based on the evidence adduced, I find the following facts that emerged in respect of the transfer of the Land to the Second Defendant:

i) The Second Defendant was introduced to the Seventh Defendant by DW1, a real estate negotiator. According to DW1, he met a land broker in the name of Karim who had a lady client interested to sell the Land. DW1 was given a photocopy of the title (bundle B1 pages 308-309) which was in fact the cancelled register document of title of the Land.

ii) Since the Second Defendant was interested to purchase the Land, there was the first meeting held with the two directors of the Second Defendant, DW1, DW2 and the Seventh Defendant. Omar Hussein & Co was appointed to act on behalf of the Second Defendant. The Seventh Defendant was the legal assistant of the law firm Omar Hussein & Co assisted by the firm's conveyancing department manager, DW2. The transaction was dealt by DW2 but overseen by the Seventh Defendant. The photocopy of the cancelled register document of title as proof of the Land title was given to the Seventh Defendant at the meeting. DW2 requested for further documentation and the Second Defendant consequently furnished them such as director's resolution, forms 24 and 49, etc. at the subsequent second meeting with the Seventh Defendant.

iii) DW2 thereafter conducted a land search on 10 October 2005 and discovered that the title given by the Second Defendant was an old title. He therefore requested for a certified true copy of the new title and was furnished the certified true copy of IDT2 (bundle B1 pages 173-174).

iv) It was followed by the third meeting on 12 October 2005 attended by the same two directors of the Second Defendant, DW1, Karim, the bogus



Plaintiff, DW2 and the Seventh Defendant. The sale and purchase agreement of the Land was discussed. The bogus Plaintiff brought photocopies of her Indian passport, Malaysian immigration departure card, statutory declaration affirmed on 20 August 2005 and form 14A dated 6 April 1988. The Seventh Defendant advised her to appoint her own solicitors and recommended the Third Defendant to her.

v) The sale and purchase agreement between the bogus Plaintiff and the Second Defendant as prepared by DW2 was executed by the directors of the Second Defendant on 19 October 2005 after several prior exchanges of letters on the terms between solicitors. The bogus Plaintiff thereafter executed and dated it 20 October 2005. She also executed the instrument of transfer (form 14A) dated 25 October 2005 as well as the stamping *proforma*. The execution was done before the Third Defendant.

vi) The Second Defendant subsequently brought to DW2 a police report lodged by the bogus Plaintiff dated 27 October 2005 that she lost the original land title. The Second Defendant insisted that Omar Hussein & Co apply for a replacement title.

vii) Accordingly, DW2 prepared the required documentation for application of the replacement title. A further land search was carried out on 16 December 2005 and DW2 was furnished with another certified true copy of IDT2 (bundle B1 pages 276-277).

viii) The bogus Plaintiff herself confirmed by letter dated 9 March 2006 that the balance of the purchase price under the sale and purchase agreement had been received and the Seventh Defendant proceeded to effect the registration of the transfer.



69. From these facts as found and as strenuously pointed out by the Plaintiff, I find several factors bizarre which to my mind point to a dishonest and concerted scheme planned by several persons other than the bogus Plaintiff to cheat and deprive the Plaintiff of the Land. They are as follows:

i) Firstly, it is queer that the Second Defendant secured a photocopy of a cancelled and also incomplete register document of title through DW1 and Karim from the bogus Plaintiff. Normally, the seller would be handing over a photocopy of the issue document of title to the prospective purchaser. The logical inference is that the bogus Plaintiff never possessed the issue document of title and this cancelled register document of title must have been procured from the Fifth Defendant to evidence some form of title to the Land. The scheme was however not well thought through and fool proof in that the photocopy of IDT2 that was available could have been but not procured from the Fifth Defendant in the first place. I am very surprised that neither the Seventh Defendant nor DW2, an experienced conveyancing manager was aware of it or realized it was suspicious. No cogent explanation was proffered by them to the court. It seems that DW2 had to thereafter conduct a land search to discover that the title as provided was an old title and he then obtained a certified true copy of IDT2.

ii) Secondly, the oddity is that none of those present at the meeting on 12 October 2005 particularly the Second Defendant and Seventh Defendant or DW2 were concerned or suspicious that the bogus Plaintiff was not in possession of the original or even photocopy of the issue document of title of the Land albeit other documents were produced including the form 14A



of the Land in 1988. In addition, the statutory declaration dated 20 August 2005 produced by the bogus Plaintiff stating that she was the bearer of Indian passport no. X205536 and re-issued with a new passport no. F4495077 in her present possession should also have “rung alarm bells” at the meeting. This declaration was necessary to connect the bogus Plaintiff with the title of the Land. However the declaration is obviously self serving. It is worthless with no weight to be attached to it without the official certification by the Indian consular office or relevant public authority. The Seventh Defendant and DW2 did not explain whether they undertook the common elementary check to ascertain whether the new passport of the bogus Plaintiff carried the endorsement of the cancellation of the old passport no. X205536. From my independent review of the new passport (bundle 1 pages 158-161), the cancellation endorsement is absent.

iii) Thirdly another major peculiarity pertains to the police report of the bogus Plaintiff made on 27 October 2005 stating that she lost IDT2 on 27 October 2005 based on an earlier statutory declaration dated 20 October 2005 declaring it lost. In this respect, counsel for the Plaintiff aptly submitted that “*Only a prophet could have achieved this feat.*” Besides, I am mindful that IDT2 although prepared was never yet issued to anyone by the Fifth and Sixth Defendants. It is also obvious that the bogus Plaintiff must have had the assistance of someone else in the preparation of this statutory declaration since she neither speak nor write Bahasa Malaysia or English Language. The Third and Fourth Defendants who were her solicitors however did not appear to know of the purported lost title. The Second Defendant instead knew of it and requested the Seventh



Defendant to apply for the replacement title. Nevertheless the Seventh Defendant with the assistance of DW2 saw it fit at the request and in the interest of the Second Defendant utilized the police report and statutory declaration to apply on behalf of the bogus Plaintiff for a replacement title from the Fifth Defendant. Why was the Third Defendant who acted for the bogus Plaintiff in respect of the conveyance of the Land not asked to undertake the application?

iv) Fourthly, the terms of the sale and purchase agreement made between the bogus Plaintiff and the Second Defendant were also not in the ordinary. The Second Defendant allegedly paid a substantial sum of RM800,000 (2/3 of the purchase price) to the bogus Plaintiff (a foreign national no less) in advance of the transaction. Moreover, the final balance of the purchase price was allegedly paid directly to the bogus Plaintiff and not through the Third and Fourth Defendants as is the norm. I observed that there is no cogent independent evidence produced on the payments made by the Second Defendant to the bogus Plaintiff such bank statements on the fund flow and am hence doubtful if the purchase price of the RM1,200,000 was ever paid to the bogus Plaintiff at all.

v) Fifthly, I have also noted that the Second Defendant had within about 4 months from the date of registration of the title in its name entered into a sale and purchase agreement with the First Defendant for RM1,800,000 thereby making a handsome profit of RM600,000 (50% on the assumption that the RM1,200,000 purchase price was actually paid to the bogus Plaintiff). In fact the title of the Land was never collected by the Second Defendant but kept at all times by Omar Hussein & Co ever since it was issued by the Fifth Defendant. In other words, the Second Defendant

wasn't interested to keep the Land but rather more concerned to dispose of it soonest possible.

70. To my mind, each of the bizarre factors constituted an individual strand of evidence of fraud which may not be itself adequate to safely conclude the commission of the fraud. Nonetheless the combined strength of all the strands when twisted together to make the rope is strong enough to justify that actual fraud was indeed committed; see *Chan Chwen Kong v. Public Prosecutor* [1961] 1 MLJ 307. In this regard, I am mindful that the circumstantial evidence must be so compelling and convincing in view of the high standard of proof required.

71. I also observed that the Second Defendant did not call any witness to testify at the trial notwithstanding that an unsigned witness statement of its director, Datuk Mazlan bin Yusof was filed pre-trial. This was in spite that there wasn't submission of no case to answer by the Second Defendant at the close of the Plaintiff's case. I am aware that Datuk Mazlan passed away during the course of the trial but there is still the other surviving director Azizi Bin Abdul Hamid who was privy to the transaction of the Land. It would be necessary for him to explain the bizarre factors highlighted above. He was also not subpoenaed by the Seventh Defendant. I believe that further damning evidence would emerge if the Azizi Bin Abdul Hamid was put under cross examination at trial. Thus his presence in court was withheld or suppressed; see *Robin Van Beurle & Anor v. La Reve (Malaysia) Sdn Bhd* [2012] 5 CLJ 61.



72. Hence this is in my view also an appropriate situation to invoke s. 114(g) of the Evidence Act 1950 to presume that the evidence which could be produced particularly to clarify the bizarre factors discussed above and is not produced, would if produced be unfavourable to the person who withholds that evidence; see *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen* [1998] 1 MLJ 465.

73. In the circumstances I am satisfied beyond reasonable doubt that the Second Defendant had in cahoots with the bogus Plaintiff as its accessory fraudulently caused the transfer of the Land from the Plaintiff to the Second Defendant and I so find and hold accordingly. I am also convinced that the Second Defendant was the mastermind of the scheme to cheat the Plaintiff of her Land; see *Goh Hooi Yin v. Lim Theong Ghee & Ors* [1990] 3 MLJ 23. The Second Defendant was not a *bona fide* purchaser and the sale and purchase agreement dated 20 October 2005 was a sham in the attempt to legitimize the transaction in order to conceal the fraud. On the totality of the evidence before me, to wit the circumstantial evidence as well as the Second Defendant's failure to call any witness such as its director, the bogus Plaintiff and Karim who were involved in the transaction, the inference of the commission of actual fraud here by the Second Defendant is justified because this is in my view the inescapable conclusion.

74. In the pleadings, the Plaintiff also contended that the Seventh Defendant committed fraud in concert with the Third and Fourth Defendants but it was clarified at the clarification on 14 January 2015 that



the allegation of fraud is now confined against the Seventh Defendant since fraud was not in the list of agreed issues between the Plaintiff and the Third and Fourth Defendants and not pursued in the closing arguments.

75. Since I have found the Second Defendant liable for fraud, the Seventh Defendant will also be liable if he was a party or privy to the fraud; see *Tai Lee Finance Co Sdn Bhd v. Official Assignee & Ors (supra)*. The distinction between them is subtle. The Seventh Defendant would be a party to the fraud if he was also in cahoots in joint enterprise with his firm's client, the Second Defendant. However, he would be privy to it if he shared the knowledge of his client; see *The Concise Oxford English Dictionary* where "privy" has been described as "*sharing in the knowledge of (something secret)*". Hence it seems to me that the former requires active participation in the fraud whereas knowledge of the fraud suffices in the latter.

76. On the facts of this case, it is clear that the Seventh Defendant worked with, if not dependent upon DW2 in the undertaking of the conveyancing transaction of the Land. Thus I do not expect the Seventh Defendant to know the minute details but he must have been aware of the broader picture. Moreover he cannot shun away the obvious facts particularly if they were very shady and suspicious.

Short of an admission, knowledge can otherwise only be found by inference.



77. In my view, all the bizarre factors discussed above are obvious facts that were telling that something in the conveyancing transaction of the Land was amiss that smacked of fraud. I noticed that the Seventh Defendant had however in his testimony dismissed them as casual and nothing that aroused suspicion. I have carefully watched him and am not convinced from his facial expression and manner of answering that he actually believed what he said.

In the old Privy Council case of *Assets Company Ltd v. Mere Roihi* [1905] A.C. 76 Lord Lindley said:

“...the mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not itself prove fraud on his part. But if it be shown that his suspicions were aroused and that he abstained from making enquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him.”

but I noted that the rigour of His Lordship’s speech has been somewhat watered down in the court of appeal case of *Rabiah Lip & Ors v. Bukit Lenang Development Sdn Bhd and Other Appeals* [2008] 3 CLJ 69. In my view, abstention to enquire on suspicions is not sufficient to find commission of fraud by the defendant where actual and not constructive or equitable fraud is required. But I am of the view that this can be distinguished and robustly applied to justify that the defendant is instead privy to the fraud. In any case, I find from the testimony of the Seventh Defendant that he had actual and not only constructive knowledge of the fraud of the Second Defendant.



78. Consequently in the circumstances, I find and hold that the Seventh Defendant was privy to the scheme of the Second Defendant in cahoots with the bogus Plaintiff. I reiterate that the Seventh Defendant had actual over and above constructive knowledge of the aforesaid scheme here. However he had chosen to appear oblivious in his self-interest to serve his client regardless of the consequences. Though he might not have actually participated in the fraudulent scheme of the Second Defendant, I am nonetheless satisfied beyond reasonable doubt that he was privy to it.

79. Be that as it may, the parties are nonetheless bound by their pleadings; see *R. Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 and *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v. Capital Insurance Bhd* [2004] 1 CLJ 357. The Plaintiff's pleaded case against the Seventh Defendant is that he acted falsely and fraudulently in concert with the Third and Fourth Defendant. It seems to me to be a charge of conspiracy to defraud that must also be proven beyond a reasonable doubt as held in *Rosazanam Bin Khalid v. Tri-Prestige Sdn Bhd & Other Appeals* [2013] 6 MLJ 102.

80. From the evidence adduced, I am not satisfied that there was the joint agreement between the Seventh Defendant and the Third and Fourth Defendant in collusion to defraud the Plaintiff even though I have found that the Seventh Defendant was privy to the fraud of the Second Defendant. I find that the Third and Fourth Defendant was merely appointed by the bogus Plaintiff on the suggestion of the Seventh Defendant, probably to



divert the glaringness of the scheme and diminish his responsibility from the knowledge he possessed. I further find that the Third and Fourth Defendants were unaware of the scheme as the Third Defendant was not privy to all of the bizarre factors discussed above. In other words, they acted for the bogus Plaintiff as another normal referred client including settling the terms of the sale and purchase agreement and reminding her of the balance of the payment due.

81. In the premises but with reluctance, I do not find the Seventh Defendant liable to the Plaintiff as pleaded because the charge of conspiracy to defraud in collusion with the Third and Fourth Defendants has not been made out.

82. Besides fraud and since I have found that the Third and Fourth Defendant dealt with the bogus Plaintiff and not the Plaintiff, all the documentation such as the sale and purchase agreement and the instruments of dealing in the Land must necessarily also have been procured by forgery. The signature of the bogus Plaintiff on these documents was passed off as that of the Plaintiff and I accordingly find and hold that these documents were procured through forgery too.

83. The legal effect is contained in s. 340 of the National Land Code which reads:



“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 a 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 shall be indefeasible.

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

(a) in any case of fraud or 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 the time being vested:

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

(4) Nothing in this section shall prejudice or prevent:-

(a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or

(b) *the determination of any title or interest by operation of law.*”

84. Mokhtar Sidin JCA in the Court of Appeal case of *Ong Ban Chai & Ors v. Seah Siong Mong* [1998] 3 MLJ 346 said at 372 that:

*“In our opinion, although we sympathize with the predicament of the respondent, it is wholly unjust to penalize the second, third and fourth appellants for the fraud of the first appellant as well as the omission of the respondent himself to challenge by the appeal the specific findings of the learned judge and on the removal of the caveats adverted to earlier in this judgment. In this connection, we find the following passage from the judgment of Lord Diplock in the Eng Mee Yong case at p 214 to be helpful in our consideration of the fourth appellant in the present appeal: **The Torrens system of land registration and conveyancing, as applied in Malaya by the National Land Code 1965, has one of its principal objects to give certainty to title to land and registrable interests in land. Since the instant case is concerned with title to the land itself, their Lordships will confine their remarks to this, though similar principles apply to other registrable interests. By s. 340, the title of any person to land of which he is registered as proprietor is indefeasible except in case of fraud, forgery or illegality, and even in such cases a bona fide purchaser for value can safely deal with the registered proprietor and will acquire from him an indefeasible registered title.**”* (emphasis added)

85. By reason of my finding that the fraud was committed by the Second Defendant as well as forgery by the bogus Plaintiff, s. 340 (2)(a) and (b) of the National Land Code are accordingly attracted. Thus the transfer and title to the Land that was registered in the name of the Second Defendant is defeasible.



86. It was also submitted that the Second Defendant was a *bona fide* purchaser for valuable consideration. This cannot be so in view of the fraud that I have found. In any event, even if the culprit was only the bogus Plaintiff, the Second Defendant would still not have obtained an indefeasible title following the federal court decision of *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2CLJ 269 because the proviso in s. 340(3) conferred deferred and not immediate indefeasibility.

Transfer of the Land to the First Defendant

87. The Plaintiff contended that the First Defendant's title to the Land is defeasible by reason of s. 340(3) of the National Land Code. In other words, it is the Plaintiff's case that the First Defendant was not the *bona fide* purchaser of the Land for valuable consideration.

88. As provided in s. 340(1) of the National Land Code, the First Defendant's registered title to the Land is indefeasible unless the exceptions in s. 340(2) to (4) are attracted. Since the Second Defendant acquired the Land by fraud and/or forgery, the sale and transfer of the Land by the Second Defendant to the First Defendant was also accordingly tainted.

89. Nevertheless by s. 340(3) of the National Land Code, the First Defendant's title remains indefeasible if the First Defendant was the *bona fide* purchaser for valuable consideration.

90. Richard Malanjum JCA (now CJ Sabah & Sarawak) had in the Court of Appeal case of *State Tailor Sdn Bhd v. Nallapan* [2005] 2 MLJ 589 defined *bona fide* purchaser as follows at 603:

*“The term ‘bona fide purchaser’ had been used in a host of cases. **Simply put it means a buyer in good faith. And the basis element of good faith is the absence of fraud, deceit or dishonesty and the knowledge or means of knowledge of such at the time of entry of the transaction. But the overriding consideration is the ‘Particular circumstance of each case’...**”* (emphasis added)

91. Furthermore in another court of appeal case of *Au Meng Nam v. Ung Yak Chew & 3 Ors* [2007] 4 CLJ 526, Raus Shariff JCA (now PCA) said at 554 [42] to [44] as follows:

“Had the learned trial judge taken the above facts and circumstances into consideration, he cannot possibly conclude that the 1st defendant was a bona fide purchaser for valuable consideration, so as to be protected under s. 340(3) of the Code. To me, the 1st defendant had acted hastily. He concluded the sale without any proper investigation into the title or the persons claiming to be proprietors. No doubt he had every right to take advantage of the low price that was offered to him but he took the risk. When he embarked into such risk, it cannot be at the expense of the plaintiffs. This is because while he had a choice, the plaintiffs had none. In fact, the plaintiffs were helpless. The plaintiffs could not do anything to prevent the fraud. Even locking the title in a safe would not had help the

plaintiffs. In such circumstances the court must not favour the 1st defendant, over the plaintiffs. To do so, would be doing injustice to the plaintiffs.

*Further, had the evidence adduced in this case been properly considered and assessed by the learned trial judge, a reasonable inference would be that the 1st defendant knew at the time he bought the said land, the purchase price was below the market value. But he wanted to take advantage of the low price. He did a fast track to complete the purchase. In doing so he disregarded his obligations to investigate the alleged proprietors and the genuineness of the documents. My respectful view is that a purchaser in good faith does not include a purchaser who is careless or who had been negligent. In *Oliver v. Hinton* [1899] Chancery Division 264 Lindley MR said:*

To allow a purchaser who acts with such gross carelessness to deprive a prior innocent mortgagee of her priority would be the greatest injustice.

So too here. The 1st defendant is under the obligation to investigate properly all matters relating to the sale of the said land and not to just blindly accept what was claimed by the 'vendors' as correct and genuine. When he failed to take the ordinary precautions which ought to be taken in such a matter he is not entitled to the protection of the court.” (emphasis added)

92. And in another recent court of appeal case of *Teoh Kim Heng v. Tan Ong Ban* [2014] 8 CLJ 316, Aziah Ali JCA said as follows:

“[18] On the evidence it is clear that the appellant is a subsequent purchaser. Being a subsequent purchaser, the appellant would obtain an indefeasible title if he could prove that he was a purchaser in good faith for valuable consideration. This is a statutory protection accorded by s. 340 of the National Land Code (NLC). The burden of proving that there was a



*valuable consideration and good faith in the conveyance of the property lies on the appellant (see *Yap Ham Seow v. Fatimawati Ismail & Ors And Another Appeal* [2013] 9 CLJ 577).*

[19] *Section 340 of the NLC states as follows:*

(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 or 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 there out shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested;

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchase.



[21] The appellant says that he had paid the full purchase price to Mohd Ismail. The respondent disputes this. However there is no evidence that Mohd Ismail had instituted any action against the appellant for payment of the balance of the purchase price. Further the fact that the appellant is in possession of the property is not challenged. We are of the considered view that there is sufficient evidence to show that the sale and purchase transaction between the appellant and Mohd Ismail had been completed.

[22] We find no evidence to show that the appellant had acted in concert with Mohd Ismail to effect the disposition of the property. It is apparent that the appellant had no knowledge about the first SPA and the second SPA.

[23] We find that the appellant had shown that he was a bona fide purchaser for value without notice and therefore he is clothed with the statutory protection accorded by s. 340 NLC. Consequently the appellant had acquired an indefeasible title to the property.” (emphasis added)

93. It is thus a question of fact to be determined from the circumstances in each case.

From the evidence adduced, I find that the First Defendant had at all material times neither knowledge nor notice of the commission of the fraud by the Second Defendant in cahoots with the bogus Plaintiff that resulted in the transfer of the Land to the Second Defendant.

In respect of the sale of the Land by the Second Defendant to the First Defendant, the First Defendant appointed its solicitors T.S. Teoh & Partners. Both the First Defendant and T.S. Teoh & Partners conducted land searches on the Land before the entry of the sale and purchase



agreement between the First Defendant and the Second Defendant. The searches done on 13 July 2006 and 21 July 2006 revealed that the title was clean and free from caveats including the private caveat lodged by the Plaintiff's son on 1 March 2001.

The First Defendant was also represented by T.S. Teoh & Partners at all material times in respect of the sale and purchase agreement that was executed on 18 August 2006 for the purchase price of RM1,800,000 and the subsequent conveyancing of the Land including the presentation of registration of the transfer of the Land.

According to DW4 and the valuation report produced in court, the market value of the land was RM1,800,000 and this was unchallenged by the Plaintiff. The stamp duty for the land was also adjudicated based on the market value of RM1,800,000. I find that this was a fair valuation of the Land at the material time.

For financing of the purchase of the Land, the First Defendant obtained a loan from CIMB Bank and both transfer and charge on the Land in favour of the First Defendant and CIMB bank respectively were registered on 14 December 2006. The payment of the purchase of the Land had been paid in full by the First Defendant.

I also observed that the First Defendant through another related company Eng Beng Manufacturing (M) Sdn Bhd had purchased two other pieces of land nearby from different sellers in 2005 and 2009 respectively and this fortifies that the purchase of the Land was made *bona fide*.



94. I noticed the Plaintiff also argued that this purchase of the Land by the First Defendant was questionable due to the non withholding of the portion of the purchase price, thereby allegedly an attempt by the First Defendant to circumvent payment of real property gains tax, hence defrauding the Inland Revenue Board.

95. S. 21B of the Real Property Gains Tax Act 1976 which was in force at the material time of the transaction provides:

“(1) Where on disposal to which section 13 applies, the consideration consists wholly or partly of money:-

(a) the acquirer shall, until he receives the Director General's certificate of clearance under section 21A, retain the whole of that money (subject to the reservation that the money retained shall not exceed a sum calculated at the rate at which the tax is for the time being chargeable, on the total value of the consideration);

(b) the Director General may, at any time, before he sends the certificate of clearance, serve upon the acquirer a written requisition in the prescribed form calling upon him to pay the whole or any part of the sum retained under paragraph (a) (or, where the acquirer had failed to comply with that paragraph, the sum which should have been so retained) within a time specified in the requisition;

(c) in a case where paragraph (b) applies, the acquirer shall deliver the sum stated in the requisition to the Director General within the time specified in the requisition.

(2) A requisition issued under this section shall be deemed to be an assessment for the purposes of this Act.



(3) *An acquirer who is required under this section to deliver to the Director General a sum which he should have, but had not retained under subsection (1)(a), shall, on complying with the requisition, be deemed for the purposes of section 16(3) to have been assessed in the sum under section 16(1) and to have paid that sum in pursuance of that assessment.*”

Thus the statutory obligation by s. 21B(1)(a) was in fact on the purchaser to retain a sum not exceeding 5% of the total value of the consideration which was RM90,000 in this case. Although the purchaser is obliged to withhold the aforesaid sum, the Director General of Inland Revenue may require the purchaser to deliver up the sum which ought to be withheld but not retained. Put simply, the withholding is for the purchaser’s protection in the event the seller fails to pay the real property gains tax. It is therefore not illegal if the purchaser does not withhold the sum but takes the risks of having to pay the tax when required to do so by the Inland Revenue Board.

96. The terms of the sale and purchase agreement between the First Defendant and Second Defendant were drawn up by T.S. Teoh & Partners and the First Defendant merely complied with the settled terms. There was no provision to withhold the portion of the real property gains tax agreed therein. In fact the First Defendant entered into similar terms in its other land purchases. In the circumstances, I find and hold that the Plaintiff’s allegation on the circumvention of fiscal statute to defraud the revenue is misconceived. I also agree with the following dicta of Lee Swee Seng J in *Yew Foo Chun v. Wong Nye Keong & Ors (supra)*:

“However whether the device of a separate Supplementary Agreement to cover renovation is an attempt to evade or avoid Real property gains tax

(RPGT) is a matter for the Inland Revenue Board. I quite agree with mr P M Lee, that even if the above conduct of the D1 and d2 vis-à-vis D5 and D6, amounts tM defrauding the Inland revenue where RPGT is concerned, that cannot be equated with defrauding the plaintiff or that as a result they ceased to be bona fide purchasers.”; see also Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen (supra).

97. In the circumstances based on the evidence adduced, I am satisfied that the First Defendant purchased the Land *bona fide* for valuable consideration and I so find and hold accordingly. In this regard, I again echo and adopt the views in *Yew Foo Chun v. Wong Nye Keong & Ors (supra)* where the facts therein and the facts here are not that dissimilar. Lee Swee Seng J said:

“Here there was no fast tracking by the Purchasers in D5 and D6 to complete the purchase other than entrusting their solicitors in D7, one Mr Mah Kok Leong, to do the necessary searches and to inspect the genuineness of the relevant documents. D5 and D6, being laymen, would be ill-equipped to undertake their own private investigation. In fact though the Plaintiff had earlier sued D7, she had later withdrawn the suit after being satisfied that D7, as solicitors for the purchasers had no knowledge of the fraud or forgery and that D7 was discharging his duties as any professional solicitor acting for his client would do with respect to a purchase of a piece of land.

I do not think that a prospective purchaser must be satisfied as to why a registered owner is selling his newly acquired property before he can be said to be a bona fide purchaser. The important thing is to ensure that the said Land was in the name of D1 and D2 before paying the initial deposit and subsequently signing the S&P. As I said before there are a myriad of permissible postulations as to why a proprietor of a property who had just purchased it would prefer to sell it rather than keep it. I do not think such a



question if asked and answered, would indicate one way or the other the bona fides of the purchaser or the lack of it.

A more important question is whether or not the negotiated purchase price was paid over by D5 and D6 as purchasers to D1 and D2 as vendors. Here the undisputed evidence was that it was clearly paid over and coupled with the fact that they had not known or met one another before would further support the evidence of D5 and D6 that they are bona fide purchasers for valuable consideration.” (emphasis added)

98. Consequently I find and hold that the First Defendant’s Land title IDT3 is indefeasible.

Removal of Plaintiff’s Private Caveat and Registrar’s Caveat

99. The First Defendant had counterclaimed that the private caveat entered by the Plaintiff on 28 March 2007 was unlawful if the land title of the First Defendant is found to be valid and indefeasible.

100. According to the First Defendant, the Land was purchased with plans to construct a factory for purposes of sale, lease or tenancy at a profit. This project was halted by reason of the entry and subsistence of the private caveat as notified to the First Defendant on 8 May 2007 by the Fifth Defendant. The Plaintiff did not withdraw or remove the caveat notwithstanding the demand by the First Defendant through its solicitors,



T.S. Teoh & Partners. In addition a registrar's caveat was also entered on the Land on 3 July 2007 following the police report made by the Plaintiff.

101. By virtue of my finding in paragraph 95 above that the First Defendant's title is valid and indefeasible, it follows and I find and hold that the private caveat was wrongfully and unlawfully entered by the Plaintiff; see s. 329(2) of the National Land Code and *Damodaran v. Vasudeva* [1974] 1 MLJ 128. However the removal of the private caveat is no longer an issue presently by reason that it has lapsed after six years on 29 March 2013 pursuant to s. 328 of the National Land Code. The registrar's caveat still subsists and ought now to be removed since the rights of the parties have been determined.

102. Nonetheless I also find and hold that the First Defendant ought in the circumstances as found fairly to be compensated in damages occasioned by the subsistence of the private caveat pursuant to s. 329 of the National Land Code. Moreover the Plaintiff should also be prohibited from lodging further private caveats on the Land; see s. 329(2) of the National Land Code.

Want of Authority and Negligence of the Third and Fourth Defendants

103. Though the Plaintiff had pleaded that the Seventh Defendant acted in concert with the Third and Fourth Defendant, the Plaintiff has clarified that



she is only pursuing against the Third and Fourth Defendant not for fraud but for acting without authority and negligently.

104. As for acting without authority, it seems that the Plaintiff has abandoned the claim from the list of agreed issues. Be that as it may, it is plain from the evidence adduced that the Third and Fourth Defendants were appointed by the bogus plaintiff and not the Plaintiff. In such situation, I am doubtful that the cause of action of acting without authority which is germane in agency relationships is applicable here; see ss. 179 to 191 Contracts Act 1950. The Plaintiff had not cited any case authority to substantiate this point and I accordingly consider it misconceived.

105. The Plaintiff has also contended that the Third and Fourth Defendants were negligent by reason of the failure on their part to take the necessary steps to verify the true identity of their client, the bogus Plaintiff before attesting to her signature on the instrument of transfer (form 14A). They did not have sight of the original issue document of title nor conducted and land searches. Everything was left to be done by the Seventh Defendant. Accordingly, the Plaintiff in reliance on *Neogh Soo Oh & Ors v. G. Rethinasamy* [1984] 1 MLJ 126 submitted that the Third and Fourth Defendants failed to exercise due care and skill required of a competent solicitor undertaking conveyancing transactions.



106. The Third and Fourth Defendants principally relied instead on the court of appeal case of *Yap Ham Seow v. Fatimawati Binti Ismail & Ors* (*supra*) that the solicitor who acted for the fraudster did not owe a duty of care to the real owner of the land. In that case Raus Shariff PCA held that:

“[89] However, assuming there were suspicion on DW5’s part, is she duty bound to inform Messrs Rajagopalu and can she be held negligent in her failure to do so? Our answer to this is thus: the second defendant’s solicitors owe a duty of care to her client (the forger) which she derived from the retainer. This duty certainly does not include informing a prospective solicitor who might take over any irregularities or discrepancies in the file.

[90] As can be gleaned from the above cited cases and at the risk of repeating ourselves, we must reiterate here that DW5’s duty of care is confined to the forger alone and not the plaintiff.” (emphasis added)

107. I find that the facts are closely similar and bound by this decision of the court of appeal. Moreover, I do not find the English cases of *Penn v. Bristol & West Building Society* [1987] 3 AER 470 and *Al-Sabah v. Ali* [1999] 3 EGCS 11 cited by the Plaintiff in rebuttal to be of assistance to displace this legal position. The former concerns an action for breach of warranty of authority which is obviously not the case here whilst the latter was based on the concession by the parties that a duty of care existed. Nonetheless the facts are also distinguishable. In that case the solicitor had the duty to satisfy himself that the instructions came from the client and not a third party that represented the client. This is plainly different from the case herein where the Third and Fourth Defendants met their client personally.



108. In addition I hold that the case of *Neogh Soo Oh & Ors v. G. Rethinasamy* (*supra*) originally relied upon by the Plaintiff is also inapplicable by reason that it was a case concerning the purchasers and their own solicitor.

109. In the premises and in the absence of a duty of care, I find and hold that the Plaintiff's claim against the Third and Fourth Defendants is unsustainable and it is not necessary to look into the other elements of the tort particularly whether the duty had been breached.

110. For completeness, if there was a duty of care on the part of the Third and Fourth Defendant owed to the Plaintiff, I do not find that all their actions or omissions as suggested by the Plaintiff amounted to breaches of that duty. The bogus Plaintiff had presented to the Third Defendant her current passport which carried the same name as the Plaintiff and the Land title. However the Third Defendant's failure to further investigate into her identity might in my view be negligent on her part. This is because as an experienced legal practitioner, she should have been alerted to the worthless statutory declaration that necessarily linked the earlier passport of the bogus Plaintiff to the Land title. This is justified in my view because the land registry has mainly only an administrative function as provided in ss. 297 to 301 of the National Land Code and depended on advocates and solicitors to attest to the instruments of registration executed by the parties to the transaction. The ascertainment of the true identity of the party concerned must be done at the attestation stage.



As to the several other conveyancing tasks such as land searches and the handing over of the issue document of title that were already done or taken over (by reason that the title was allegedly lost and needed replacement) respectively by the Seventh Defendant, who is an advocate and solicitor, this is in my view unobjectionable and not negligent on her part.

If there was a duty of care that was breached here by the Third and Fourth Defendants, the loss and damage suffered by the Plaintiff is a given being the loss of the Land.

111. In the premises, I find and hold that the negligence alleged by the Plaintiff against the Third and Fourth Defendant has not been established and is hence unsustainable.

Negligence of the Fifth and Sixth Defendants

112. The Plaintiff's contention against the Fifth and Sixth Defendants is that they breached the National Land Code 1965 by having registered the transfer of the Land to the Second Defendant and then to the First Defendant notwithstanding that the Land was encumbered by the private caveat lodged by the Plaintiff's son in 2001. According to the Plaintiff, the law imposes a duty on public authorities to exercise due care in carrying out their functions and day to day operations and the Plaintiff argued that it is reasonable to conclude that there must have been gross negligence on the part of the Fifth and Sixth Defendants; see *Pendaftar dan Pemeriksa*



Kereta-kereta Motor, Melaka & Ors v. KS South Motor Sdn Bhd [2000] MLJ 540.

113. The defence put up by the Fifth and Sixth Defendants are both procedural and substantive.

114. On the procedural aspect, the Fifth and Sixth Defendants relied on ss. 5 and 6 of the Government Proceedings Act 1956 which read:

“5. Liability of the Government in Tort

Subject to this Act, the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government.

6. Limits of Liability of the Government

(1) No proceedings shall lie against the Government by virtue of section 5 in respect of any act, neglect or default of any public officer, unless proceedings for damages in respect of such act, neglect or default would have laid against such officer personally.

(2) Any written law which negatives or limits the amount of the liability of any public officer in respect of any act, neglect or default committed by that officer shall, in the case of proceedings against the Government under section 5 in respect of such act, neglect or default of such officer, apply in



relation to the Government as it would have applied in relation to such officer if the proceedings against the Government had been proceedings against such officer.

(3) No proceedings shall lie against the Government by virtue of section 5 in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process.

(4) No proceedings shall lie against the Government by virtue of section 5 in respect of any act, neglect or default of any public officer, unless that officer was at the material time employed by the Government and paid in respect of his duties as an officer of the Government wholly out of the revenues of the Government, or any fund certified by the appropriate financial officer for the purposes of this subsection or was at the material time holding an office in respect of which the appropriate financial officer certifies that the holder thereof would normally be so paid.

(5) For the purposes of subsection (4) the expression “appropriate financial officer” means, in respect of the Federal Government, the Minister of Finance, and in respect of the Government of a State, the State Financial Officer, and, in the case of the States of Sabah and Sarawak, the State Minister responsible for finance.”

115. These provisions have been interpreted by the federal court in *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* [2009] 1 CLJ 663 where Nik Hashim FCJ held:

“Thus I entirely agree with the views expressed by Abdul Aziz J (later FJ) in Haji Abdul Rahman, supra. Contrary to the finding of the Court of Appeal, Haji Abdul Rahman was correctly decided and should be upheld. Therefore, on the proper construction of ss. 5 and 6 of Act 359, in any claim in tort against the Government who was responsible for the alleged



tortuous act must be a party and his liability be established before the Government can be made vicariously liable as principal. It would be insufficient to merely identify the officer without joining the officer as a party because liability by evidence needs to be established. It is only upon a successful claim against the officer personally can a claim be laid against the Government.

*In the present case, all the eight causes of actions are action in tort or tort-based premised on the act or omission of an individual. None of the Governments sued is capable of committing the wrong pleaded. **Since the Governments' liability in tort can only be vicarious by virtue of ss. 5 and 6 of the Act 359, and as officers who were responsible for the alleged wrongdoing were not joined as defendants to the action, it is therefore not possible in law to maintain a successful claim in tort against the Government as primary tortfeasors. That being so, the applicant's application to strike out the respondents' actions is meritorious... In this respect, I agree with the appellants that this is not just a case of joining wrong parties but bringing an action against the wrong parties...*** (emphasis added)

Furthermore the court of appeal in *Government of the State of Sabah v. Syarikat Rasband* [2010] 7 CLJ 945 adopted the same position and Low Hop Bing JCA emphasized:

*"Section 6 expressly prohibits the bringing of any proceedings against the Government for damaged under s. 5 unless the action for such wrongful act, neglect or default would have laid against the officer personally. **This is a substantive provision that goes to the jurisdiction of the court. Liability can only be attributed to the Government where the officer's act, neglect or default is proved to have established the liability for the officer personally. In the absence of the officer's liability (which can only arise and bind the officer(s) if and when the officer or officers are cited as defendants), no proceedings shall lie against the Government. Where no such proceedings could lie against the***



Government, the court is in no position to exercise any jurisdiction in relation thereto.” (emphasis added).

116. Furthermore, the Fifth and Sixth Defendants submitted that they were the wrong parties sued by the Plaintiff. The proper party should be the Director of Lands and Mines of the State. In this respect, the Fifth and Sixth Defendants relied on s. 16 of the National Land Code which provides:

“16. Actions by and against the State Authority

(1) The State Director may, on behalf of the State Authority, commence, prosecute and carry on in the name of his office any action, suit or other proceeding relating to:-

- (a) State land;*
- (b) any contract concerning land to which the State Authority is a party;*
- (c) any trespass to, or other wrong committed in respect of land;*
- (d) the recovery of any item of land revenue, or any instalment thereof; or*
- (e) the recovery of any fine, or the enforcement of any penalty, under this Act.*

(2) Any action, suit or other proceeding relating to land in which it is sought to establish any liability on the part of the State Authority shall be brought against the State Director in the name of his office.

(3) In any action, suit or other proceeding to which this section applies, the State Director may appear personally, or may be represented by any advocate and solicitor, any Federal Counsel, the State's Legal Adviser or any Land Administrator or other officer appointed under sub-section (1) of section 12.”



117. In the federal court case of *Government of the State of Negeri Sembilan v. Yap Chong Lan & Anor Case* [1984] 1 CLJ (Rep) 144, Eusoffe Abdoolcader FCJ held as follows:

*“At the inception of the hearing the State Legal Adviser who appeared for the State Government and the Director of Lands and Mines took a preliminary objection to the joinder of the State Government as a party to the proceedings in view of the provisions of s. 16(2). The learned Judge deferred his decision on this point until the conclusion of the trial and in his reserved judgment dismissed it on the grounds that 'because of the various declarations sought against it' the State Government 'should be a proper and necessary party and ought to be heard, for the purpose of completely adjudicating on all the issues herein'. We must with respect say that this is a paralogism as it involves the fallacy of petitio principii; it begs the question as there can be no question of any relief being accorded against the State Government if it is not a proper party. The State Government as such has nothing to do with proceedings under the Code. **It is the State Authority that is the pertinent entity, and State Authority is defined in s. 5 to mean the Ruler or Governor of the State, as the case may be. Section 12(1) provides for the State Authority to appoint a Director of Land and Mines for the State and sub-section (3) of that section specifies his functions, powers, duties and responsibilities. Section 16 enacts provisions for actions by and against the State Authority, and sub-section (2) thereof specifically stipulates that any action, suit or other proceeding relating to land in which it is sought to establish any liability on the part of the State Authority shall be brought against the Director of Lands and Mines of the State in the name of his office. It is accordingly abundantly clear that the State Government should never have been joined in the proceedings and on the preliminary objection taken it should have been discharged as a party thereto. There appears to be a popular misconception on this aspect of the matter and on the role of the Government of a State as such in relation to the Code with the resultant indiscriminate misjoinder of State Governments as parties in proceedings thereunder, and we expect due heed to be taken of the point we make in this regard.**”*



In short and since the Plaintiff's case is one in tort, it seems to me that the proper parties here ought to be the Director of Land and Mines of Selangor joined together with the officer(s) who committed the tort. Generally, the joining of both the employee and employer is essential to impute liability of the employee vicariously onto the employer.

118. I am again bound by the decisions of the higher courts on this aspect and I do not think that the misjoinder and non-joinder can be overcome by estoppel due to the participation of the Fifth and Sixth Defendants at the trial as submitted by the Plaintiff or to apply Order 15 rule 6 of the Rules of Court 2012 to rectify the problem. In any case, I am not aware of the identity of the relevant officers at the material time even if the court may wish to do so on its own motion following *Tsoi Ping Kwan v. Medan Juta Sdn Bhd & Anor* [1996] 3 MLJ 367. There is also in my view no necessity that a striking out application must have been made pre-trial although the Fifth and Sixth Defendants have the option to do so. In other words, this misjoinder and non-joinder can be raised at any time including post trial. As it stands, the Plaintiff's case against the Fifth and Sixth Defendants is bad procedurally.

119. As to the substantive defence, the Fifth and Sixth Defendants submitted that the Fifth/Sixth Defendant was misled by the other parties such as the Second Defendant's solicitors who made the applications and submitted the instruments of dealing. The Fifth/Sixth Defendant merely in good faith carried out its administrative function accorded by the National



Land Code. I noticed that in their substantive defence, the Fifth and Sixth Defendants were taken as synonymous - as the Fifth/Sixth Defendants. It is pointed out in *Selvaraju Velasamy & Anor v. Abdullah Ali Kutty* [2009] 2 CLJ 753 that the governmental bodies did not have the expertise to determine the authenticity of the documents presented. In that case, Vernon Ong JC (now JCA) at 780 said:

“Clearly this additional responsibility is impractical and unreasonable. It would be unjust as the duty to ensure the authenticity of certificates would entail delay thereby causing hardship to the public as a whole.”

I am wholly in agreement with His Lordship’s views and wish to add that the responsibility should lie on the solicitors undertaking the conveyancing transaction.

120. As to the Fifth/Sixth Defendant having registered the transfer of the Land to the Second Defendant and later to the First Defendant notwithstanding the subsistence of the private caveat lodged by the Plaintiff’s son in 2001, it was submitted that the caveat was lodged without any caveatable interest on his part. He claimed to be a future beneficiary to the Land. In any event, the Fifth/Sixth Defendant treated the private caveat as if entered by the Plaintiff herself as the registered proprietor to protect the Plaintiff’s own interest in the Land as well. Thus by s. 322(5) of the National Land Code the caveat would not prohibit the registration of the transfer where the instrument was presented by the person whose instance the caveat was entered.

121. Though it sounded logical, I find it difficult to accept that the private caveat entered by the son could be synonymously treated as if it was a caveat entered by his mother in the absence of documentary evidence to link that common intention.

122. As to the lack of caveatable interest on the part of the Plaintiff's son, I accept following *Version Buy Sdn Bhd v. Thong Wee Kee & Anor* [2014] 8 CLJ 840 that the registrar was only administratively tasked and was not obliged to enquire into the validity of the caveator's interest at the time the private caveat was lodged. I further find and hold that as the result, the caveat is susceptible to be removed pursuant to ss. 326 to 327 of the National Land Code; see also *Ahmad Shazilly Ismail Bakti v. Nik Salma Zaidah Hj Mohd Zaid* [2014] 5 CLJ 817. There is however no power on the part of the Fifth/Sixth Defendant here to ignore or discard the subsistence of the caveat to restraint any dealing on the land unless the caveat has lapsed, withdrawn or removed as per the provisions of the National Land Code.

123. I wholly agree with the dicta of Prasad Abraham J (now JCA) in *Uptown Properties Sdn Bhd v. Pentadbir Tanah Wilayah Persekutuan & Ors* [2012] 8 MLJ 733 at 731 [28] in the context of land searches:

“The maintenance of a land registry that is efficient and maintains accurate particulars is a duty that the first defendant owes to every member of the public who makes and relies on a search made at the land registry maintained by the first defendant. If this confidence was jeopardized that



could have dire consequences for trade and economic activity in this country.”

I will not hesitate to extend the duty of the land registry to unwaveringly give the desired effect of caveats to restrain dealings, otherwise the loss of confidence and consequences would be similarly dire as is the case here. The loss and damage suffered by the Plaintiff here is a given being the loss of the Land.

124. In the premises, I find that substantively the Fifth/Sixth Defendant was grossly negligent including in breach of statutory duty by having registered the transfer of the Land notwithstanding so restrained by a subsisting private caveat.

125. Save for the aforesaid breach of duty, I however find that the Fifth/Sixth Defendant was not negligent for not having issued the replacement title notwithstanding the application by the bogus Plaintiff for one as explained in paragraphs 54 and 55 above.

126. As to s. 22 of the National Land Code which provides:

“22. Protection of officers

No officer appointed under this Part shall be liable to be sued in any civil court for any act or matter done, or ordered to be done or omitted to be done, by him in good faith and in the intended exercise of any power, or performance of any duty, conferred or imposed on him by or under this Act.”



I find that this section is inapplicable here by reason that the relevant officers have not been named as parties, see paragraphs 111 to 115 above. This section will only be attracted to exempt the named officers from liability if these officers have been named and found to be negligent. It follows that the principal should also then be vicariously exempted if the officers are exempted. The reliance on the application of s. 22 requires the officers to have acted in good faith. If applicable here, the burden of proof to establish good faith rests on the Fifth/Sixth Defendant but I again observed that the relevant officers were not call as witnesses to testify in court.

127. Put simply, I find and hold that s. 22 of the National Land Code cannot be invoked here based on the case as presented before the court.

128. In summing up, I find that the Fifth and Sixth Defendants are not liable in negligence because of procedural defect notwithstanding that the Fifth Dhas been grossly negligent in registering the transfer.

Summary of Findings

129. My principal findings can thus be summarized as follows:

- i) The Plaintiff had *locus standi* to maintain this suit and claim to be the registered owner of the Land;



- ii) The duplicate title produced by the Fifth Defendant and used for the transfer of the Land from the Plaintiff to the Second Defendant was not invalid or in other words *void ab initio* and hence, this and the subsequent transfer of the Land to the First Defendant were not nullities;
- iii) The transfer of the Land to the Second Defendant was procured through fraud as well as forgery of the Second Defendant and the registration thereof in the name of the Second Defendant was therefore defeasible;
- iv) The Seventh Defendant did not act fraudulently in concert with Third and Fourth Defendants in the transfer of the Land to the Second Defendant;
- v) The subsequent transfer of the Land to the First Defendant and the registration thereof in the name of the First Defendant was indefeasible by reason that the First Defendant was the *bona fide* purchaser for valuable consideration;
- vi) Accordingly, the registrar's caveat entered on the Land in 2007 ought to be removed. The Plaintiff must compensate the First Defendant for damages as the result thereof;
- vii) The Third and Fourth Defendant did not act without authority and was not negligent *vis a vis* the Plaintiff; and
- viii) The Fifth and Sixth Defendants were incorrectly enjoined in the suit and thus they were not liable for negligence in effecting the transfer and registration of the Land notwithstanding that there was a subsisting private caveat lodged on the Land by the Plaintiff's son in 2001.



Conclusion

130. Just as in the my earlier case of *Soon Poy Yong @ Soon Puey Yong v. Westport Properties Sdn Bhd & 18 Ors (supra)*, I sympathize with the Plaintiff for not being able to recover the Land. Her remedies are only confined in damages against the fraudster.

131. In the premises and based on the foregoing reasons, I allow the Plaintiff's claim to the extent that the Second Defendant shall pay the Plaintiff damages together with interest thereon at 5% per annum from 27 June 2007 to full realization to be assessed by the registrar. The rest of the declarations and orders sought by the Plaintiff as prayed are not allowed.

132. As for the counterclaim of the First Defendant, I allow the prayers in paragraphs 25.3 to 25.5 save that the interest is fixed at 5% per annum. In addition, I order that the Fifth Defendant removes the registrar's caveat and cancel the entry thereof on the register document of title and note thereon the reason for the cancellation and the date thereof.

133. The parties shall further submit on the applicability of the Bullock or Sanderson order on costs.



Dated: 29 JANUARY 2015

(LIM CHONG FONG)

JUDICIAL COMMISSIONER

HIGH COURT SHAH ALAM

COUNSEL:

For the plaintiff - Bastian Vendargon, (PK Nathan, T Gunaseelan and Gene Vendargon with him); M/s Gunaseelan & Associates

For the first defendant - Pang Kong Leng, (Shelby Chin with him); M/s Cheah Teh & Su

For the second defendant - Sivasankar Chelliah; M/s Sankar & Co



For the third and fourth defendants - Leong Wai Hong (David Tan with him); M/s Skrine

For the fifth and sixth defendants - Mohamad Mustaffa P Kunyalam; M/s Kamar Penasihat Undang-Undang Negeri Selangor Darul Ehsan

For the seventh defendant - Low Chi Cheng (Sharifah Nadia Aljafri with her); M/s Lim Kian Leong & Co