Pushpaleela a/p R Selvarajah & Anor v Rajamani d/o Meyappa Chettiar and other appeals

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 01(f)-32–10 OF 2016 (B), 01(f)-33–10 OF 2016 (B) AND 01–34–10 OF 2016
RAUS SHARIF CHIEF JUSTICE, ZULKEFLI PCA, AHMAD MAAROP CJ (MALAYA), RICHARD MALANJUM CJ (SABAH AND SARAWAK) AND AZAHAR MOHAMED FCJ
29 JANUARY 2019

Civil Procedure — Appeal — Grounds of appeal — Whether Court of Appeal seriously misdirected itself on fact and law in failing to appreciate third and fourth defendants had to owe a duty of care to the plaintiff before considering a breach of that duty — Whether Court of Appeal failed to appreciate fact that register document of title was in name of first defendant and thus conclusive evidence that title was vested in first defendant

Civil Procedure — Pleadings — Function of pleadings — Whether plaintiff's pleaded case against seventh defendant premised on fraud or tort of conspiracy to defraud — Whether plaintiff's pleaded case for fraud satisfactorily proven on higher standard

Land Law — Indefeasibility of title and interests — Fraud — Whether replacement title generated by land registry valid when original document of title was in possession of owner of land — Whether land registry duped into issuing a replacement title — Whether replacement title capable of validly passing title to subsequent purchaser in good faith and for valuable consideration

Tort — Negligence — Duty of care — Whether lawyer owed duty of care to plaintiff as real owner of land when lawyer was acting for fraudster who claimed to be owner of land — Whether there was factual foreseeability — Whether sufficient legal proximity between parties — Whether policy considerations against imposing such a duty

The present three related appeals arose from a suit commenced by Rajamani d/o Meyapa Chettiar ('the plaintiff') against seven defendants. At all material times, Rajamani d/o Meyapa Chettiar ('the plaintiff'), an Indian national and bearer of Indian passport No X205536, was the original registered proprietor and lawful owner of a parcel of land known as EMR 6527 ('the land'). However, without the plaintiff's knowledge and consent, the land had been transferred by a fraudster, who had a name identical to the plaintiff, to a third

party, who subsequently sold the land to another. The evidence disclosed that A
although the original document of title to the land ('IDT1') was in the
plaintiff's possession, the transfers were made using a computerised issue
document of title. Pushpaleela a/p R Selvarajah ('the third defendant'), a
partner in the law firm Messrs MY Choong, Pushpa & Co ('the fourth
defendant'), was at all material times the advocate and solicitor who acted for B
the vendor/fraudster, in respect of the sale of the land to Infinite Income Sdn
Bhd ('the second defendant'), while Sheelan Arjunan ('the seventh defendant')
was the lawyer who acted for the second defendant in the purchase of the land.
The seventh defendant was also the person who had introduced the fraudster to
the third defendant. In order to pass of as the plaintiff, the fraudster had C
produced an original statutory declaration affirmed before an Indian Notary
Public stating that she was the bearer of Indian passport No X205536 and was
re-issued with a new passport No F4495077. After due verification that the
information was consistent, the third defendant believed the fraudster to be the
plaintiff and asked her to execute the transfer form and the sale and purchase D
agreement for the sale of the land to the second defendant for the sum of
RM1.2m. The seventh defendant had assisted the fraudster to apply for the
issuance of a replacement title on the ground that the original title was lost. The
replacement title GM 9890, arising out of the sale of the land by the fraudster
to the second defendant, was issued in the name of the second defendant E
(IDT3). Subsequently, Eng Beng Development Sdn Bhd ('the first defendant')
had purchased the land from the second defendant for the sum of RM1.8m
and the computerised document of title GM 9890 was issued for the land in
the name of the first defendant as registered owner (IDT4). When the plaintiff
discovered about the transfer of the land without her knowledge, she lodged a F
police report and filed a suit against the seven named defendants on the
grounds that they were liable to her losing ownership and interest to the land.
The plaintiff 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 Pentadbir Tanah Daerah Klang ('the fifth defendant') or Pendaftar G
Hakmilik Negeri Selangor Darul Ehsan ('the sixth defendant') through acts of
fraud or deception of others and 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. As such, the
plaintiff contended that the transfer of the land in favour of the second H
defendant and then to the first defendant was based on a wrongly issued title
and was void ab initio. Further, she submitted that the transfer was procured
fraudulently and/or through forgery because the plaintiff neither knew nor
dealt with the second defendant. As against third defendant and/or the fourth
defendant, the plaintiff contended that she never engaged the services of the I
solicitor and that the third and fourth defendants had acted negligently by
acting for the fraudster/vendor. The plaintiff also contended that the seventh
defendant acted fraudulently in concert with the third and/or fourth
defendants for having facilitated and caused the transfer of the land to the

second defendant. The High Court found that the third and fourth defendants did not owe a duty of care to the plaintiff and dismissed the plaintiff's claim in negligence against the third and fourth defendants. In respect of the claim against the first defendant the High Court found that the duplicate title produced by the fifth defendant and used for the transfer of the land to the second defendant was not invalid and thus the subsequent transfer of the land to the first defendant was also not null and void. Insofar as the claim against the seventh defendant was concerned, the High Court found that the seventh defendant had actual knowledge of the fraud committed. However, as the plaintiff's pleaded case against the seventh defendant was one of conspiracy with the third and fourth defendants to defraud and there was no evidence of such a conspiracy, the High Court dismissed the plaintiff's claim against the seventh defendant. The plaintiff appealed against the decision of the High Court. At the same time the seventh defendant filed a cross-appeal in respect of the specific findings of fraud made against him by the High Court. The Court of Appeal reversed the decision of the High Court and found that the third and fourth defendants did owe a duty of care to the plaintiff and that there had been a breach of that duty in the circumstances of the present case; that since IDT1 remained valid and indefeasible, the plaintiff's title to the land remained indefeasible and could not be challenged and it followed that the transfer of the land to the first and second defendants, which was based on the replacement title, had to be void; that the seventh defendant had acted in concert with the third and fourth defendants in relation to the fraudulent execution of the sale and purchase agreement, which resulted in the plaintiff's loss of the land. At the same time the Court of Appeal dismissed the seventh defendant's cross-appeal on the basis that it saw no reason to interfere in respect of findings of fact by the High Court. Aggrieved by this decision three separate applications for leave to appeal were filed by the first, the third and fourth defendants, and the seventh defendant respectively. The third and fourth defendants raised the issue as to whether a lawyer owed a duty of care to the plaintiff, as the real owner of the land, when the lawyer was acting for another person who claimed to be the owner of the land. The first defendant raised the issue as to whether a replacement title that was generated by the land registry, when the original issue document of title was at all material times in the possession of the original owner, was valid and capable of validly passing title to a subsequent purchaser in good faith and for valuable consideration. The seventh defendant raised the issue as to whether a specific plea of fraud against a person for acting in concert with others could stand, when the plea of fraud against the others was withdrawn. The defendants/appellants were granted leave to proceed with the present three appeals, which were heard together.

Held, allowing the appeals by the third and fourth defendants and the first defendant and dismissing the appeal by the seventh defendant:

(1) A careful analysis of the cases relied on by the Court of Appeal in the present case did not support the broad proposition that the third and fourth defendants owed a duty of care to the plaintiff. The Court of Appeal had seriously misdirected itself on fact and law in failing to appreciate that the third and fourth defendants had to owe a duty of care to the plaintiff before the court would consider whether there had been a breach of the duty of care. The plaintiff's claim against the third and fourth defendants was based on the tort of negligence and in a claim based on the tort of negligence, it had to be firstly shown that the defendant owed a duty of care to the plaintiff and once the duty existed, the plaintiff had to show that the defendant had breached it. For the establishment of a duty of care in tort, the preferred test in Malaysia was the three-fold test of foreseeability, proximity and policy considerations but the Court of Appeal in the present case did not examine this point. On the threshold question of factual foreseeability, the third and fourth defendants were retained as solicitors for the fraudster, whom they believed to be the owner of the land. In this context, they could not be expected to consider the interests of the plaintiff (who they did not know existed) when acting for their client, the fraudster. As solicitors for the fraudster, they were mainly responsible for protecting the interests of their client, the fraudster in first land transaction. In the circumstances it was not reasonable for them to further enquire whether their client was really whom she claimed to be, or whether her actions might cause harm to the plaintiff whom they had no idea existed in the first place (see paras 110–112).

(2) Further, in assessing whether there was sufficient legal proximity between the parties in a case where the plaintiff only suffered pure economic loss, as in the present case, one of the factors that a court should consider was the principle of voluntary assumption of responsibility (by the defendant) and reliance (by the plaintiff). In the present case, the only nexus between the plaintiff and the third and fourth defendants was the plaintiff's interest in the land, which did not create legal proximity where the plaintiff was never the third and fourth defendants' client, and the plaintiff never relied on the third and fourth defendants who had no knowledge of the plaintiff's existence. The third and fourth defendants also never assumed responsibility for the plaintiff and thus it was clear that there was no legal proximity between the plaintiff and the third and fourth defendants. Hence, a duty of care could not be imposed on solicitors who acted for a fraudster owner of land who sold the said land, towards the real owner of the land, as there was no foreseeability, no proximity, and there were policy considerations against imposing such a duty (see paras 114–118 & 124).

(3) Based on the caselaw, the land title would be void ab initio, if the land authority had in flagrant violation of its responsibility under the NLC,

unlawfully registered any land in the register document of title and issued the replacement issue document of title in the name of a third party. However, in the present case because the fifth and sixth defendants had not contravened the NLC in any way in respect of the preparation of IDT2. In the present case, the title would not be void ab initio as the land registry had been duped into issuing a replacement title (see paras 134–136 & 140).

(4) The High Court found 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 fraudster 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, it was clear that the first defendant who conducted searches on the register and purchased the land in good faith and for valuable consideration, had, upon registration as the proprietor on the register document of title, acquired an indefeasible title, notwithstanding that the second defendant's title was defeasible. It was now well settled that a subsequent purchaser in good faith was entitled to raise the shield of indefeasibility and a registered interest of a subsequent purchaser could only be liable to be set aside if the interest was not acquired in good faith. Hence, 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. That being the case, the underlying basis for the Court of Appeal in the present case to reverse the decision of the High Court despite the first defendant being a subsequent purchaser in good faith and for valuable consideration, was wholly misconceived and untenable. The Court of Appeal was more concerned with the fact that the plaintiff had in her possession IDT1 but overlooked and failed to appreciate the fact that the register document of title was in the name of the first defendant and that this was conclusive evidence that the title to the land was vested in the first defendant (see paras 146–147 & 151–153).

(5) In the case of the seventh defendant, the Court of Appeal was of the view that the plaintiff's pleaded case against him was premised on fraud, as opposed to the tort of conspiracy to defraud. The Court of Appeal thus accepted as correct the High Court's finding of fraud against the seventh defendant. Based on a close reading of the re-amended statement of claim, as well as the manner in which the case was pursued at trial against the seventh defendant, it was clear that the plaintiff's case against the seventh defendant was premised on fraud. Based on the evidence, the seventh defendant had been involved in everything from dealing with the fraudster, to linking her up with the third and fourth defendants, to dealing with her replacement title, and facilitating the sale of the land from the fraudster to the second defendant and shortly thereafter for a

second time from the second defendant to the first defendant at a marked-up price. Thus, the plaintiff's pleaded case for fraud had been satisfactorily proved on the higher standard than applicable (see paras 159 & 163–165).

[Bahasa Malaysia summary

Tiga rayuan berkaitan timbul daripada guaman yang dimulakan oleh Rajamani a/p Meyapa Chettiar ('plaintif') terhadap tujuh defendan. Pada setiap masa matan, plaintif, seorang warganegara India dan pemegang pasport India No X205536, adalah pemilik berdaftar asal dan pemilik sah sebidang tanah dikenali sebagai EMR 6527 ('tanah tersebut'). Walau bagaimanapun, tanpa pengetahuan dan persetujuan plaintif, tanah tersebut telah dipindah milik oleh seorang penipu, yang mempunyai nama yang serupa dengan plaintif, kepada pihak ketiga, yang kemudian telah menjual tanah tersebut kepada orang lain. Keterangan menunjukkan bahawa meskipun surat ikatan hak milik asal tanah tersebut ('IDT1') dalam milikan plaintif, Pushpaleela a/p R Selvarajah ('defendan ketiga'), seorang rakan kongsi dalam firma guaman Tetuan MY Choong, Pushpa & Co ('defendan keempat'), adalah ada setiap masa matan seorang peguambela dan peguamcara yang bertindak untuk penjual/penipu itu, berkaitan jualan tanah tersebut kepada Infinite Income Sdn Bhd ('defendan kedua'), manakala Sheelan Arjunan ('defendan ketujuh') adalah peguam yang bertindak untuk defendan kedua dalam pembelian tanah tersebut. Defendan ketujuh juga orang yang memperkenalkan penipu itu kepada defendan ketiga. Bagi tujuan kelihatan sebagai plaintif, penipu itu telah mengemukakan deklarasi statutori asal yang disahkan di hadapan Notari Awam India menyatakan bahawa dia adalah pemegang passport India No X205536 dan telah dikeluarkan passport baharu No F4495077. Selepas pengesahan bahawa maklumat adalah konsisten, defendan ketiga mempercayai penipu itu sebagai plaintif dan memintanya menyempurnkan borang pindah milik dan perjanjian jual beli untuk jualan tanah tersebut kepada defendan kedua berjumlah RM1.2 juta. Defendan ketujuh telah membantu penipu itu memohon keluaran hak milik gantian atas alasan bahawa hak milik asal telah hilang. Hak milik gantian GM 9890, yang timbul daripada jualan tanah tersebut oleh penipu kepada defendan kedua, telah dikeluarkan atas nama defendan kedua (IDT3). Berikutan itu Eng Beng Development Sdn Bhd ('defendan pertama') telah membeli tanah terebut daripada defendan kedua berjumlah RM1.8 juta dan dokumen berkomputer hak milik GM 9890 telah dikeluarkan untuk tanah tersebut atas nama defendan pertama sebagai pemilik berdaftar (IDT4). Apabila plaintif mendapat tahu tentang pindah milik tanah tersebut tanpa pengetahuannya, dia telah membuat laporan polis dan memfailkan guaman terhadap tujuh defendan yang dinamakan atas alasan bahawa mereka bertanggungjawab untuk kehilangan pemilikan dan kepentingannya ke atas tanah tersebut. Plaintif menegaskan bahawa pindah milik tanah tersebut kepada defendan kedua telah dikendalikan dan dilaksanakan melalui pendua hak milik tanah tersebut yang telah salah dikeluarkan oleh Pentadbir Tanah Daerah Klang (‘defendan kelima’) atau Pendaftar Hakmilik Negeri Selangor Darul Ehsan (‘defendan keenam’) melalui perbuatan penipuan atau menipu orang lain dan tanpa siasatan awal yang betul oleh defendan kelima atau defendan keenam bagi menentukan kesahihan permohonan untuk pendua hak milik itu dan identiti pemohon yang betul. Oleh itu, plaintif menegaskan bahawa pindah milik tanah tersebut menyebelahi defendan kedua dan kemudian kepada defendan pertama adalah berdasarkan hak milik yang salah dikeluarkan dan adalah tidak sah ab initio. Selanjutnya dia berhujah bahawa pindah milik itu telah diperoleh secara penipuan dan/atau melalui pemalsuan kerana plaintif tidak mengetahui atau berurusan dengan defendan kedua. Terhadap defendan ketiga dan/atau defendan keempat, plaintif berhujah bahawa dia tidak pernah menggunakan perkhidmatan peguamcara dan bahawa defendan-defendan ketiga dan keempat telah bertindak cuai kerana bertindak bagi pihak penipu/penjual. Plaintif juga berhujah bahawa defendan ketujuh telah bertindak secara fraud bersama defendan dan/atau defendan keempat kerana mengendalikan dan menyebabkan pindah milik tanah tersebut kepada defendan kedua. Mahkamah Tinggi mendapati defendan-defendan ketiga dan keempat tidak mempunyai kewajipan berjaga-jaga kepada plaintif dan menolak tuntutan plaintif untuk kecuaian terhadap defendan-defendan ketiga dan keempat. Berhubung tuntutan terhadap defendan pertama Mahkamah Tinggi mendapati pendua hak milik yang dikemukakan oleh defendan kelima dan yang digunakan untuk pindah milik tanah tersebut kepada defendan kedua bukannya tidak sah dan oleh itu pindah milik tanah tersebut berikutnya kepada defendan pertama juga tidak terbatal dan tidak sah. Setakat mana tuntutan terhadap defendan ketujuh adalah berkaitan, Mahkamah Tinggi mendapati bahawa defendan ketujuh mempunyai pengetahuan sebenar tentang fraud yang dilakukan. Walau bagaimanapun, oleh kepada kes yang dipli oleh plaintif terhadap defendan ketujuh adalah berasaskan konspirasi dengan defendan-defendan ketiga dan keempat untuk menipu dan tiada keterangan tentang konspirasi sedemikian, Mahkamah Tinggi menolak tuntutan plaintif terhadap defendan ketujuh. Plaintif telah merayu terhadap keputusan Mahkamah Tinggi. Pada masa sama defendan ketujuh telah memfailkan rayuan balas berkaitan dapatan spesifik tentang fraud yang dibuat terhadapnya oleh Mahkamah Tinggi. Mahkamah Rayuan telah mengakas keputusan Mahkamah Tinggi dan mendapati defendan-defendan ketiga dan keempat mempunyai kewajipan berjaga-jaga kepada plaintif dan terdapat pelanggaran kewajipan tersebut dalam keadaan kes ini; bahawa oleh kerana IDT1 masih sah dan tidak dapat dibuktikan, hak milik plaintif ke atas tanah tersebut masih tidak boleh disangkal dan tidak boleh dicabar dan ia diikuti bahawa pindah milik tanah tersebut kepada defendan-defendan pertama dan kedua, yang berdasarkan hak milik gantian, perlu dibatalkan; bahawa defendan ketujuh telah bertindak bersama defendan-defendan ketiga dan keempat berkaitan penyempurnaan fraud perjanjian jual beli itu, yang mengakibatkan plaintif kehilangan tanah tersebut. Pada masa yang sama, Mahkamah Rayuan telah menolak rayuan balas defendan ketujuh atas alasan ia melihat tiada sebab untuk campur tangan dengan dapatan fakta oleh Mahkamah Tinggi. Terkilan dengan keputusan ini, tiga permohonan berasingan untuk kebenaran membuat rayuan telah difailkan oleh defendan-defendan pertama, ketiga dan keempat, dan defendan ketujuh masing-masingnya. Defendan-defendan ketiga dan keempat telah menimbulkan isu sama ada peguam mempunyai kewajipan berjaga-jaga kepada plaintif, sebagai pemilik sebenar tanah tersebut, walhal peguam itu bertindak untuk orang lain yang mendakwa dirinya pemilik tanah tesebut. Defendan pertama telah menimbulkan isu berhubung sama ada hak milik gantian itu telah dikeluarkan oleh pejabat pendaftaran tanah, pada hal dokumen hak milik keluaran asal adalah pada setiap masa dalam milikan pemilik asal, adalah sah dan mampu secara sah menyerahkan hak milik kepada pembeli berikutnya dengan niat baik dan untuk balasan yang bernilai. Defendan ketujuh telah menimbulkan isu-isu tentang sama ada pli spesifik berhubung fraud terhadap seseorang kerana bertindak secara bersama dengan orang lain boleh kekal, pada hal pli untuk fraud terhadap yang lain telah ditarik balik. Defendan-defendan/perayu-perayu telah diberikan kebenaran untuk meneruskan tiga rayuan ini, yang telah didengar bersama.

Diputuskan, membenarkan rayuan-rayuan oleh defendan-defendan ketiga dan keempat dan defendan pertama dan menolak rayuan oleh defendan ketujuh:

(1) Analisis yang teliti tentang kes yang diguna pakai oleh Mahkamah Rayuan dalam kes ini tidak menyokong cadangan yang luas bahawa defendan-defendan ketiga dan keempat mempunyai kewajipan berjaga-jaga kepada plaintif. Mahkamah Rayuan telah benar-benar salah arah dari segi fakta dan undang-undang kerana gagal memahami bahawa defendan-defendan ketiga dan keempat mempunyai kewajipan berjaga-jaga kepada plaintif sebelum mahkamah boleh mempertimbangkan sama ada terdapat pelanggaran kewajipan berjaga-jaga. Tuntutan plaintif terhadap defendan-defendan ketiga dan keempat adalah berdasarkan tort kecuaian dan dalam tuntutan yang berdasarkan tort kecuaian, ia perlu terlebih dahulu menunjukkan bahawa defendan mempunyai kewajipan berjaga-jaga kepada plaintif dan selepas kewajipan itu wujud, plaintif perlu menunjukkan bahawa defendan telah melanggarinya. Bagi pembuktian kewajipan berjaga-jaga dalam tort, ujian pilihan di Malaysia adalah ujian tiga serangkai iaitu ramalan, kedekatan dan pertimbangan polisi tetapi Mahkamah Rayuan dalam kes ini tidak memeriksa perkara tersebut. Berhubung soalan ambang tentang ramalan faktual, defendan-defendan ketiga dan keempat telah dikekalkan seagai peguamcara untuk penipu tersebut, yang mana mereka mempercayai adalah pemilik tanah tersebut. Dalam konteks ini, mereka tidak dapat dijangkakan untuk mempertimbangkan

kepentingan plaintif (yang mereka tidak tahu wujud) apabila bertindak untuk anakguam mereka, iaitu penipu tersebut. Sebagai peguamcara untuk penipu tersebut, mereka terutamanya bertanggungjawab untuk melindungi kepentingan anakguam mereka, penipu dalam transaksi tanah pertama. Dalam keadaan tersebut ia tidak munasabah untuk mereka selanjutnya menyiasat sama ada anakguam mereka adalah sebenarnya sepertimana yang mereka dakwa, atau sama ada tindakannya mungin menyebabkan kemudaratan kepada plaintif yang mereka tidak pun mengetahui wujud (lihat perenggan 110–112).

(2) Selanjutnya, dalam menaksir sama ada terdapat kedekatan sah yang mencukupi antara pihak-pihak dalam suatu kes di mana plaintif hanya mengalami kerugian ekonomi tulen, sebagaimana dalam kes ini, salah satu faktor yang patut dipertimbangkan oleh mahkamah adalah prinsip andaian tanggungjawab secara sukarela (oleh defendan) dan kebergantungan (oleh plaintif). Dalam kes ini, satu-satunya kaitan antara plaintif dan defendan-defendan ketiga dan keempat adalah kepentingan plaintif dalam tanah tersebut, yang bukan kedekatan sah di mana plaintif bukan anakguam defendan-defendan ketiga dan keempat, dan plaintif tidak bergantung kepada defendan-defendan ketiga dan keempat yang tidak mempunyai pengetahuan tentang kewujudan plaintif. Defendan-defendan ketiga dan keempat juga tidak mengambil tanggungjawab ke atas plaintif dan oleh itu adalah jelas bahawa tiada kedekatan sah antara plaintif dan defendan-defendan ketiga dan keempat. Justeru, kewajipan berjaga-jaga tidak boleh dikenakan keatas peguamcara yang bertindak untuk penipu tersebut iaitu pemilik tanah tersebut yang telah menjual tanah tersebut, ke atas pemilik sebenar tanah tersebut, kerana tiada ramalan, kedekatan dan pertimbangan polisi untuk mengenakan kewajipan sedemikan (lihat perenggan 114–118 & 124).

(3) Berdasarkan kes undang-undang, hak milik tanah tersebut adalah tidak sah ab initio, jika pihak berkuasa tanah telah melanggar tanggungjawabnya di bawah KTN, secara tidak sah mendaftar mana-mana tanah dalam daftar dokumen hak milik dan mengeluarkan dokumen hak milik itu atas nama pihak ketiga. Walau bagaimanapun, dalam kes ini oleh kerana defendan-defendan kelima dan keenam tidak bercanggah dengan KTN dalam apa cara berkaitan persediaan IDT2. Dalam kes ini, hak milik itu tidak terbatal ab initio kerana pejabat daftar tanah telah menipu dalam pengeluaran hak milik gantian (lihat perenggan 134–136 & 140).

(4) Mahkamah Tinggi mendapati bahawa defendan pertama telah pada setiap masa matan tidak mempunyai pengetahuan atau menyedari perlakuan fraud oleh defendan kedua bersama penipu tesebut yang telah mengakibatkan pindah milik tanah tersebut kepada defendan kedua.

Berhubung jualan tanah tersebut oleh defendan kedua kepada defendan pertama, ia adalah jelas bahawa defendan pertama yang membuat carian atas daftar dan membeli tanah tersebut dengan niat baik dan untuk balasan bernilai, telah, selepas pendaftaran sebagai pemilik atas daftar dokumen hak milik, memperoleh hak milik yang tidak boleh disangkal, walau apa pun bahawa hak milik defendan kedua boleh disangkal. Ia kini ditetapkan bahawa pembeli berikutnya yang berniat baik mempunyai hak untuk menimbulkan perlindungan tidak boleh disangkal dan hak berdaftar pembeli berikutnya hanya boleh diketepikan jika kepentingan itu tidak diperoleh dengan niat baik. Justeru, pindah milik tanah tersebut yang berikutnya kepada defendan pertama dan pendaftarannya atas nama defendan pertama tidak boleh disangkal oleh kerana defendan pertama adalah pembeli berniat baik untuk balasan bernilai. Jika begitu, asas untuk Mahkamah Rayuan dalam kes ini untuk mengakas keputusan Mahkamah Tinggi meskipun defendan pertama adalah pembeli berikutnya yang berniat baik dan balasan bernilai, telah disalah tanggap dan tidak boleh dikekalkan. Mahkamah Rayuan lebih memberi perhatian kepada fakta bahawa plaintif memiliki IDT1 tetapi terlepas pandang dan gagal memahami fakta bahawa daftar dokumen hak milik adalah atas nama defendan pertama dan bahawa ini adalah bukti konklusif bahawa hak milik tanah tersebut terletak pada defendan pertama (lihat perenggan 146–147 & 151–153).

(5) Dalam kes defendan ketujuh, Mahkamah Rayuan berpendapat bahawa kes yang dipli oleh plaintif terhadapnya berasaskan fraud, berbanding dengan tort berhubung konspirasi untuk menipu. Mahkamah Rayuan dengan itu menerima sebagai betul dapatan Mahkamah Tinggi tentang fraud terhadap defendan ketujuh. Berdasarkan pembacaan telilti pindaan penyataan tuntutan yang telah dipinda semula, dan juga cara kes diteruskan semasa perbicaraan terhadap defendan ketujuh, ia adalah jelas bahawa kes plaintif terhadap defendan ketujuh adalah berasaskan fraud. Berdasarkan keterangan, defendan ketujuh terlibat dalam semuanya daripada berurusan dengan penipu tersebut, hingga mengaitkannya dengan defendan-defendan ketiga dan keempat, kepada menguruskan hak milik gantiannya, dan memudahkan jualan tanah tersebut dari penipu tersebut kepada defendan kedua dan sejurus selepas itu untuk kali kedua dari defendan kedua kepada defendan pertama pada harga yang dinaikkan. Oleh demikian, kes yang dipli oleh plaintif untuk fraud telah dibuktikan dengan memuaskan pada piawai yang lebih tinggi daripada yang terpakai (lihat perenggan 159 & 163–165).]

Notes

For cases on duty of care, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1440–1566.

A For cases on fraud, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3773–3823.

For cases on function of pleadings, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 7512–7517.

For cases on grounds of appeal, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue)
B paras 1405–1409.

Cases referred to

Al-Sabah v Ali [1999] All ER (D) 49, PC (distd)

Allied Finance and Investments Ltd v Haddow & Co [1983] NZLR 22, HC
C (refd)

Anwar Patrick Adrian and another v Ng Chong & Hue LLC and another [2014] 3 SLR 761; [2014] SGCA 34, CA (refd)

Badenach v Calvert [2016] HCA 18, HC (refd)

Boonsom Boonyanit v Adorna Properties Sdn Bhd [1995] 2 MLJ 863; [1995] 2
D AMR 1828, HC (refd)

Brownie Wills v Shrimpton [1998] 2 NZLR 320, CA (refd)

Burmeister v O'Brien [2010] 2 NZLR 395, HC (refd)

Carey v Freehills [2013] FCA 954 (refd)

Chief Land Registrar v Caffrey & Co [2016] EWHC 161 (Ch), Ch D (refd)

E *Chong Su Kong & Others v Sia Hiong Yee & Others* [2010] MLJU 957; [2011] 2 CLJ 801, HC (refd)

Chu Said Thong and another v Vision Law LLC [2014] 4 SLR 375, HC (refd)

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441; [2015] 2 CLJ 453, FC (refd)

F *Esser v Brown* [2004] BCJ No 1312, CA (refd)

Gartside v Sheffield, Young & Ellis [1983] NZLR 37, CA (refd)

Gibbs v Messor & Co [1891] AC 248, PC (refd)

Graham v Hall [2006] NSWCA 208, CA (distd)

Kamahap Enterprises Ltd v Chu's Central Market Ltd (BCCA) [1989] BCJ
G No 2108, CA (refd)

Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd [2017] 4 MLJ 697, FC (refd)

Liputan Simfoni Sdn Bhd v Pembangunan Orkid Desa Sdn Bhd [2018] MLJU
H 2112; [2019] 1 CLJ 183, FC (refd)

Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor [2015] 4 MLJ 734, FC (refd)

Low Huat Cheng & Anor v Rozdenil bin Toni and another appeal [2016] 5 MLJ 141, FC (refd)

NRAM Ltd (formerly NRAM plc) v Steel and another (Scotland) [2018] 3 All ER
I 81; [2018] UKSC 13, SC (refd)

Overseas Realty Sdn Bhd v Wong Yau Choy & Ors (Tetuan Tay Ibrahim & Partners, third party) [2014] MLJU 1868; [2014] 8 CLJ 107, HC (refd)

P&P Property Ltd v Owen White & Catlin LLP [2016] All ER (D) 15 (Oct), Ch D (refd)

Penn v Bristol and West Building Society [1995] 2 FLR 938, Ch D (distd)
Primosso Holdings Ltd v Alpers [2006] 2 NZLR 455, CA (refd)
Quah Hong Lian Neo v Seow Teong Teck & Ors [1936] 1 MLJ 161 (refd)
Registrar-General of Land v Marshall [1995] 2 NZLR 189, HC (refd)
Ross v Caunters (a firm) [1979] 3 All ER 580; [1980] Ch 297, Ch D (not folld)
Scott v Valentine [2012] OJ No 6240 (refd)
See Leong Chye @ Sze Leong Chye & Anor v United Overseas Bank Bhd and another appeal [2019] 1 MLJ 25; [2018] 7 AMR 521, FC (refd)
Shayo (M) Sdn Bhd v Nurlieda bt Sidek & Ors [2013] 7 MLJ 755, HC (refd)
Sia Hiong Tee & Ors v Chong Su Kong & Ors [2015] 4 MLJ 188, FC (refd)
Star Amusement Limited v Navin Prasad & Ors [2013] FJSC 8, SC (refd)
T Sivam a/l Tharamalingam (as representative/administrator for the estate of Nagamuthu a/l Periasamy, deceased) v Public Bank Bhd [2018] 5 MLJ 711; [2018] 6 CLJ 1, FC (refd)
Tan Chiw Thoo v Tee Kim Kuay [1997] 2 MLJ 221, FC (distd)
Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1, FC (refd)
Teh Bee v K Maruthamuthu [1977] 2 MLJ 7, FC (refd)
Tenaga Nasional Malaysia v Batu Kemas Industri Sdn Bhd and another appeal [2018] 5 MLJ 561; [2018] 6 CLJ 683, FC (refd)
Tetuan Abdul Aziz & Associates v Sunshine Haven Sdn Bhd [2016] 4 MLJ 439, CA (refd)
Uptown Properties Sdn Bhd v Pentadbir Tanah Wilayah Persekutuan & Ors [2012] 8 MLJ 713, HC (refd)
White and another v Jones and others [1995] 1 All ER 691, HL (distd)
Yap Ham Seow v Fatimawati bt Ismail & Ors and another appeal [2014] 1 MLJ 645, CA (folld)

Legislation referred to

Courts of Judicature Act 1964 s 78
Evidence Act 1950 s 114(g)
Land Ordinance (Cap 68)
Land Titles Act 1996 [CN]
National Land Code ss 5A(3)(a), 85(2), 89, 166(1)(c), (1)(d), 168, 170(2)(a), (2)(c), 299(1)(a), 324, 329, 340, 340(1), (2), (2)(b), (2)(c), (3), 383(2), 396, 422(c)(i), 433, Form 5BK, Form 14A, 14th Schedule, paras 8, 8(3), (4), (5), (9), (9)(c), 9(c), 16
Ontario Land Title Act 1990 [CN]
Real Property Act 1900 [AUS]

Appeal from: Civil Appeal No B-01(W)-71–03 of 2015 (Court of Appeal, Putrajaya)

Leong Wai Hong (David Tan and Brenda Chan Qing Wen with him) (Skrine) in Civil Appeal No 01(f)-32–10 of 2016 (B) for the appellant.
Muhammad Shafee Abdullah (KL Pang, Shelby Chin and Farhan Shafee with

him) (Cheah Teh & Su) in Civil Appeal No 01(f)-33–10 of 2016 (B) for the appellant.

NV Sree Harry (M Mahendra and B Enoveetha with him) (M Mahendra & Co) in Civil Appeal No 01(f)-34–10 of 2016 (B) for the appellant.

Bastian Vendargon (PK Nathan, T Gunaseelan, Gene Vendargon and Keshvinjeet Singh with him) (Gunaseelan & Assoc) in Civil Appeal Nos 01(f)-33–10 of 2016 (B) and 01(f)-34–10 of 2016 (B) for the first respondent.

(Sankar & Co) in Civil Appeal No 01(f)-33–10 of 2016 (B) for the second respondent.

Leong Wai Hong (David Tan and Brend Chan Qing Wen with him) (Skrine) in Civil Appeal No 01(f)-33–10 of 2016 (B) for the third and fourth respondents.

Mohd Syahrizal Syah bin Zakaria (Wan Nor Azmin bt Kassim with him) (Assistant Legal Advisor Selangor, Selangor State Legal Advisor Office) in Civil Appeal No 01(f)-33–10 of 2016 (B) for the fifth and sixth respondents.

NV Sree Harry (M Mahendra and B Enoveetha with him) (M Mahendra & Co) in Civil Appeal No 01(f)-33–10 of 2016 (B) for the seventh respondent.

Richard Malanjum CJ (Sabah and Sarawak) (delivering supporting judgment):

[1] I have read the judgment in draft of my learned brother ('judgment of the court'). I have also considered the judgment of the Court of Appeal. The facts of this case have already been duly summarised in the judgment of the court. And the parties are referred herein as they were at the trial court.

[2] In summary, the core issue in these appeals rests on which of the two competing interests should prevail under the Torrens system of registration of land titles.

[3] On the one hand lies the plaintiff, Rajamani d/o Meyappa Chettiar, the original registered proprietor of the land as described in the judgment of the court ('the said land'). She found herself losing the said land without her knowing or doing anything in any manner which caused her to jeopardise her title to her land.

[4] On the other hand is the claim of the first defendant, Eng Beng Development Sdn Bhd, which the learned trial judge found to be a bona fide purchaser for value of the said land.

[5] Having read s 340 of the National Land Code ('the Code') which was discussed as applicable and having considered the reasons given in the judgment of the court including the scope of the section, I find no good reason to come to a different conclusion.

[6] In so concurring, I remain very conscious of the fact that ultimately as between the plaintiff and the first defendant, one of these two innocent parties is compelled to suffer the consequences of the acts of the fraudsters. And based on the earlier judicial decisions of the courts in this country and in other jurisdictions on similar issue, the inescapable trend appears to favour the subsequent bona fide purchaser for value (the first defendant in this case) over the original registered proprietor (the plaintiff).

[7] That the trend favours bona fide subsequent purchasers for value in all jurisdictions applying the Torrens system has been aptly summarised as follows in Baalman, *The Singapore Torrens System* at p 86:

> The Torrens System of land registration is predominantly a purchaser's system. Its aim is to facilitate the transfer of land as a commercial commodity by removing most of the risks of financial loss which beset purchasers under the general law.

[8] Basically under the Torrens system the land register is conclusive evidence of the description of the land. A third-party conducting an inquiry of the land need not go beyond the register to ensure that the land he or she is about to purchase is not fraught with encumbrances.

[9] In fact as far back as 1891, Lord Watson of the Privy Council deciding an appeal from Australia, observed in *Gibbs v Messor & Co* [1891] AC 248 at pp 254–255 as follows:

> The object [of Torrens legislation] is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title.

[10] And quite recently the above rationale was reiterated by the Supreme Court of Fiji in the case of *Star Amusement Limited v Navin Prasad & Ors* [2013] FJSC 8 at paras 37 and 44–45:

> [I]f one takes into consideration the fact that the Land Transfer Act, Cap 131, is based on the 'Torrens System' which is a system of land title where a Register of land holdings maintained by the State guarantees an indefeasible title to those included in the Register. The system had its origins in New South Wales in the late 19th Century, and has since influenced the development of the law in many jurisdictions including Fiji ...
>
> Of course, there have been other and earlier cases such as *Gibbs v Messor & Co* [1891] AC 248, where the court preferred to follow the principle of deferred indefeasibility, which means that the purchaser's title is defeasible and can be 'set

> aside' if the real proprietor makes a claim. However, if the purchaser transfers his title to a new purchaser (bona fide and for valuable consideration) before any such claim is made, that new purchaser's title does become indefeasible.
>
> Any doubt that may have existed in this regard were dispelled in a most decisive manner in *Frazer v Walker* [1967] 1 AC 569 in which the Privy Council upheld the title of a bona fide purchaser for value despite the existence of fraud on the part of his predecessor in title, as he himself was unaware of any fraud.

[11] It is therefore abundantly clear that in a dispute such as this, the law favours the subsequent bona fide purchaser for value. What then of an innocent registered proprietor whose land is taken from him or her due to the fraud of another?

[12] In fact, in some cases, the party losing out may not necessarily always be the original registered proprietor. It may even be the immediate purchaser affected by the application of the principle of deferred indefeasibility as affirmed by this court in the case of *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1 at para 53. Thus, as between a bona fide immediate purchaser and the original registered proprietor, the said immediate purchaser stands to lose by reason of the fraud of another.

[13] As the law now stands, our Code, unfortunately, provides absolutely no remedy to innocent parties who are deprived of their lands due to fraud or forgery. In other jurisdictions with the Torrens system in place such apparent lacuna bordering to injustice has been addressed by way statutory provision for assurance funds.

[14] For instance, in the Province of Ontario, Canada an assurance fund under the Ontario Land Title Act 1990 was established. This Act allows the party deprived of the land to claim compensation from the The Land Titles Assurance Fund not only for fraud but even for errors or omissions during the registration process (including automated registration — much like the present case). Under the law, the compensation includes financial loss resulting from the fraud or error, reasonable legal costs and such other reasonable costs.

[15] Similarly, in the Province of British Columbia, Canada a Government Assurance Fund under the Land Titles Act 1996 was also set up. It allows the defrauded registered proprietor to file a claim against the fraudster and to name the relevant Minister as a nominal defendant. A claim may also be made for registration errors. If the fraudster cannot be found, or is dead, the action may be brought just against the Minister. Once the claim is proved, the claimant will be compensated from the assurance fund.

[16] Even Australia, the home country of the Torrens system, provides for assurance funds. In New South Wales for example, there is in place the Torrens Assurance Fund established under the auspices of the Real Property Act 1900. It allows claims for compensation from the fund, broadly put, on grounds of fraud or an error, or omission in the Register.

[17] Assurance funds are in fact integral to the very being of the Torrens system. Sir Robert Richard Torrens had himself contemplated the need for insurance fund in this form of registration system. As observed by Hammond J of the High Court of New Zealand in *Registrar-General of Land v Marshall* [1995] 2 NZLR 189 at p 194:

> In the original work which gave rise to the Torrens System (*The South Australian System of Conveyancing by Registration of Title (1859))* Robert Richard Torrens himself said at p 9 that one consequence of the Torrens system must be 'the necessity of providing a fund from which rightful heirs and others may be compensated for the value of land which they are debarred from reclaiming against persons who have acquired title by registration …'. Although not articulated as such at that time, the contemporary public policy reasons for such compensation fall, I think, under two heads. First, in economic terms this is a classic case for insurance. The registered owner has a large financial interest in the land. That land is at risk from a defined peril which applies to a large group of owners and which strikes infrequently and randomly. If there was no compensation, insurance in some form would need to be created. As *Mapp, Torrens' Elusive Title (1978)* (Alberta Law Review Book Series), put it at p 70: 'Because the risk is created by a state imposed title registration system, it seems imperative that the indemnity system designed to distribute that risk must be provided by the state as an integral part of the title registration system'.

[18] Reverting to Malaysia the idea of having assurance funds is anything but new. As early as 1936, it was observed in *Quah Hong Lian Neo v Seow Teong Teck & Ors* [1936] 1 MLJ 161 at p 162:

> An essential element in a system of Registration of Title, properly so called, is that registration acts in some degree as a State warranty of title. The title of a registered proprietor is expressly declared to be indefeasible except in certain specified cases — eg fraud. And it seems that all the Torrens systems confine the fraud which will upset the title of the registered proprietor to fraud to which he is party or privy. In many jurisdictions Certificates of Title are issued which are declared to be conclusive as to ownership, and *sometimes there is an assurance fund to indemnify persons aggrieved by the operation of the statutes*. (Emphasis added.)

[19] The above observation was made years before the Code was even conceived but for some reason or another, assurance funds were left out of the Code. Much later in 2010, David Wong Dak Wah J in a case of a similar species as the present case made the following observation in *Chong Su Kong & Others v Sia Hiong Yee & Others* [2010] MLJU 957; [2011] 2 CLJ 801 at para 29:

> I associate myself to that statement and wish to add that the relevant authority

should seriously look into the setting of an assurance fund to compensate for any loss to any innocent purchasers resulting from forgery similar in this case and the *Adorna Properties*. Only with this fund can one say that the Torrens system guarantees the absolute and indefeasible title of a registered owner. This fund can be funded by the users of the Land Registry by imposing a levy of say a sum of RM10 for each transaction.

[20] No doubt the above observation was made in respect of the Sabah Land Ordinance (Cap 68). In my considered view, in light what I have already stated, there is no reason why the above suggestion ought not to apply with equal force to the Code.

[21] Thus, it is high time for the relevant authorities to consider, as done in other jurisdictions, with the Torrens system of land registration, to establish a statutorily assurance fund to mitigate the losses suffered by registered owners because of fraud or forgery.

[22] The Torrens system ought to be implemented fairly, and based on what has been laid out above, as how it was originally conceived. Apart from ensuring that all effort is made to prevent cases such as the present one from re-occurring, the relevant authorities must seriously look into amending the Code to cater for an effective assurance fund.

[23] In the upshot, I concur with the conclusion arrived at in the judgment of the court with the result in respect of the plaintiff being the unfortunate loser. However, we must apply the law as it stands. I therefore agree with the answers to the leave questions and the orders made in the judgment of the court.

Azahar Mohamed FCJ (delivering judgment of the court):

INTRODUCTION

[24] This judgment is prepared pursuant to s 78 of the Courts of Judicature Act 1964, as the then Chief Justice and President of the Court of Appeal have since retired. This is a unanimous decision by the remaining members of the panel who heard this appeal.

[25] These three related appeals emanated from a suit in the High Court of Malaya at Shah Alam under Civil Suit No 21–136 of 2007. The appeals are against the decision of the Court of Appeal, which reversed the decision of the High Court after a full trial of the matter arising out of a replacement issue document of title that was issued by the land authorities and the fraud committed using this title. As a result of which, the unfortunate original landowner had been defrauded of her land. A

[26] One of the main disputes in these appeals is about the competing claims on the ownership of the land between two innocent parties, that is to say, the plaintiff as the original owner and the first defendant as the current registered proprietor of the land cum a subsequent purchaser in good faith and for B valuable consideration.

[27] In addition, these appeals also raise an important issue and one that most closely involves the legal profession: whether solicitors owe a duty of care C to third parties.

THE THREE APPEALS

[28] The first appeal, which is Federal Court Civil Appeal No 01(f)-32–10 D of 2016 (B) is by Pushpaleela a/p R Selvarajah and Messrs MY Choong, Pushpa & Co (the third and fourth defendants in the High Court). Rajamani d/o Meyappa Chettiar (the plaintiff in the High Court) is the respondent.

[29] In the second appeal, which is Federal Court Civil Appeal E No 01(f)-33–10 of 2016 (B) the appellant is Eng Beng Development Sdn Bhd (the first defendant in the High Court). While the respondents are as follows: the first respondent is Rajamani d/o Meyappa Chettiar (the plaintiff in the High Court); the second respondent is Infinite Income Sdn Bhd (the second defendant in the High Court); the third respondent is Pushpaleela a/p R F Selvarajah (the third defendant in the High Court); the fourth respondent is Messrs MY Choong, Pushpa & Co (the fourth defendant in the High Court); the fifth respondent is Pentadbir Tanah Daerah Klang (the fifth defendant in the High Court); the sixth respondent is Pendaftar Hakmilik Negeri Selangor (the sixth defendant in the High Court); and the seventh respondent is Sheelan G Arjunan (the seventh defendant in the High Court).

[30] The third appeal, which is Federal Court Civil Appeal No 01(f)-34–10 of 2016 (B) is by Sheelan Arjunan (the seventh defendant in the High Court) and the respondent is Rajamani d/o Meyappa Chettiar (the plaintiff in the H High Court).

[31] We shall refer to the parties in this judgment as they were cited in the High Court. I

THE PARTIES

[32] The plaintiff was the original registered proprietor and lawful owner of a parcel of land known as EMR 6527 ('the land'), until she was deprived of her rights to her land in what was aptly described as a 'land scam case' by the High Court. The plaintiff had at all material times been in possession of the original manual issue document of title ('IDT1') to the land. She had never parted with the title of the land. She commenced the suit for loss of ownership and recovery of her land. She had named seven defendants whom she alleged were liable to her losing ownership and interest to the land.

[33] The first defendant, a private limited company was the subsequent purchaser of the land, having purchased it from the second defendant for a consideration of RM1.8m ('the second transaction').

[34] The second defendant, a private limited company was the immediate purchaser of the land from the fraudster who impersonated the true plaintiff, allegedly for RM1.2m ('the first transaction').

[35] The third defendant was at all material times an advocate and solicitor and was the person who acted for the fraudster in respect of the first transaction. She was the person responsible for attesting the signature of the fraudster contained in the relevant transfer form (Form 14A), thereby facilitating the transfer of the land to the second defendant.

[36] The fourth defendant was the law firm in which the third defendant at all material times was a partner appointed to represent the fraudster in the first land transaction.

[37] The fifth and sixth defendants were the land authorities responsible for all the transactions in respect of the land and for the maintenance and proper upkeep of all records of dealing involving the land.

[38] The seventh defendant was at all material times an advocate and solicitor and a legal assistant in the law firm known as Messrs Omar Hussein & Co. The seventh defendant acted for the second defendant in respect of the first transaction of the land from the fraudster, and the subsequent sale of the same to the first defendant shortly thereafter.

BACKGROUND TO THE DISPUTE

[39] In order to appreciate the legal issues involved in these appeals, it is necessary to state the related facts. The events leading up to the filing of this suit are that on 25 May 1988, the plaintiff became the registered owner of the land after purchasing it from one Karuppiah Chettiar @ PL Karuppiah Chettiar s/o Murugappa Chettiar. The plaintiff once held the Indian passport No X205536 (issued on 23 May 1985), which is the identification document on the register document of title of the land. The plaintiff's Indian passport No X205536 was valid until 22 May 1995. The plaintiff at all material times held the original manual issue document of title EMR 6527 of the land, IDT1. The registered owner on IDT1 is stated as holding Indian passport No X205536.

[40] The plaintiff's son lodged a private caveat on the land, which was registered on 1 March 2001 on the ground that his father, who was the closest beneficiary of the plaintiff's property, had passed away.

[41] From 1988–2006, the plaintiff paid all quit rent payable in respect of the land. The plaintiff had received the annual quit rent statements from the fifth and sixth defendants in January/February of each of those years.

[42] In the meantime, on 24 May 2002, the fifth and sixth defendants generated a computerised issue document of title GM 5066 for the land in the name of the plaintiff ('IDT2').

[43] Although the fifth and sixth defendants had prepared IDT2, they never issued it to anyone including the plaintiff, who had not surrendered the original IDT1.

[44] In mid-October 2005, the seventh defendant, whom the third defendant had gotten to know through legal practice, approached the third defendant. The seventh defendant informed the third defendant that he was acting for the second defendant who intended to purchase the land. The seventh defendant told the third defendant that the 'vendor' was an Indian national by the name of Rajamani d/o Meyappa Chettiar, a name identical to that of the plaintiff. It is important to note that the plaintiff had 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.

[45] As it turned out the 'vendor' was a fraudster. According to the seventh defendant, the fraudster wanted him to also act for her (the fraudster). The seventh defendant had advised the fraudster to appoint her own solicitor, and recommended the third and fourth defendants.

[46] The seventh defendant told the third defendant that he felt he would be in a position of conflict if he were to also act for the fraudster. The fraudster could not speak English or Malay and that the third defendant was therefore chosen for her ability to converse in Tamil.

[47] The fraudster then appointed the fourth defendant to represent her in the sale of the land to the second defendant. It is important to point out that at all material times, the plaintiff did not know of the existence of the third defendant, never met the third defendant, and never retained the third and fourth defendants as solicitors.

[48] By Messrs Omar Hussein & Co's letter dated 14 October 2005, the seventh defendant forwarded to the third defendant a draft sale and purchase agreement between the second defendant and the fraudster for the third defendant's comments.

[49] By the fourth defendant firm's letter dated 17 October 2005, the third defendant then reverted to Messrs Omar Hussein & Co with her comments on the draft sale and purchase agreement.

[50] By a reply letter dated 18 October 2005, the seventh defendant informed the third defendant that the second defendant had agreed to the comments of the third defendant.

[51] By Messrs Omar Hussein & Co's letter dated 19 October 2005, the seventh defendant forwarded to the third defendant, among others, four sets of the sale and purchase agreement and two sets of the memorandum of transfer for the fraudster's execution.

[52] On or about 20 October 2005, the fraudster went to the fourth defendant's office accompanied by the seventh defendant for the execution of the sale and purchase agreement and the transfer form. At the meeting, the seventh defendant gave the third defendant the following documents:

(a) copy of the result of a private land search conducted by Messrs Omar Hussein & Co on the land;

(b) copies of the title IDT1 to the land; and

(c) the fraudster's letter dated 20 October 2005 confirming that the second defendant had duly paid a sum of RM650,000 towards the purchase price of the land.

[53] The fraudster then showed the third defendant the following documents:

(a) original Indian passport No F4495077;

(b) original departure card issued by the Malaysian Immigration authorities; and

(c) original statutory declaration affirmed before an Indian Notary Public on 20 August 2005 by the fraudster stating that she was the bearer of Indian passport No X205536 and was re-issued with a new passport No F4495077.

[54] The third defendant verified the information contained in the documents given by the seventh defendant and the fraudster and made a copy of all these documents for the fourth defendant's record. The fraudster informed the third defendant that she had previously held the Indian passport bearing No X205536 but had now been issued with a new Indian passport bearing No F4495077. This was also stated in the statutory declaration by the fraudster that was affirmed before a notary public.

[55] The fraudster further informed the third defendant that her address was No 2/132, Gobalapuraan, Piramanavayal-Post, Manamelkudi TK, Pudukkottai DT, 614 630, India and this address matched the address in the sale and purchase agreement drafted by the seventh defendant.

[56] The third defendant verified the information contained in the Indian passport, departure card and statutory declaration with the result of the private land search on the land and the copy of the title IDT1 to ensure consistency.

[57] After due verification that the information was consistent, the third defendant asked the fraudster to execute the transfer form and the sale and purchase agreement dated 20 October 2005 for the sale of the land to the second defendant for the sum of RM1.2m. The seventh defendant was also present during the fraudster's execution of these documents.

[58] Thereafter, the third defendant had very little to do with the first transaction. After the fraudster had duly executed the sale and purchase agreement and the transfer form, the seventh defendant took the duly executed documents back for his further action.

[59] By two letters dated 18 November 2005 and 28 November 2005, the third and fourth defendants wrote to Messrs Omar Hussein & Co for an update on the status of the first transaction.

[60] By Messrs Omar Hussein & Co's letter dated 9 December 2005, Messrs Omar Hussein & Co informed the third and fourth defendants that the balance purchase price had not been settled by the second defendant and that the transfer form had not been presented in the second defendant's favour.

[61] In the meantime, by a police report dated 27 October 2005, the fraudster lodged a report that she had lost her bag, which contained the title document for the land. The third defendant was not told by the fraudster that her title document for the land was lost, and was also not aware that the fraudster had made the police report.

[62] According to the seventh defendant, the second defendant instructed him to apply for a replacement title. The seventh defendant used the police report and statutory declaration by the fraudster to apply to the fifth defendant for a replacement title on behalf of the fraudster.

[63] At all material times, the third and fourth defendants had no knowledge of and were not involved in the application for a replacement title. It appears that the first time the third defendant heard of the missing title and the application for the replacement title was when she read the seventh defendant's statement of defence.

[64] By Messrs Omar Hussein & Co's letter dated 24 March 2006, the seventh defendant forwarded to the fourth defendant the fraudster's letter dated 9 March 2006 confirming that the balance purchase price had been fully settled by the second defendant.

[65] By an application dated 6 January 2006 to the fifth defendant, the fraudster through the seventh defendant applied for the issuance of a replacement title on the ground that the original title was lost.

[66] By a letter dated 24 May 2006, the fraudster authorised Messrs Omar Hussein & Co to collect the replacement title on her behalf.

[67] By a letter dated 29 April 2006 from the seventh defendant to the Pejabat Tanah Daerah Klang, the seventh defendant informed the Pejabat Tanah Daerah Klang that they authorised one Agasthia Raja Bala Kumar (IC No 830308-14-6173) to collect the replacement title on behalf of the seventh defendant.

[68] It is important to keep in mind that there was no evidence before the court that the replacement title GM 9890 was ever issued in the name of the fraudster. The replacement title GM 9890 was issued in the name of the second defendant ('IDT3') arising out of the sale of the land by the fraudster to the second defendant.

[69] On 12 April 2006, the transfer of ownership of the land from the fraudster to the second defendant was presented by Messrs Omar Hussein & Co at the land office and duly accepted.

[70] At the time of the transfer, the private caveat lodged by the plaintiff's son had not been withdrawn and was still subsisting on the land.

[71] The computerised document of title GM 9890 (IDT3) was issued for the land in the name of the second defendant. Messrs Omar Hussein & Co collected IDT3 from the fifth defendant. The second defendant instructed Messrs Omar Hussein & Co to hold IDT3 in their safekeeping as they were contemplating disposing of the land in the near future. A

[72] By a sale and purchase agreement dated 18 August 2006, the first defendant purchased the land from the second defendant for the sum of RM1.8m. B

[73] In consideration for a charge dated 14 December 2006 executed in favour of CIMB Bank Bhd, CIMB Bank Bhd financed the first defendant's purchase of the land. C

[74] Subsequently, the computerised document of title GM 9890 was issued for the land in the name of the first defendant as registered owner and CIMB Bank Bhd as chargee ('IDT4'). D

[75] By March 2007, the plaintiff had not received the quit rent statement in respect of the land for 2007. The plaintiff had only received the statement of rates payable from the Klang Municipal Council. E

[76] On 26 March 2007, the plaintiff's family friend, Sithambaram a/I Muthiah ('PW2') paid the rates on behalf of the plaintiff and enquired from the fifth defendant as to why the plaintiff had not received the quit rent statement for 2007. The fifth defendant informed PW2 that the land was already registered in the name of the first defendant. F

[77] PW2 then and there conducted a title search on the land and discovered that it had been transferred to the second defendant on or about 25 October 2005 and thereafter to the first defendant on or about 20 September 2006. G

[78] On 28 March 2007, the plaintiff lodged a private caveat to protect her interest in the land. H

[79] By a police report dated 30 March 2007, the plaintiff lodged a report that the land had been transferred to a third party without her having sold or transferred or signed any document for a transfer of the land. I

[80] Upon the discovery of the deprivation of her land, on 27 June 2007, the plaintiff filed the suit in the High Court against all the seven defendants. Although the causes of action pursued against all the seven defendants were quite distinct, the facts were nonetheless inter-connected.

THE HIGH COURT SUIT

[81] The plaintiff contended that the transfer of the land to the second defendant was procured fraudulently and/or through forgery. The plaintiff neither knew nor dealt with the second defendant at all. The plaintiff contended that she never engaged the services of the third defendant and/or the fourth defendant.

[82] She also contended that the seventh defendant acted fraudulently in concert with the third and/or fourth defendants for having facilitated and caused the transfer of the land to the second defendant.

[83] 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.

[84] The plaintiff further contended that the first defendant was not a bona fide purchaser of the land for valuable consideration from the second defendant.

[85] Finally, the plaintiff contended that the fifth defendant and sixth defendant were negligent in breach of the National Land Code ('the NLC') 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.

[86] Accordingly, the plaintiff in the re-amended statement of claim sought and prayed for the following declarations and orders:

(a) that the plaintiff is the registered proprietor of the land and the true lawful owner thereof;

(b) 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;

(c) 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;

(d) 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;

(e) that the second defendant is not a bona fide purchaser of the land for valuable consideration;

(f) that the first defendant is not a bona fide purchaser of the land for valuable consideration;

(g) that the duplicate title to the land is a nullity and/or void ab initio; and accordingly;

(h) that the purported title and interest of the first defendant and second defendant in the land be set aside; and

(i) 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.

[87] The plaintiff also sought damages against the defendants as well as interests and costs.

DECISION OF THE HIGH COURT

[88] As regards the claim against the third and fourth defendants, the High Court dismissed the plaintiff's claim. The High Court in a comprehensive and well-reasoned judgment held that the third and fourth defendants, who acted for the fraudster, did not owe a duty of care to the plaintiff, relying on the Court of Appeal decision in *Yap Ham Seow v Fatimawati bt Ismail & Ors and another appeal* [2014] 1 MLJ 645, which the High Court found itself to be bound by it. The High Court observed that the third and fourth defendants were in fact potentially negligent in failing to further investigate into the identity of the fraudster. However, in the absence of a duty of care (as found by the High Court), the plaintiff's claim in negligence against them failed.

[89] In respect of the claim against the first defendant, the High Court dismissed the plaintiff's claim. In this regard, the High Court found that the duplicate title produced by the fifth defendant and used for the transfer of the land 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; 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 subsequent bona fide purchaser for valuable consideration. The High Court added that as the first defendant's title is valid and indefeasible, it follows therefore that the private caveat was wrongfully and unlawfully entered by the plaintiff and although the same has lapsed, the registrar's caveat which still subsists, ought to be removed since the rights of the parties have been determined. In the circumstances, the first defendant ought to be fairly compensated in damages pursuant to s 329 of the NLC and the plaintiff is prohibited from lodging further caveats on the land.

[90] Insofar as the claim against the seventh defendant is concerned, the High Court found that the seventh defendant had actual knowledge of the fraud committed by the second defendant. Consequently, the High Court expressly found that the seventh defendant was privy to the fraud beyond reasonable doubt. That was the applicable standard of proof for fraud in civil cases at the material time. However, the High Court proceeded to dismiss the plaintiff's claim against the seventh defendant, albeit with reluctance, on the basis that the court was of the view that the pleaded case against the seventh defendant was one of conspiracy with the third and fourth defendants to defraud, and the court was not satisfied that there existed such a conspiracy or collusion. Hence, purely on a technical reading of the pleaded case against the seventh defendant that it was a plea in the tort of conspiracy, the plaintiff's claim was dismissed by the High Court.

[91] It bears noting that the second defendant was absent both at the trial in the High Court and at the hearing in the Court of Appeal and its counsel had also failed to turn up at this appeal. Nor did it file any appeal or cross-appeal against the decision of the High Court.

DECISION OF THE COURT OF APPEAL

[92] On appeal brought by the plaintiff against the decision of the High Court concerning the plaintiff's claim against the third and fourth defendants, the Court of Appeal reversed the decision of the High Court and found that the third and fourth defendants liable in negligence. The Court of Appeal held that *Yap Ham Seow* is not authority for the blanket proposition that a solicitor never owe a duty of care to a third party. A solicitor may, in certain circumstances, owe a duty of care to a third party. The Court of Appeal distinguished *Yap Ham Seow* and found, on the facts and circumstances of this case, that the third and fourth defendants did owe a duty of care to the plaintiff. The Court of Appeal further found that there was clearly a breach of that duty of care, based on the facts of the case.

[93] Insofar as the claim against the first defendant is concerned, on appeal brought by the plaintiff against the decision of the High Court, the Court of Appeal allowed her appeal against the first defendant. In allowing the plaintiff's appeal, the Court of Appeal, among others, held:

(a) for any transfer of land to take effect in law, the document of title used to effect the transfer must *ex necessitate* be a valid document of title. Upon registration, the plaintiff acquired indefeasibility under s 340(1) of the NLC and such indefeasibility could only be defeated by any of the specified statutory grounds of fraud et cetera under s 340(2) or other grounds of equity. On the facts, the plaintiff's title had never been impeached by reason of s 340(2) or other grounds of equity;

(b) IDT1 remained valid and indefeasible. Under the circumstances, the issuance and registration of any other title in respect of the land would be void ab initio. Each title document must relate to only one lot of land. There cannot be two titles existing side by side in respect of the same parcel of land. Therefore, since IDT1 in the plaintiff's possession was validly issued, registered and never rendered defeasible due to s 340(2) of the NLC or other grounds of equity, the first defendant's replacement title in respect of the land had to be void. The plaintiff's title to the land remained indefeasible and could not be challenged;

(c) the first defendant's replacement title being void had no legal effect whatsoever and was incapable of conferring indefeasibility. Such void title was ipso facto defeasible and the first defendant could not seek shelter behind the proviso to s 340(3) of the NLC to claim indefeasibility. The mere fact that the first defendant had purchased the land in good faith and for valuable consideration did not confer indefeasibility to its title if such title was otherwise void at inception. IDT3 was a void document of title as it was issued and registered during the subsistence of a valid and indefeasible document of title, namely IDT1; and

(d) the only way the first defendant could have acquired valid and indefeasible title to the land was by having the land lawfully transferred to it by the plaintiff as the registered proprietor and not by some fraudster who had no title to the land. Sub-sections (1) and (3) of s 340 of the NLC does not confer title to land. Title is conferred by the State Authority by way of alienation or by the registered proprietor by way of transfer. Subsections (1) and (3) merely confer indefeasibility upon registration of title. However, where the title itself was void ab initio, the registration would not confer indefeasibility and the proviso to s 340(3) would not apply to assist the first defendant. Since the plaintiff's title had not, at any point of time, become defeasible by reason of s 340(2) or other grounds of equity, it remained indefeasible and was not affected by the fraudulent transfer of the land by the fraudster to the second defendant and subsequently to the first defendant.

[94] An appeal was filed by the plaintiff to the Court of Appeal against the decision of the High Court dismissing her claim against the seventh defendant. A cross-appeal was filed by the seventh defendant in respect of the specific findings of fraud made against him by the High Court. The Court of Appeal allowed the plaintiff's appeal and dismissed the seventh defendant's cross-appeal. The Court of Appeal was of the view that the plaintiffs pleaded case against the seventh defendant was premised on fraud, as opposed to the

A tort of conspiracy to defraud. The Court of Appeal accepted as correct the High Court's finding of fraud against the seventh defendant. Hence, there were concurrent findings in that regard. The plea that the seventh defendant acted in concert with the third and fourth defendants was in relation to the fraudulent execution of the sale and purchase agreement, and the memorandum of
B transfer which resulted in the plaintiff's loss of the land. This too, the Court of Appeal found to have been proven. Insofar as the seven defendant's cross-appeal was concerned, it was dismissed on the basis that the Court of Appeal saw no reason to interfere in respect of findings of fact by the High Court, which findings also involved the credibility of the seventh defendant as
C a witness.

THE QUESTIONS OF LAW ON APPEAL TO THE FEDERAL COURT

D **[95]** Aggrieved by the decision and orders of the Court of Appeal, three separate leave applications were filed by the first, third and fourth, and seventh defendants respectively, for leave to appeal to the Federal Court. Leave to appeal was granted by this court on 11 October 2016. The questions of law for which leave to appeal was granted by the Federal Court are as follows:

E

Question 1 — The third and fourth defendants' appeal (first appeal):

> In deciding whether a solicitor who acted for a fraudster owner of land who sold the said land owes a duty of care to the real owner of the land, whether the Court of Appeal decision in *Yap Ham Seow v Fatimawati bt Ismail & Ors and another appeal*
> F [2014] 1 MLJ 645 or the Court of Appeal decision below is the correct decision.

Question 2 — The first defendant's appeal (second appeal):

> G Whether a replacement title in continuation generated by the land registry, when the original issue document of title was at all material times in the possession of the original owner, is:
>
> (i) valid and capable of validly passing title to the subject land ('Land') to a subsequent purchaser in good faith and for valuable consideration within
> H the meaning of the proviso to s 340(3) of the National Land Code; or
>
> (ii) void ab initio and incapable of so passing title?

Question 3 — The seventh defendant's appeal (third appeal):

> I Can a specific plea of fraud against a person for acting in concert with others stand, when the plea of fraud against the others is withdrawn?

[96] We will now proceed to consider the questions of law raised in the respective appeals. We will deal first with question 1.

QUESTION 1

[97] The crux of question 1 is whether the Court of Appeal decision in *Yap Ham Seow* is a correct decision. It raises an enormously important question whether or not a duty of care should be imposed on solicitors who acted for a fraudster owner of land who sold the land, towards the real owner of the land. In the context of the present case, this is a land fraud case whereby the third and fourth defendants acted as solicitors for the fraudster to sell the land belonging to the plaintiff; the third and fourth defendants never acted for the plaintiff.

[98] Before turning to the rival contentions of the parties, it is convenient at this juncture that we discuss the case of *Yap Ham Seow* mentioned in the question of law. In that case, a solicitor had acted for the fraudster who purported to sell land on behalf of the owner under a forged power of attorney. The plaintiff was the owner of the land. The first defendant was the solicitor who attested the forged power of attorney. The second defendant was the solicitors firm who acted for the fraudster, and DW5 was the solicitor in charge. The third defendant was the first purchaser of the land. The fourth defendant was the subsequent purchaser of the land. The fifth defendant was the land registrar. The Court of Appeal in *Yap Ham Seow* held in respect of the solicitor's liability to the owner plaintiff as follows:

> [76] …We are inclined to agree with the submissions of learned counsel for the second defendant that the learned trial judge had stretched the standard of care and the duty owed by the solicitor in this case a bit too far without any justification when His Lordship imputed a duty of care on the second defendant and by extension its solicitor, DW5. In discussing the duty of care owed by a solicitor to his client we can do no better than cite the case of *Neogh Soo Oh & Ors v G Rethinasamy* [1984] 1 MLJ 126, wherein Gunn Chit Tuan J (as he then was) emphasised that:
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> > a solicitors duty is to use reasonable care and skill in giving such advice and taking such action as the facts of a particular case demand.
>
> [89] However, assuming there was 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 solicitor owes 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. In highlighting a solicitor's duty under a retainer we can do no better than to cite the case of *Midland Bank Trust Co Ltd & Anor v Hett, Stubbs & Kemp (a firm)* [1978] 3 All ER 582 at p 583: wherein it was held that:
>
> > Now no doubt the duties owed by a solicitor to his client are high, in the sense that he holds himself out as practicing a highly skilled profession, but I think that the court must beware of imposing on solicitors, or on professional men in other spheres, duties which go beyond the scope of what they are requested and undertake to do. It may be that a particularly meticulous and conscientious practitioner would, in his client's general interests, take it on himself to pursue a

> line of enquiry beyond the strict limits comprehended by his instructions. But that is not the test. The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession, and cases such as *Duchess of Argyll v Beuselinck*, *Griffiths v Evans* and *Hall v Meyrick* demonstrate that the duty is directly related to the confines of the retainer.
>
> [90] As can be gleaned from the above cited case 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. She had performed her duties as a solicitor in the preparation and execution of the legal documentations ie the memorandum of transfer and the sale and purchase agreement in favour of her client and when she was unable to get her client's cooperation she decided to discharge herself.

[99] At the hearing before us, learned counsel for the third and fourth defendants argued that the Court of Appeal in *Yap Ham Seow* correctly decided that a solicitor who acted for a fraudster client did not owe a duty of care to a third party owner of the land. Learned counsel submitted that the Court of Appeal in the present case erred in law in holding the third and fourth defendants owed a duty of care towards the plaintiff for, among others, the following reasons:

(a) case law from Malaysia, New Zealand, Canada, United Kingdom, Singapore and Australia show that solicitors do not owe a duty of care to non-clients except in very limited circumstances ie disappointed beneficiaries cases and where there is reliance (citing among others *Tetuan Abdul Aziz & Associates v Sunshine Haven Sdn Bhd* [2016] 4 MLJ 439, *Burmeister v O'Brien* [2010] 2 NZLR 395, *Primosso Holdings Ltd v Alpers* [2006] 2 NZLR 455, *Gartside v Sheffield, Young & Ellis* [1983] NZLR 37, *Allied Finance and Investments Ltd v Haddow & Co* [1983] NZLR 22, *Brownie Wills v Shrimpton* [1998] 2 NZLR 320, *Scott v Valentine* [2012] OJ No 6240, *Esser v Brown* [2004] BCJ No 1312, *Kamahap Enterprises Ltd v Chu's Central Market Ltd (BCCA)* [1989] BCJ No 2108, *P&P Property Ltd v Owen White & Catlin LLP* [2016] All ER (D) 15 (Oct), *White and another v Jones and others* [1995] 1 All ER 691, *Al-Sabah v Ali* [1999] All ER (D) 49, *Chu Said Thong and another v Vision Law LLC* [2014] 4 SLR 375, *Anwar Patrick Adrian and another v Ng Chong & Hue LLC and another* [2014] 3 SLR 761; [2014] SGCA 34, *Badenach v Calvert* [2016] HCA 18 and *Carey v Freehills* [2013] FCA 954). Learned counsel gave emphasis to the fact that the present case is not a disappointed beneficiaries case and there was no reliance; and

(b) the court should not impose a duty of care on the third and fourth defendants towards the plaintiff for the reasons that:

   (i) the loss to the plaintiff was not a foreseeable consequence of the conduct of the third and defendants (citing *Burmeister v O'Brien* and *Primosso Holdings Ltd v Alpers*); and

(ii) there is no legal proximity between the plaintiff and the third and fourth defendants because:

(1) the plaintiff only suffered pure economic loss, which requires a more restrictive approach, to imposing a duty of care. There must be some special circumstances ie reliance and assumption of responsibility to show proximity between the plaintiff and the third and fourth defendants (citing *Clerk & Lindsell on Torts* (21st Ed, 2014), *Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor* [2015] 4 MLJ 734 and *Tetuan Abdul Aziz & Associates v Sunshine Haven Sdn Bhd*); and

(2) the only nexus between the plaintiff and the third and fourth defendants is the plaintiff's interest in the land, which does not create legal proximity where the plaintiff was never the third and fourth defendants' client, and the plaintiff never relied on the third and fourth defendants who had no knowledge of the plaintiff's existence (citing *Chu Said Thong and another v Vision Law LLC*, *Burmeister v O'Brien*, *Scott v Valentine*, *P&P Property Ltd v Owen White & Catlin LLP and Anor*).

[100] In resisting the appeal, learned counsel for the plaintiff put forward an argument that the Court of Appeal in the present case was correct in holding that the third and fourth defendants were liable in negligence. Learned counsel submitted that a solicitor, in certain circumstances, owes a duty of care to third parties (other than his client) and accordingly can be liable in negligence (citing, among others, *Ross v Caunters (a firm)* [1979] 3 All ER 580; [1980] Ch 297, *White v Jones*, *Penn v Bristol and West Building Society* [1995] 2 FLR 938, *Al-Sabah v Ali*, *Graham v Hall* [2006] NSWCA 208).

[101] It is important to highlight that the Court of Appeal in the present case relied on *Ross v Caunters*, *Penn v Bristol & West Building Society* and *Al-Sabah v Ali* in holding that the third and fourth defendants were liable in negligence to the plaintiff. The Court of Appeal in this regard said:

> [88] We consider these authorities to be good law on liability in negligence by advocates and solicitors to third parties in circumstances peculiar to the facts and circumstances of the present case. With due respect to the learned JC, he was wrong in holding that he was bound by the dictum in *Yap Ham Seow*. We agree with learned counsel for the plaintiff that the case is not authority for the blanket proposition that a solicitor never owes a duty of care to a third party. Whether a solicitor is to be held liable to a third party must depend on the facts and circumstances of each case.

[102] The following important question then arises: whether the English court's decisions in the three cases relied on by the Court of Appeal in the present appeal are authorities for the proposition that a solicitor who acted for a fraudster owner of land who sold the said land owes a duty of care to the real owner of the land? We have read thoroughly and give our consideration of the cases to point the difference of that cases from the present case.

[103] In *Ross v Caunters*, a beneficiary of a will sued the solicitor who prepared the will for negligence. The English High Court held that a solicitor who was instructed by his client to carry out a transaction to confer a benefit on an identified third party owed a duty to that third party to use proper care in carrying out the instructions because: (i) it was not inconsistent with the solicitor's liability to his client for him to be held liable in tort to the third party, having regard to the fact that the solicitor could be liable for negligence to his client both in contract and in tort; (ii) there was a sufficient degree of proximity between a solicitor and an identified third party for whose benefit the solicitor was instructed to carry out a transaction for it to be within the solicitor's reasonable contemplation that his acts or omissions in carrying out the instructions would be likely to injure the third party; and (iii) there were no reasons of policy for holding that a solicitor should not be liable in negligence to the third party, for the limited duty owed to him of using proper care in carrying out the client's instructions differed from the wider duty owed to the client of doing for the client all that the solicitor could properly do, and far from conflicting with or diluting the duty to the client was likely to strengthen it. Hence, *Ross v Caunters* only extended the duty of care of solicitors to third parties to a very specific category of cases ie disappointed beneficiaries of wills. It does not apply in our case as the plaintiff is not a disappointed beneficiary.

[104] In *Penn v Bristol*, the English High Court had held that the solicitor owed a duty of care to the co-owner wife in the land fraud perpetrated by her co-owner husband because she was within the reasonable contemplation of the solicitor. The solicitor had known that he was acting not just for the husband but also the co-owner wife whose instructions he had not verified. *Penn v Bristol* can clearly be distinguished because the solicitor was aware at all material times that he was also acting for another co-owner ie the wife whose instructions he had not verified. Therefore, there was foreseeability and proximity between the solicitor and the wife in *Penn v Bristol*. However, in our present case the third and fourth defendants did not know of the plaintiff's existence or her interest in the land.

[105] The last case relied on by the Court of Appeal to support its finding that the third and fourth defendants owed a duty of care to the plaintiff is the case of *Al-Sabah v Ali*. But that case was decided on the basis that the solicitors conceded that they had assumed responsibility to the plaintiff. Further, the solicitors' known client was the plaintiff whom they had never met, and whose instructions they never verified. Further, *Al-Sabah v Ali* can be distinguished on the basis that the plaintiff was not a third party, but the firm's client from the outset. The solicitors in *Al-Sabah v Ali* are therefore put on notice to verify their client's instructions, but they never met the client. In the present case, the third and fourth defendant's solicitors had met their client personally (the fraudster) and had been at all material times under no impression that they were dealing with only a representative. The third and fourth defendants' client was the fraudster not the plaintiff.

[106] It will be recalled that in his submission, learned counsel for the plaintiff also relied on *White v Jones* and *Graham v Hall* to support his contention that the third and fourth defendants owed a duty of care to the plaintiff. We have read the two cases. In our opinion there are crucial differences between the present case and the two cases cited by learned counsel.

[107] *White v Jones* is a case pertaining solicitors' liability to third party beneficiaries in wills. Our present case is not a disappointed beneficiaries case. In that case the House of Lords discussed the extension of solicitors' liability to third party beneficiaries in wills cases. The House of Lords imposed a duty by solicitors towards third party beneficiaries solely in order to address a lacuna in the law and to do 'practical justice'.

[108] In the New South Wales Court of Appeal decision in *Graham v Hall*, one Mr Hall had 'instructed ... a solicitor, to act for both him and Mrs Hall' without his wife's knowledge. The solicitor attested the wife's signature on a registered mortgage that had been forged by her husband. The court held that the solicitor (Mr Graham) owed a duty of care to the wife (Mrs Hall). The court held:

> In my opinion Mr Graham owed Mrs Hall a duty of care in attesting the signature on the mortgage, and in representing that the signature purporting to be that of Mrs Hall was placed on the mortgage in his presence and that Mrs Hall was personally known to him.

[109] The important point in that case is that the solicitor was attesting the signature of his own client. We therefore agree with the arguments of learned counsel for the third and fourth defendants, that the case does not stand for the general proposition that a solicitor owes a duty of care to a third party.

[110] It can be seen from the foregoing analysis that the cases relied on by the Court of Appeal in the present case and by learned counsel for the plaintiff do not support the broad proposition that the third and fourth defendants owed a duty of care to the plaintiff.

[111] One final point remains regarding the judgment of the Court of Appeal on this issue. It is noteworthy that the Court of Appeal expressed its conclusion that the third and fourth defendants were also liable in negligence to the plaintiff in the following passages of its judgment:

> [90] On the facts of the present case it is clear to us that the third and fourth defendants were negligent in failing to take all necessary steps to verify the true identity and status of the imposter, the bogus Rajamani. When the bogus Rajamani produced an Indian passport bearing No F4495077, which did not match with the real Rajamani/plaintiff's passport which bears No X205536, and gave a self-serving declaration in the 'Surat Akuan' at p 2857 of the appeal record to link the two passports, the third defendant was put to notice of the need to make further enquiries.
>
> [91] But she chose not to, despite the glaring disparity in the passport numbers staring her in the eyes. It was a red flag that should have aroused her suspicion as to the true identity of the person who appeared before her and claiming to be the landowner. ...
>
> [92] Had the third defendant carried out further investigation as a prudent and reasonably competent solicitor would under the circumstances, instead of blindly accepting what was claimed by the 'vendor' as correct and genuine, she would have discovered that the Rajamani that she was dealing with was not Rajamani the real landowner.
>
> [94] Careless conveyancing lawyers must bear the natural and probable consequences of their acts or omissions. The truth is, the learned JC himself acknowledged, albeit reluctantly that the third defendant was negligent ...
>
> [95] That effectively was a finding that the third defendant, and by extension the fourth defendant, had breached their duty of care to the plaintiff. Nevertheless, being guided by his view that a solicitor only owes a duty of care to his client and not to third parties, it was inevitable that the learned JC would find the third and fourth defendants not liable in negligence to the plaintiff.

[112] The above passages are not free from difficulties. The Court of Appeal seemed to hold that the third and fourth defendants owed the plaintiff a duty of care because of their alleged negligent acts. That cannot be right. The Court of Appeal erred by taking an overly simplistic view. In our opinion the Court of Appeal had seriously misdirected itself on fact and law in failing to appreciate that the third and fourth defendants must owe a duty of care to the plaintiff before the court considers whether there has been a breach of the duty of care. The case of *Esser v Brown*, which was cited by learned counsel for the third and fourth defendants illustrates this point very well. The Canadian Court of Appeal in this case who overturned the trial judge's finding that a notary (Ms Luoma) who acted for a fraudulent co-owner owed duty of care to the defrauded co-owner (Ms Esser) held:

> 30 As I have already mentioned, the trial judge seemed to hold that Ms Luoma owed the plaintiff a duty of care because of her finding that in the circumstances, Ms Luoma was careless in ignoring the 'red flags' described by the trial judge. With respect, the existence or non-existence of 'red flags' seems related more closely to the question of carelessness or standard of care than to the duty of care, which must be

> considered as a separate question of law. In other words, it is not correct, in my respectful opinion, to say that the notary owed a duty of care because there were 'red flags'. This conflates the question of whether there was carelessness on the defendant's part — ie a failure to comply with a reasonable standard of conduct — with the question of duty of care. Standard is generally considered after a duty of care has been found and involves determining whether there were any established rules of her profession, or customary practices, that she failed to follow; or whether the 'warning signs' adverted to by the trial judge should reasonably have aroused her suspicion. If on examination the court is satisfied that the defendant's actions fell below that of a competent notary, then (assuming both a duty of care and a causal link between her conduct and the plaintiff's loss), liability will be imposed ...

[113] In *Burmeister v O'Brien*, the New Zealand High Court held that the solicitor (Mr Henley-Smith) who acted for the fraudsters (O'Briens) did not owe a duty of care to the defrauded plaintiffs (Burmeisters). In this respect the High Court held:

> [223] I have no doubt that Mr Henley-Smith did not act in accordance with good professional practice when he accepted the blank transfer signed by the Burmeisters, filled it in with their names on his purchaser client's instructions without further inquiry, and then proceeded to sign the transfer correct as solicitor for the O'Briens, and the discharge of mortgage correct as solicitor for the Burmeisters. Rather, he should have refused to take any steps and required the documentation to be referred back to the Burmeisters, for them or their solicitors to fill in the documents and provide him with the necessary details.
>
> [224] However, these errors cannot in themselves lead to the creation of a duty of care. The fact that Mr Henley-Smith may have breached the standards of proper professional conduct does not in itself create a cause of action in negligence.

[114] Reverting to the rival contentions of the parties, it must be emphasised that as against the third and fourth defendants, the plaintiff's claim was based on the tort of negligence. In a claim based on the tort of negligence, it must first be shown that the defendant owed a duty of care, as a legal obligation, to the plaintiff and once the duty existed, the plaintiff must show that the defendant had breached it.

[115] For the establishment of a duty of care in tort, the preferred test in Malaysia is the three-fold test of foreseeability, proximity and policy considerations (see *Tenaga Nasional Malaysia v Batu Kemas Industri Sdn Bhd and another appeal* [2018] 5 MLJ 561; [2018] 6 CLJ 683). We note that the Court of Appeal in the present case did not examine this point. In *Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor*, this court set out the approach for imposing a duty of care as follows:

> [34] To put it in a nutshell the preferred test is the three fold test, where the requirements of foreseeability, proximity and policy considerations must exist in

any claim for negligence. The three fold test has been recognised by the *House of Lords in Caparo Industries plc v Dickman* [1990] 2 AC 605, as the elements giving rise to a duty of care. In the judgment of Lord Bridge in *Caparo* at pp 617–618, His Lordship said that:

> What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other.

…

[62] As a matter of interest it can be seen that as regards the proper approach that should be used in imposing a duty of care, legal thinking has been divided between the use of general principles as a test for duty, and the incremental approach which calls for the development of the law in incremental stages by using precedents as the yardstick against which all claims in negligence should be measured.

…

[64] In other words, the imposition of policy considerations require some measure of public policy to be infused in the establishment of a duty of care. In the present appeal, we agree with the Court of Appeal that the court must give consideration to the presence of a contractual matrix between the developer and purchasers which clearly define the rights and liabilities of parties and their relative bargaining positions. There can be no action against the architect if the remedy asked for is specifically provided for in the contract. Otherwise, it has the effect of rewriting the contractual terms. Such claims must be dismissed on grounds of policy. Nevertheless, we must reiterate that a claim for negligence must be brought within the scope of duty of care. The recoverability of claims for pure economic loss in negligence cases is dependent on the facts of individual cases. Some measure of public policy must be considered though it should not be the sole determinant of liability.

[116] On the threshold question of factual foreseeability, we ask ourselves the following question: was it factually foreseeable that the third and fourth defendants' act or omission might cause the plaintiff to be deprived of her rights to her land? Viewed objectively, we answer that question in the negative. The third and fourth defendants were retained as solicitors for the fraudster, whom they believed to be the owner of the land. In this context, they could not be expected to take into account the interests of the plaintiff (who they did not know existed) when acting for their client, the fraudster. As solicitors for the fraudster, they are mainly responsible for protecting the interests of their client, the fraudster in first land transaction. The expected scope of the third and fourth defendants' duty only covered the carrying out of the fraudster's instructions. In the circumstances it was not reasonable for them to further enquire whether their client was really whom she claimed to be, or whether her actions might cause harm to the plaintiff whom they had no idea existed in the first place. Given that they did not even know that the plaintiff existed, much less had any knowledge of her interest in the land, it is unrealistic to expect a solicitor to be able to guard the plaintiff's interests under those circumstances.

[117] The next important issue for determination is whether there is sufficient legal proximity between the plaintiff and the third and fourth for a duty of care to arise. In assessing whether there was sufficient legal proximity between the parties in a case where the plaintiff only suffered pure economic loss (as in the present case), one of the factors that a court should consider is the principle of voluntary assumption of responsibility (by the defendant) and reliance (by the plaintiff). This court in *Lok Kok Beng & 49 Ors v Loh Chiak Eong* explain this as follows:

> [35] The most difficult ingredient to prove in establishing a duty of care is the requirement of sufficient proximity between the claimant and the defendant. The court would have to look at the closeness of the relationship between the parties and other factors to determine sufficient proximity based on the facts and circumstances of each case. These factors are likely to vary in different categories of cases. The fact that damages sought by the claimant is pure economic loss not flowing from personal injury or damage to the property is also a factor to be considered. As has often been acknowledged, a more restricted approach is preferable for cases of pure economic loss. As such, the concepts of voluntary assumption of responsibility and reliance are seen as important factors to be established for purposes of fulfilling the proximity requirement. The reason for a more stringent approach taken in the claims involving pure economic loss is because such loss might lead to an indeterminate liability being imposed on a particular class of defendants, thus leading to policy issues.

[118] It is against the above background, we now turn to the application of the principles of voluntary assumption of responsibility and reliance to the facts of the present case. It is plain for us to see that the only nexus between the plaintiff and the third and fourth defendants is the plaintiff's interest in the land, which does not create legal proximity where the plaintiff was never the third and fourth defendants' client, and the plaintiff never relied on the third and fourth defendants who had no knowledge of the plaintiff's existence. They never met each other prior to the commencement of the present action, nor knew of each other's existence. The third and fourth defendants had dealt directly with their client the fraudster at all material times. The third and fourth defendants also never assumed responsibility for the plaintiff. The fact that the third and fourth defendants' client was a fraudster does not create proximity between the plaintiff and the third and fourth defendants. Hence, it is clear to us that there is no legal proximity between the plaintiff and the third and fourth defendants.

[119] In this regard, learned counsel for the third and fourth defendants drew our attention to the latest position in the United Kingdom that solicitors do not owe a duty of care to non-clients where reliance on the solicitor was not reasonable. In the recent UK Supreme Court case of *NRAM Ltd (formerly NRAM plc) v Steel and another (Scotland)* [2018] 3 All ER 81; [2018] UKSC 13, a solicitor (Ms Steel) acted for a borrower in negotiations with the chargee (Northern Rock) to discharge certain properties in return for partial redemption of the loan. In the course of acting for the borrower, the solicitor made an inaccurate and grossly negligent misrepresentation to the chargee (Northern Rock), who proceeded to rely on the misrepresentation and suffered loss as a result. The Supreme Court (Lord Wilson, with whom Lady Hale, Lord Reed, Lord Hodge and Lady Black agreed) held that the solicitor (Ms Steel) owed no duty of care to the chargee (Northern Rock) as Northern Rock's reliance on the solicitor was not reasonable. The Supreme Court explained:

> [32] Perhaps it helps only slightly for us to have been reminded in the authorities cited above that Ms Steel and the firm are liable to Northern Rock only if it was a special case. Probably of greater assistance is the analysis in the Al-Kandari case that the solicitors owed a duty of care to the opposite party because they had stepped outside their normal role. But the six authorities cited above demonstrate in particular that the solicitor will not assume responsibility towards the opposite party unless it was reasonable for the latter to have relied on what the solicitor said and unless the solicitor should reasonably have foreseen that he would do so. These are, as I have shown, two ingredients of the general liability in tort for negligent misrepresentation; but they are particularly relevant to a claim against a solicitor by the opposite party because the latter's reliance in that situation is presumptively inappropriate. Thus the reasonableness of the claimant's reliance and of the defendant's foreseeability of it comprised the special feature which gave rise to the liability in the *Allied Finance* case and in the *Dean* case and to the arguable liability in the *Connell* case; and, although the claim in the *Midland Bank* case failed for other reasons, the fourth of the requirements valuably identified in Lord Jauncey's judgment was that the solicitor should have been aware that the pursuer was likely to rely on what he had said.
>
> …
>
> [35] … Overarchingly, however, neither the general jurisprudence relating to liability in negligence for a misrepresentation leading to economic loss nor the focussed jurisprudence relating to a solicitor's liability to the opposite party in that regard supports a conclusion that it is not always necessary for the representee to establish that it was reasonable for him to have relied on the representation. On the contrary, the reasonableness of his reliance on it is, as I have explained, central to the concept of an assumption of responsibility.

[120] From the irrefutable evidence, the point to be made here is that in our present case there was no reasonable reliance by the plaintiff.

[121] Having said that there is no legal proximity between the plaintiff and the third and fourth defendants, we also agree with the submissions of learned counsel for the third and fourth defendants that there are policy considerations against imposing a duty of care on the third and fourth defendants towards the plaintiff. Imposing such a duty require solicitors to assume that their clients are acting deceitfully and will put them in a position of potential conflict of interest. That would effectively make solicitors an insurer for all transactions, which would lead to increased costs that are passed on to the clients. Such a duty would apply not just to solicitors but also to agents for any person in any transaction, including accountants, bankers, insurers, stockbrokers or any other manifestation of an agent. In *Burmeister v O'Brien* the New Zealand High Court said:

> [231] I do not accept that a duty of care can be imposed on lawyers who receive signed documents in otherwise unexceptional circumstances, to verify the signatures. It may be a breach of professional standards to fill in a blank transfer (as I have already indicated at [223] and [226] above). However, the absence of any relationship with the person who has signed militates against a duty of care to that person to investigate the validity of the signature. The policy implications of imposing such a duty would be considerable, as it would add to legal costs, and place a practitioner in a position where he or she could not accept an assurance from a client. The fact that the transfer was signed in blank was not enough in my view to place a duty of care on Mr Henley-Smith to the Burmeisters (as distinct from a duty to observe professional standards) to follow up or refuse to act.
>
> …
>
> [234] I therefore conclude that there was not sufficient proximity between the Burmeisters and Mr Henley-Smith to give rise to a duty of care. Even if there were sufficient proximity, there would be policy reasons which would weigh against a finding of a duty. Caution must be exercised in imposing a duty on solicitors to those who are not only not the solicitor's clients, but who indeed have interests essentially in conflict with those of the solicitor's direct client.
>
> …
>
> [238] Mr Henley-Smith was not in the classic duty of care situation. He was giving no certificate at all to the Burmeisters. They were not in his contemplation as persons who might rely on any actions on his part. To impose a duty on solicitors involved in registering a transfer for a purchaser to look out for the interests of the other party to the conveyancing transaction runs the risk of placing solicitors in a possible conflict position. There are good policy reasons why no duty of care should be extended to such a situation.

[122] So far we have deal with the issues pertaining to the key question of whether the third and fourth defendants owed a duty of care to the plaintiff.

[123] We now turn to address briefly on the submissions of learned counsel for the third and fourth defendants that foreign cases show that solicitors do not owe a duty of care to non-clients except in very limited circumstances (ie disappointed beneficiaries cases and where there is reliance). We need not go through all the cases here. We would only draw attention to some of the decisions. A review of the cases in the United Kingdom and Canada, indicates that solicitors do not owe a duty of care to third parties. The courts have held that solicitors acting for a fraudster vendor do not owe a duty of care to a defrauded purchaser. The exceptions to the rule are disappointed beneficiaries cases and where there is reliance and assumption of responsibility (see *P&P Property Ltd v Owen White & Catlin LLP and Anor*, *White v Jones*, *Al-Sabah v Ali and Ors*, *Chief Land Registrar v Caffrey & Co* [2016] EWHC 161 (Ch), *Scott v Valentine*, *Esser v Brown* and *Kamahap Enterprises Ltd v Chu's Central Market Ltd (BCCA)* [1989] BCJ No 2108). The following point has already been made earlier but deserved to be reiterated. The present case is not a disappointed beneficiaries case and there was no reliance and assumption of responsibility.

[124] Hence, based on all the above, we conclude that our court should not impose a duty of care on solicitors who acted for a fraudster owner of land who sold the said land, towards the real owner of the land, as there is no foreseeability, no proximity, and there are policy considerations against imposing such a duty.

[125] We will now turn to question 2, which is in relation to the first defendant's appeal (the second appeal).

QUESTION 2

[126] This question highlights some of the problems and difficulty in relation to the computerisation of land titles. In this regard, it will be recalled that despite having the original issue document of title (IDT1) and paying all quit rent, and despite not entering into any sale of the land, the plaintiff found herself dispossessed of the land. The land came to be transferred to the second defendant who then transferred it to the first defendant. The evidence disclosed that the transfers were made by the use a computerised issue document of title.

[127] As we have seen, the Court of Appeal decided that the first defendant's title is defeasible, despite it being a subsequent purchaser in good faith and for valuable consideration, on the following grounds. The plaintiff's title under IDT1 remains indefeasible; IDT4 is void because it cannot be issued during IDT1's subsistence, relying on the case of *Tan Chiw Thoo v Tee Kim Kuay* [1997] 2 MLJ 221; the first defendant cannot acquire indefeasibility of title by relying on a void title in IDT4; the second transfer by a fraudster, and not by the plaintiff herself, to the first defendant is ineffective; and in the contest for title between an innocent original owner and an innocent subsequent purchaser in good faith and for valuable consideration, the scales of justice tilt in favour of the innocent original owner.

[128] As a starting point, it is necessary for contextual apprehension and appreciation to set out the governing statutory provision for the conversion of existing manual titles to computer printed titles. Section 5A(3)(a) of the NLC, expressly states the provisions of 14th Schedule shall apply once the computerised land registration system comes into force in Malaysia. Paragraph 8 of the Schedule sets out in some detail the process of the conversion. A registered proprietor may apply for conversion under para 8(4) of the Schedule. The Registrar can start the conversion on his own accord as provided for in para 8(5). Paragraph 8(3) provides that the existing issue document of title shall continue to be in force and valid for all purposes until the relevant computer printed issue document of title is prepared and issued to the proprietor after the register document of title is converted. Paragraph 8(9) provides for the mandatory duties of the Registrar upon conversion of an existing document of title to a computer printed issue document of title as follows:

> (9) Upon the conversion of an existing document of title to a computer printed document of title under the preceding sub- paragraphs, 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 has 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 sub-paragraph (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.

[129] With that, we turn to consider the rival contentions of the parties before us. The main thrust of the submissions of learned counsel for the first defendant may be summarised as follows. The concept of indefeasibility of title is central to the Torrens System of registration of title. The position of the law in Malaysia is now settled in that the proviso in s 340(3) of the NLC provides for deferred indefeasibility (citing *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1). Therefore, the first defendant who conducted searches on the register and purchased the land in good faith and for valuable consideration, had, upon registration as the proprietor on the register document of title, acquired an indefeasible title, notwithstanding that the second defendant's title itself is defeasible. Learned counsel argued that the duplicate title produced by the fifth defendant and used for the transfer of the land 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. 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. But, 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.

[130] On the other side, in contending that the first defendant's appeal should be dismissed, learned counsel for the plaintiff reiterated the undisputed fact that the plaintiff was the registered proprietor of the land and had at all material times been in possession of the manual IDT1. She had never parted with the possession of it. In fact the plaintiff had produced the original of IDT1 at trial and it was marked as an exhibit. She had never engaged any lawyer to sell the land or deal with it in anyway and she had never signed any document for purposes of effecting transfer of the land. As such, learned counsel submitted, 'the plaintiff's case simply put is that any transfer of the said land to any party, and any application for replacement titles purportedly made in her name, are clearly bad in law, and consequentially are void for breaches of the provisions of the National Land Code 1965 ('NLC'). All subsequent 'manufactured' titles to the said land (GM5066 and GM9890) are incapable of supporting transfers of interest in title'.

[131] It was his submission 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 NLC. 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, namely, IDT2 and IDT3. Accordingly, he submitted that since there were several titles issued in respect of the same land, the later titles were invalid and defeasible pursuant s 340(2) of the NLC. He argued that the original IDT1 must prevail.

[132] On the specific issue of whether the first defendant acquired indefeasible title or interest in the land, learned counsel for the plaintiff argued 'that title GM 9890 (the 1st Defendant's title) which is purportedly a replacement title in continuation from GM 5066, which in turn was purportedly in continuation from EMR 6527, is a void title and defeasible for the aforesaid reasons including that it was obtained by fraud and/or forgery. See section 340(2) NLC'. He added that the void title (IDT4) and the earlier

(IDT2) cannot be capable of overriding the validly issued original IDT1 which remains in the plaintiffs possession (citing *Shayo (M) Sdn Bhd v Nurlieda bt Sidek & Ors* [2013] 7 MLJ 755, *Uptown Properties Sdn Bhd v Pentadbir Tanah Wilayah Persekutuan & Ors* [2012] 8 MLJ 713 and *Overseas Realty Sdn Bhd v Wong Yau Choy & Ors (Tetuan Tay Ibrahim & Partners, third party)* [2014] MLJU 1868; [2014] 8 CLJ 107).

[133] The nub of his submissions is that, 'GM 9890 is thus not capable of validly passing title to a purchaser or subsequent purchaser (as in our case), whether in good faith and for valuable consideration or otherwise. As quite correctly pointed out by the Court of Appeal in our case, the mere fact the 1st Defendant purchased the said land in good faith and for valuable consideration does not confer indefeasibility to its void title. When one does not have a valid title in the first place, one cannot acquire indefeasibility'.

[134] In our opinion, as correctly stated by the High Court in the present case, the land title would be void ab initio, if and only if, the land registry had, in blatant breach of its duty under the NLC 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.

[135] The key question that arises here then is whether IDT2 was issued in breach of the NLC? It is true that the plaintiff was the original owner of the land and had at all material times in her possession the original issue IDT1. On 24 May 2002, the fifth and sixth defendants generated a computerised replacement title in continuation for the land, under IDT2 as part of the computerisation process. This was a result of the computerisation process pursuant to para 8 of the 14th Schedule of the NLC. There is one thing that is very important point to note: 1DT2 was generated in the name of 'Rajamani a/p Meyappa Chettiar', that is to say, in the plaintiff's name. As at 12 October 2005 and 16 December 2005, IDT2 was in the name of the plaintiff. It was certified to be a true copy by one 'Azlina Binti Aziz, Penolong Pegawai Daerah (Daftar) Klang', who was the officer in charge then. Therefore, IDT2 was correctly prepared in the name of the of the plaintiff being the 'person ... last registered as proprietor in the subsisting register document of title' pursuant to s 170(2)(a) of the NLC, as found by the High Court. IDT2 was received by the High Court pursuant to s 383(2) of the NLC. It is equally important to note that the new computerised 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. Pursuant to the provisions in the NLC, the registrar of land titles is required to convert the manual land titles to computerised 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 computerised land title to the registered proprietor until the original manual land title is surrendered to him. At the material time IDT2 was therefore in the computerised land title system. It is true that IDT1 had never been surrendered to the fifth defendant. However, under para 9(c) of the 14th Schedule of the NLC that the surrender of the title would only be required if IDT2 was to be given to the plaintiff in exchange. There is no evidence that IDT2 was issued or given to anyone including the plaintiff. In our opinion, the fifth and sixth defendants have not contravened the NLC in any way in respect of the preparation of IDT2. Having considered with care the lucid and clear reasoning of the High Court, we are in full agreement with the High Court's findings, which the Court of Appeal did not disturb, that there were no breaches of the following provisions of the NLC in the issuance of IDT2:

(a) there was no breach of ss 168 and 433 of the NLC because IDT2 was prepared on the registrar's own initiative pursuant to para 8(5) of the 14th Schedule of the NLC, instead of the circumstances in s 166(1)(c) or (d);

(b) there was no breach of para 8(9)(c) of the 14th Schedule of the NLC because the surrender of the existing manual title would only be required if the new computerised title was to be given to the first defendant in exchange; and

(c) there was no breach of s 170(2)(c) of the NLC because IDT2 was prepared on the registrar's own initiative pursuant to para 8(5) of the 14th Schedule of the NLC, instead of the circumstances in s 166(1)(c) or (d); IDT2 was correctly issued in the name of the plaintiff; and the lodgement of a private caveat is only endorsed on the register document of title pursuant to s 324 of the NLC, and not on the issue document of title.

[136] In so far as to the cases cited by learned counsel for the plaintiff to support his contention that IDT4 and the earlier IDT2 could not override the validity of IDT1, it is our opinion that the cases could not be more different from the present case.

[137] First the case of *Shayo (M) Sdn Bhd v Nurlieda by Sidek & Ors* where the issuance of the impugned computerised issue document of title was without doubt due to a grave failure by the land authority to adhere to the strict mandatory provisions set out in the 14th Schedule of the NLC. As such the issuance of the computerised issue document of title was ultra vires and unlawful with the effect that any other instruments executed thereon would also be void and liable to be set aside at the instance of the plaintiff as the rightful registered proprietor.

[138] Secondly the case of *Uptown Properties Sdn Bhd v Pentadbir Tanah Wilayah Persekutuan & Ors* where the land authority had mistakenly described the fourth defendant as the registered proprietor of the land and issuing it with a duplicate title. This act was held by the High Court to be unlawful and ultra vires. It was held that the issuance of a duplicate computerised title in the name of the fourth defendant when the land continued to be in the possession of the plaintiff coupled with the breach of the 14th Schedule of the NLC rendered the registration of the fourth defendant as proprietor void pursuant to s 340(2)(c) of the NLC. Since the act of issuing the fourth defendant with a duplicate title was unlawful and ultra vires, any instrument executed by the fourth defendant in favour of the fifth and sixth defendants as vendors of the land would be void as being by way of an insufficient instrument pursuant to s 340(2)(b) of the NLC, and thus liable to be set aside under the principle of deferred defeasibility.

[139] The third case cited by learned counsel is the case of *Overseas Realty Sdn Bhd v Wong Yau Choy & Ors* where on the evidence it was held that the transfer from the plaintiff to the first defendant was realised by the use of a computerised issue document of title which was not even the first computerised issue document of title but a subsequent one. This indicated that there was an issuance of a computerised issue document of title by the land authorities in respect of the property but no evidence was led by the defendants to explain the circumstances under which the first computerised issue document of title was issued. The failure to do so, in the face of allegations of breach of statutory duty and negligence, invited the invocation of s 114(g) of the Evidence Act 1950 in that there was non-compliance with the provisions of the NLC. The court further held that it was plain and obvious that there was non-compliance with the provisions of the NLC when the land authorities embarked upon their exercise to convert land titles in Perak to computerised issue document of titles in Form 5BK.

[140] As can be seen from the above analysis of the cases, the land title would be void ab initio, if the land authority had in flagrant violation of its responsibility under the NLC unlawfully registered any land in the register document of title and issued the replacement issue document of title in the name of a third party. We should note that it would be a different thing if the present case were such a situation.

[141] The point that we want to make can now be stated as follows. As in the present case, 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 *Yap Ham Seow* where the title was issued pursuant to a crafty scheme by fraudsters claiming that the original title was lost. Similarly, in *Liputan Simfoni Sdn Bhd v Pembangunan Orkid Desa Sdn Bhd* [2018] MLJU 2112; [2019] 1 CLJ 183 an imposter company applied to the land authority for a replacement issue document of title alleging that it had lost the original document of title of the subject land. The original document of title was at all material times in the possession of the owner as in our present case. The land authority was duped into issuing a replacement issue document of title.

[142] As to the point raised by learned counsel for the plaintiff that there were two titles to one lot, our opinion is that s 85(2) of the NLC merely provides that for each lot, there shall be prepared one title for the whole lot, and not several titles for portions within that one lot. This makes sense because the lot has already been surveyed and its area calculated pursuant to s 396 of the NLC. The important point is this: s 85(2) does not deal with the issue of issuance of a computerised title in continuation pursuant to para 8 of the 14th Schedule of the NLC, which is the situation of IDT2 in our present case. The case of *Tan Chiw Thoo v Tee Kim Kuay*, relied on by the Court of Appeal in the present case can be distinguished on the facts. First, in that case the competing claims is between the original owner and another person who was subsequently 'alienated' the same land, and not between the original owner and a subsequent purchaser who is entitled to rely on the principle of deferred indefeasibility. Secondly, the two titles were issued in different persons' names, whereas in our case, both IDT1 and IDT2 were issued in the first defendant's name. And thirdly, there were two titles issued for the same land, and not a replacement title issued in substitution of the earlier title as in our present case. As regards s 422(c)(i) of the NLC, it merely provides that a person who fraudulently procures the registration or issue of any document of title is guilty of an offence; but does not render the title issued void ab initio.

[143] As to the point raised that IDT3 was wrongly issued as the replacement title for IDT2, it bears noting that although there was an application by the fraudster to the fifth defendant for the issuance of a replacement title on 6 January 2006 on the ground that the original title was lost, there is however no evidence that the replacement title as applied was issued and likewise there is no evidence of collection of that title. Nevertheless in the meantime, the fraudster and the second defendant entered into a sale and purchase agreement dated 20 October 2005 and subsequently, there was the presentation for transfer of the land by the fraudster to the second defendant. The signatures purporting to be of the plaintiff on the sale and purchase agreement were forged. The signatures purporting to be of the plaintiff on the transfer form were also forged. The purported transfer of the land from the plaintiff to the second defendant was registered on 12 April 2006, with the production of the original title dispensed with as there was an application by the fraudster for the issuance of a replacement title on the ground that IDT2 was lost, pursuant to s 299(1)(a) of the NLC. The transfer of IDT2 was by the fraudster who impersonated the plaintiff, and who claimed to previously hold passport No 'X205536', which is the plaintiff's passport. The transfer of the land to the second defendant was pursuant to a crafty scheme analogous to that in *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1995] 2 MLJ 863; [1995]

2 AMR 1828 and *Yap Ham Seow v Fatimawati Ismail & Ors*. Pursuant to this transfer, a new computerised title was issued on 16 May 2006 for the land in the name of the second defendant as the registered proprietor, under GM 9890 (‘IDT3’) pursuant to para 16 of the 14th Schedule of the NLC. As correctly found by the High Court, 1DT3 was a new issue document of title prepared pursuant to para 16 of the 14th Schedule of the NLC. In this process, the registrar by s 299(1)(a) of the NLC was empowered to register the transfer by dispensing with the preparation of the original document of title because the original title was lost as claimed and pending replacement at that material time. It bears noting that IDT3 was issued in the name of the second defendant pursuant to transfer rather than pursuant to the application for replacement title as testified by DW8 that, ‘Tapi sebaik sahaja pindah milik didaftarkan maka dia ialah pemilik berdaftar, jadi ikutkan Infinite Income ialah pemilik berdaftar untuk 9890’.

[144] The first defendant entered the scene only after the issuance of IDT3. Prior to purchasing the land, the first defendant conducted searches on the land, which showed the second defendant as the registered proprietor and the land free from encumbrances. Subsequently, the first defendant entered into a sale and purchase agreement of the land with the second defendant on 18 August 2006 at the purchase price of RM1.8m, which was the market value at that time. The first defendant had paid the purchase price in full. There were no forgeries in relation to the second SPA or related transfer forms. The transfer of the land from the second defendant to the first defendant was registered on 14 December 2006, simultaneous with the registration of a charge in favour of the first defendant’s end-financier. The authorised registering authority carried out the act of registration. Pursuant to the transfer, a new title was issued on 16 January 2007 for the land in the name of the first defendant as the registered proprietor, under GM 9890 (IDT4). It must be emphasised that the register document of title of the land currently shows the first defendant as the registered proprietor of the land and the latest search on the subject land shows that the first defendant as the registered proprietor of the land.

[145] This brings into sharp focus the provisions of s 89 of the NLC, which provides that:

> 89 Conclusiveness of register documents of title.
>
> Every register document of title duly registered under this Chapter shall, subject to the provisions of this Act, be conclusive evidence —
>
> (a) that title to the land described therein is vested in the person or body for the time being named therein as proprietor; and

> (b) of the conditions, restrictions in interest and other provisions subject to which the land is for the time being held by that person or body, so far as the same are required by any provision of this Act to be specified or referred to in that document.

[146] Now, once the scheme of the provisions of s 89 is seen, it is apparent that since the register document of title is conclusive evidence of ownership and in the present instance since the register document of title bears the name of the first defendant as the registered proprietor, it follows and becomes conclusive evidence that the first defendant is the registered proprietor unless defeasible pursuant to s 340 of the NLC. What appears on the registered document of title is conclusive as the register is everything under the Torrens System. In *Gibbs v Messor & Co* [1891] AC 248, Lord Watson said:

> The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that every one who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title.

[147] In the case of *Teh Bee v K Maruthamuthu* [1977] 2 MLJ 7, it was held that 'the fact that the register document of title was in the name of the appellant was conclusive evidence that the title to the land was vested in the appellant'. The concept of indefeasibility of title under s 89 of the NLC applies to the person whose name currently appears as the proprietor on the register document of title and not to a former registered proprietor (see *Yap Ham Seow*).

[148] As pointed out by Teo Keang Sood and Khaw Lake Tee in *Land Law in Malaysia, Cases and Commentary* (3rd Ed) at pp 182–183:

> Under the Torrens system, it is the act of registration that vests title or interest; once registered, the title or interest cannot be divested except otherwise statutorily provided. Registration is the cornerstone of the Torrens system. It is not a system of registration or recordation of title, under which what are registered are existing titles or interests; registration under such system does not vest or divest any title or interest. Under the Torrens system, the registered title or interest is also free of all adverse claims or encumbrances not otherwise noted on the register. The effect of registration is to defeat all prior and subsequent unregistered claims. Under this system, and as underscored by section 89 of the Code, the register is all important and conclusive evidence that the title is vested in the person or body for the time being named as the proprietor and that the land is subject to such conditions, restrictions in interest and other provisions as specified in the title. Theoretically, this is known as the 'indefeasibility of title', which is reflected in section 340 of our Code under which it is provided that registration confers an indefeasibility title or interest, until and unless that title or interest is challenged or set aside on any of the grounds set out under section 340(2).

[149] In the case of *T Sivam a/l Tharamalingam (as representative/administrator for the estate of Nagamuthu a/l Periasamy, deceased) v Public Bank Bhd* [2018] 5 MLJ 711; [2018] 6 CLJ 1, this court held:

> The concept of indefeasibility of title is central to our Torrens system of registration of title, which provides for the registration of all titles and interests. Under it, a title is made conclusive on registration, subject however to statutory exceptions, so that the State guarantees that the title is unimpeachable (see *The Centenary of the Torrens System in Malaysia*, edited by Tan Sri Datuk Professor Ahmad Ibrahim and Judith Sihombing, at p 1).
>
> The cardinal principle is that the register is everything, and that except in cases of actual fraud on the part of the person dealing with the registered proprietor such person upon the registration of the title under which he takes from the registered proprietor has an indefeasible title against the entire world (see *Teh Bee v K Maruthamuthu* [1977] 2 MLJ 7 and *Fels v Knowles* [1906] 26 NZLR 640).

[150] Tied to the above discussion, the point to note is that the proviso in s 340(3) of the NLC provides for deferred indefeasibility, and not immediate indefeasibility. This is the primary defence of the first defendant in the present case. It is now well settled that subsequent purchaser in good faith is entitled to raise the shield of indefeasibility and a registered interest of a subsequent purchaser can only be liable to be set aside if the interest is acquired not in good faith (see *Tan Ying Hong v Tan Sian San & Ors*, *Sia Hiong Tee & Ors v Chong Su Kong & Ors* [2015] 4 MLJ 188, *Low Huat Cheng & Anor v Rozdenil bin Toni and another appeal* [2016] 5 MLJ 141, *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697, *See Leong Chye @ Sze Leong Chye & Anor v United Overseas Bank Bhd and another appeal* [2019] 1 MLJ 25; [2018] 7 AMR 521 and *T Sivam a/l Tharamalingam v Public Bank Bhd*). To be more specific, a subsequent purchaser in good faith and for valuable consideration enjoys immunity from adverse claim to his title. For that reason, as between the competing claims of the original owner and the subsequent purchaser in good faith and for valuable consideration, the latter would be entitled to ownership of the subject land. Indefeasibility is conferred on the current registered proprietor, and not a former registered proprietor. This is a statutory protection accorded to a subsequent acquirer of interest.

[151] As a subsequent purchaser, the first defendant had purchased the land in good faith and for valuable consideration. The High Court found 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 fraudster 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 TS Teoh & Partners. Both the first defendant and its solicitors 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.

[152] Applying the well established principle to the present case, it is our considered opinion that the first defendant who conducted searches on the register and purchased the land in good faith and for valuable consideration, had, upon registration as the proprietor on the register document of title, acquired an indefeasible title, notwithstanding that the second defendant's title itself is defeasible. Hence, 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.

[153] That being the case, the underlying basis for the Court of Appeal in the present case to reverse the decision of the High Court despite the first defendant being a subsequent purchaser in good faith and for valuable consideration, was wholly misconceived and untenable. The Court of Appeal's reasoning goes against the conventional understanding of deferred indefeasibility. The Court of Appeal decided on the law indefeasibility of title by leaning towards the other extreme, by favouring the original owner against the subsequent purchaser for valuable consideration, despite purporting to follow the principle of deferred indefeasibility. This approach was wholly unnecessary. The Court of Appeal was more concerned with the fact that the plaintiff had in her possession IDT1 but overlooked and failed to appreciate the fact that the register document of title was in the name of the first defendant. This was conclusive evidence that the title to the land was vested in the first defendant. The effect of the decision of the Court of Appeal is that subsequent purchasers in good faith and for valuable consideration who are the current registered proprietors may find that their titles are defeasible by claims from the original owners, even when their titles are supposed to be protected by the principle of deferred indefeasibility. This would be an undesirable state of affairs. In our opinion, in a dispute for title between an innocent original owner and an innocent subsequent purchaser in good faith and for valuable consideration, it must, and always be decided based on the principle of deferred indefeasibility as provided in the proviso to s 340(3) of the NLC, rather than the judge's individual preference as to which side the scales of justice tilts. The Court of Appeal failed to take into account this vital point the importance it deserved. As stated in *The National Land Code, A Commentary by Judith Sihombing* (Binder 3, Issue 35, XXVI 4454) 'The traditional view, is that the proviso was inserted into subsection (3) rather than subsection (2) for a special purpose, namely that of enabling the court to decide which of two innocent parties, where the interest of neither is to be preferred over the other and both claim the same land, is to be favoured'. A

[154] On the issue, we conclude that a replacement title in continuation generated by the land registry, when the original issue document of title was at all material times in the possession of the original owner, is valid and capable of validly passing title to the purchaser. B

[155] It now only remains to be considered the legal issues posed under question 3 in relation to the seventh defendant's appeal (third appeal).

QUESTION 3 C

[156] As seen earlier the seventh defendant acted for the second defendant in respect of the initial purchase of the land from the fraudster and the subsequent sale of the same to the first defendant shortly thereafter. The seventh defendant D also introduced the fraudster to the third and fourth defendants, and requested them to act for the fraudster in the first transaction. The seventh defendant and the law firm in which he was attached to, acted for the second defendant (and through it for the fraudster) to apply for and obtain replacement title to the land. E

[157] The plaintiff's pleaded case against the seventh defendant is captured in para 21(a) of the re-amended statement of claim which reads, 'the Plaintiff pleads that the 7th Defendant acted falsely and fraudulently in acting in concert with the 3rd and 4th Defendants by causing the fraudulent execution F of the sale and purchase agreement dated 20.10.2005 and the Memorandum of Transfer dated 25.10.2005, knowing full well that it would cause the Plaintiff to lose the said land'.

[158] It will be recalled that the High Court found that the seventh G defendant had actual knowledge of the fraud committed by the second defendant. This is essentially a finding of fact. Accordingly, the High Court expressly found that the seventh defendant was privy to the fraud beyond reasonable doubt, which was the applicable standard of proof for fraud in civil cases at the material time. Nevertheless, the High Court proceeded to dismiss H the plaintiff's claim against the seventh defendant on the basis that the court was of the view that the pleaded case against the seventh defendant was one of conspiracy with the third and fourth defendants to defraud, and the court was not satisfied that there existed such a conspiracy or collusion.

I

[159] As indicated earlier, an appeal was filed by the plaintiff to the Court of Appeal against the decision of the High Court dismissing her claim against the seventh defendant. A cross-appeal was filed by the seventh defendant in respect of the specific findings of fraud made against him by the High Court. The

Court of Appeal allowed the plaintiff's appeal and dismissed the seventh defendant's cross-appeal. The Court of Appeal was of the view that the plaintiff's pleaded case against the seventh defendant was premised on fraud, as opposed to the tort of conspiracy to defraud. The Court of Appeal accepted as correct the High Court's finding of fraud against the seventh defendant. The plea that the seventh defendant acted in concert with the third and fourth defendants was in relation to the fraudulent execution of the sale and purchase agreement and the memorandum of transfer which resulted in the plaintiff's loss of the land. In its judgment the Court of Appeal explained that in the present case 'acting in concert' is not a plea in conspiracy:

> [114] With due respect to the learned JC, this is erroneous because the plaintiff's pleaded case against the seventh defendant was not founded on conspiracy. It was founded on privy to fraud, which the learned JC himself found to have been proved against the seventh defendant. There was no plea of conspiracy to defraud in the amended statement of claim.
>
> [115] The plaintiff's averment that the seventh defendant had acted in concert with the third and fourth defendants to cause fraudulent transfer of the land must be seen in the context of their act of obtaining the signatures of the bogus Rajamani on the agreement and memorandum of transfer. That was proved as the seventh defendant had acted in concert with the third and fourth defendants to achieve the attestation and witnessing of the signatures.
>
> [116] Having regard to the totality of the evidence and the surrounding circumstances of the case, the seventh defendant's defence that he had no knowledge of the fraud because he was a junior and inexperienced litigation lawyer cannot hold water. In the first place, being an inexperienced junior lawyer is no excuse for being negligent unless it can be shown that he could not have known of the fraud with due diligence.
>
> [117] But most important of all, the learned JC had found the seventh defendant to be privy to the fraud committed by the second defendant. This finding is fatal to his defence as it demolished the whole substratum of his defence of lack of knowledge and experience.

[160] Insofar as the seventh defendant's cross-appeal was concerned, it was dismissed on the basis that the Court of Appeal saw no reason to interfere in respect of findings of fact by the High Court, which findings also involved the credibility of the seventh defendant as a witness.

[161] At the hearing before us, learned counsel for the seventh defendant argued that 'acting in concert' is a plea in conspiracy. According to learned counsel, case laws have often regarded 'acting in concert' synonymous with 'conspiracy'. We were referred to certain authorities but in our opinion they did not assist us. He submitted that the plaintiff's ingredients of the allegation of fraud against the seventh defendant in that the seventh defendant acted in concert with the third and fourth defendants, by causing the fraudulent execution of the sale and purchase agreement and the memorandum of transfer, knowing full well that it would cause the plaintiff to lose the land, was a plea in 'conspiracy to defraud'. It was submitted that the plaintiff withdrew the allegation of fraud against the third and fourth defendants. With the allegation of fraud against the third and fourth defendants being withdrawn, the charge of conspiracy to defraud against the seventh defendant for fraudulently acting in concert with the third and fourth defendants, by causing the fraudulent execution of the sale and purchase agreement and the memorandum of transfer knowing full well that it would cause the plaintiff to lose the land would automatically fall. He added that the plaintiff did not allege that the seventh defendant acted fraudulently, independently or with any other person. Neither did the plaintiff allege that the seventh defendant was the mastermind behind the fraud with the concerted aid of others.

[162] We agree with learned counsel for the plaintiff that question 3 is for all intents and purposes turns on a question of interpretation of the plaintiff's pleaded case against the seventh defendant, namely whether the pleaded case was one premised on fraud or conspiracy to defraud.

[163] In our opinion, a close reading of para 21(a) of the re-amended statement of claim, as well as the manner in which the case was pursued at trial against the seventh defendant, makes it clear that the plaintiff's case against the seventh defendant was for fraud. A plain reading of the relevant pleading would show that the case against the seventh defendant was that he acted falsely and fraudulently; in acting in concert with the third and fourth defendants caused the fraudulent execution of the relevant sale and purchase agreement and memorandum of transfer; and with the knowledge that it would cause the plaintiff to lose the land. In fact the Bahasa Malaysia version of para 21(a) which states 'Plaintif memplidkan bahawa Defendan Ke-7 telah bertindak secara salah dan frod apabila bertindak bersama-sama Defendan Ke-3 dan Ke-4 dengan mengakibatkan perlaksanaan perjanjian jualbeli bertarikh 20.10.2005 dan Memorandum Pindahmilik bertarikh 25.10.2005, dengan pengetahuan penuh bahawa ia akan mengakibatkan Plaintif menghilangkan hartanahnya', clearly indicate that the plaintiff's pleaded case against the seventh defendant was premised on fraud. It is not correct, as submitted by learned counsel for the seventh defendant, that a cause of action for fraud was not expressly pleaded.

[164] From the evidence, it emerged that the seventh defendant had been involved in everything from dealing with the fraudster, to linking her up with the third and fourth defendants, to dealing with her replacement title, and facilitating the sale of the land from the fraudster to the second defendant and shortly thereafter for a second time from the second defendant to the first defendant at a marked up price. In the words of the High Court:

> 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.

[165] It is axiomatic that as an appellate court we will not readily interfere with findings of fact arrived at by the court of first instance unless that court is shown to be plainly wrong in arriving at its decision (see *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453). It has not been successfully shown to us that the findings were plainly wrong or perverse in any way. In this context, we agree with the Court of Appeal that there was a specific plea of fraud against the seventh defendant, and that the plea of acting in concert was only with regards to the fraudulent execution of the sale and purchase agreement and the memorandum of transfer. There was no explicit plea of conspiracy to defraud. On the evidence before us, we are of the opinion that the plaintiff's pleaded case for fraud has been satisfactorily proved on the higher standard then applicable, as found by the High Court. The High Court however erred in taking a technical and restrictive approach and reading a 'tort of conspiracy' into plain pleadings for fraud.

ANSWERS TO LEAVE QUESTIONS

[166] In consequence and in view of all the above, our answers to the legal issues posed under questions 1, 2, and 3 are as follows:

Question 1: The Court of Appeal decision in *Yap Ham Seow* is the correct decision. Our court should not impose a duty of care on solicitors who acted for a fraudster owner of land who sold the said land, towards the real owner of the land, as there is no foreseeability, no proximity, and there are policy considerations against imposing such a duty.

Question 2: A replacement title in continuation generated by the land registry, when the original issue document of title was at all material times in the possession of the original owner, is valid and capable of validly passing title to the subject land to a subsequent purchaser in good faith and for valuable consideration within the meaning of the proviso to s 340(3) of the NLC.

Question 3: On the view that we have taken, it is unnecessary for us to answer question 3.

CONCLUSION

[167] In all the above circumstances we hereby make the following orders:

(a) we allow the appeal by the third and fourth defendants in the first appeal. In the result, all the orders of the Court of Appeal are set aside and we reinstate the orders of the High Court;

(b) we allow the appeal by the first defendant in the second appeal. In the result, all the orders of the Court of Appeal are set aside and we reinstate the order of the High Court. We make the following consequential orders. The order of the Court of Appeal in respect of the fifth and sixth defendants is varied as follows: (a) para 2(h)(i) and (ii) are set aside; and (b) the fifth and sixth defendants to pay damages to the plaintiff to be assessed by the High Court judge. We affirm para 6 of the order of the Court of Appeal; and

(c) we dismiss the appeal by the seventh defendant. We affirm the orders of the Court of Appeal. The seventh defendant to pay damages to the plaintiff to be assessed by the High Court judge.

Order accordingly.

Reported by Kohila Nesan