
HONG LEONG BANK BHD v. STAGHORN SDN BHD & OTHER APPEALS
FEDERAL COURT, PUTRAJAYA
ABDUL HAMID MOHAMAD, CJ; ABDUL AZIZ MOHAMAD, FCJ; AZMEL MAAMOR, FCJ
CIVIL APPEAL NOS: 02-14-2005(B), 02-15-2005(B) & 02-17-2005(B)
26 DECEMBER 2007
[2008] 2 CLJ 121

***CIVIL PROCEDURE**: Parties - Intervention - Application to intervene in proceedings to set aside order for sale and auction sale - Whether proceedings still in existence - Whether object of intervention beyond attainment - Whether applicant qualified to intervene - Rules of the High Court 1980, O. 15 r. 6(2)(b)*

***LAND LAW**: Lien - Sale of land by court - Whether registered proprietor could deposit document of title as security for loan to third party - Whether judgment could be obtained against third party - Whether document of title could be deposited by third party*

***WORDS & PHRASES**: "At any stage of the proceedings" - Meaning of - Rules of the High Court 1980, O. 15 r. 6(2) - When a party may apply for leave to intervene in proceedings*

The three consolidated appeals herein pertained to a piece of land (the 'land') which was successfully auctioned off after an order for sale to satisfy a sum of RM5.5 million owed by one Park Avenue to Hong Leong Bank Berhad ('HLB') which had held the land under a lien-holder's caveat. The facts showed that Staghorn Sdn Bhd ('Staghorn') initially purchased the land from its registered proprietors and paid a 10% deposit in respect thereof. Subsequently, the land was transferred to its sister company, Teck Lay Realty Sdn Bhd which paid the balance of the purchase on a loan taken with Bank Bumiputra Malaysia Berhad. The turn of events that followed led to Park Avenue which was Teck Lay's holding company, depositing the document of title to the land to HLB for entry of a lien-holder's caveat for a loan taken with HLB by Park Avenue in the sum of RM5.5 million. When Park Avenue defaulted in the repayments thereof, HLB obtained judgment that led to the order for sale. The land was sold by public auction to one Wong Bin Chew ('Wong') to whom a certificate of sale was issued. Staghorn then applied for leave to intervene in the proceedings and to set aside the order for sale and the auction sale. Staghorn claimed that it was, at all times, the purchaser of the land. It argued that it was supposed to resell the land to Teck Lay which was to be subject to a third party charge to secure a loan given by HLB to Park Avenue. However, as the resale by Staghorn to Teck Lay did not materialise, Staghorn remained the beneficial owner of the said land and that the order for sale contravened s. 281 of the National Land Code ('NLC') rendering the order for sale and the auction sale void. The learned judge of the High Court ('HC') allowed Staghorn's application for leave to intervene which he held was leave under O. 15 r. 6(2)(b) of the Rules of the High Court 1980 ('RHC') and set aside the order for sale and the auction sale. HLB and Wong who had intervened in the proceedings, appealed to the Court of Appeal ('CA'). The CA allowed the appeals on the grounds that there was no proceeding in existence when the order for intervention was made. Staghorn appealed to the Federal Court ('FC') which ordered the appeals remitted before the CA to be heard on all

issues including the exercise of the court's discretion but excluding the issue on jurisdiction under O. 15 r. 6 RHC. The CA then dismissed the appeals by HLB and Wong, allowing Staghorn's application to intervene and setting aside the order for sale and the auction sale. The CA, however, disagreed with the orders of the HC to hand the document of title to Staghorn and to declare Staghorn as the true beneficial owner of the land. That decision led to the three appeals by HLB, Wong and Staghorn before the FC herein.

Leave was granted on five questions of law. The FC primarily addressed the first question, namely, whether a party with no proprietary rights in the land in question, could be allowed to intervene to set aside the order for sale. The other questions concerned the following: (1) whether a registered proprietor of land could deposit his document of title as security for a loan to a third party and whether judgment could be obtained against the third party under s. 281 NLC; (2) whether the document of title could be deposited by a third party with the consent of the registered proprietor; and (3) whether an order for sale made pursuant to a lien-holder's caveat, created by the deposit of the document of title by a third party with the consent of the registered proprietor, illegal and liable to be set aside.

Held (allowing the appeals against the order for leave to intervene and against the setting aside of the order for sale):

Per Abdul Hamid Mohamad CJ (Azmel Maamor FCJ concurring):

> **(1)** An application to set aside an order for sale by an existing party to the proceeding may be made before the final order is perfected, otherwise the judge is *functus officio*. (para 58)
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> **(2)** An application for leave to intervene in order to set aside an order for sale by a party not already a party to the proceedings must be made under O. 15 r. 6 RHC. The application may be made "At any stage of the proceedings" meaning before judgment, otherwise the proceedings have concluded and there is no longer a proceeding in existence for the party to intervene in. The judge also becomes *functus officio*. (para 59)
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> **(3)** An application for leave to intervene is supported by affidavit. As such, the judge merely decides on affidavit evidence whether to grant leave. At that stage, the judge should not make a definite finding of fact which, as envisaged by O. 15 r. 6 RHC 1980 will and can only be made after all evidence has been adduced in the trial which will follow subsequently. (para 60)
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> **(4)** Any party whether a party in the original proceedings or not, who wants to challenge the order for sale or any judgment, other than a default judgment or where it is specifically provided for in the rules, may only do so by filing a fresh action. (para 61)
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> **(5)** While the principles laid down in *Pegang Mining* as to exercise of discretion are applicable, all the requirements of O. 15 r. 6(2) RHC must still be satisfied. (para 62)
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> **(6)** The learned judge of the HC allowed Staghorn to intervene after three years and five months after the order for sale was made. From the judgment

the learned judge did refer to O. 15 r. 6 RHC but he failed to consider the opening words, "At any stage of the proceedings...". Instead, the learned judge relied on *Pegang Mining Co. Ltd v. Choong Sam & Ors* ('*Pegang Mining* ') and *Arab Malaysian Merchant Bank Bhd v. Jamaludin Dato Mohd Jarjis* ('*Arab Malaysian* ') for the principles applicable. While the principles laid down in *Pegang Mining* as to the exercise of discretion were applicable, the learned judge should have addressed the first point, *ie*, whether there was a proceeding in existence for Staghorn to intervene. Only if a proceeding exists would the principles in *Pegang Mining* become applicable. (paras 64 & 65)

(7) The learned judge of the HC did consider the issue of *functus officio* but he did not ask himself the question whether the final order was made and perfected. Instead, the learned judge went to great lengths to consider whether the order for sale was validly made as if hearing an appeal. Having heard that the order for sale was wrong in law and should be set aside, the learned judge held that the judge who made the order for sale was not *functus officio* and allowed Staghorn to intervene. That approach was clearly wrong. (para 68)

(8) In an application to intervene by a non-party in a proceeding, a judge, firstly, has to determine whether there is a proceeding. Secondly, whether the applicant has shown that "there **may** exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter. The judge should not make a definite finding of fact or law based on the facts that have not been adduced yet. (para 70)

(9) The CA failed to focus its mind on O. 15 r. 6(2) RHC and ask itself the question whether the learned judge of the HC addressed his mind to the said provision in the exercise of his discretion to grant the leave to intervene. Just because the learned judge cited the cases of *Pegang Mining* and *Arab Malaysian*, the CA concluded that the learned judge was firmly in grip with the relevant tests. The CA failed to consider whether "there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter. There was simply no issues left to be determined when the order had already been made, perfected and carried out completely. (para 77)

(10) The HC and the CA focussed on the validity of the order for sale instead of focussing on O. 15 r. 6 RHC. Having found that it was not validly made, the application to intervene was allowed relying on the exception in the case of *Badiaddin Mohd Mahidin v. Arab Malaysian Finance Bhd* ('*Badiaddin* '). At the application stage to intervene under O. 15 r. 6 RHC, consideration should be given to the provision of the rule itself, *ie*, whether or not the application satisfied the requirements of the said rule. *Badiaddin* at that stage was irrelevant. It was only relevant in considering whether the previous order of the court could be set aside in a fresh action. (paras 78, 80)

(11) As a matter of judicial policy, a judge should not be allowed to re-open a case, set aside an earlier judgment or order and substitute it with his own. A point of illegality could not be reserved by a litigant for future use without deploying it at the trial or in an appeal therefrom (Peh Swee Chin FCJ). Just because the second judge is of the view that the order of the first judge had caused injustice, it does not mean that the order to intervene should be given. The requirements of the rule still have to be satisfied. (paras 82, 83 & 87)

(12) The finding of facts by the CA regarding the rights of Staghorn did not support the test that it applied. The CA clearly held that Staghorn had divested its rights and interest and had no beneficial interest in the said land. Hence, Staghorn could not be said to have satisfied the test of having an interest to intervene. (paras 88 & 89)

[Staghorn's appeal dismissed.]

***Bahasa Malaysia** Translation Of Headnotes*

Ketiga-tiga rayuan yang disatukan di sini adalah berhubung sebidang tanah ('tanah') yang dilelong ekoran satu perintah jualan bagi menjelaskan sejumlah RM5.5 juta yang terhutang oleh Park Avenue kepada Hong Leong Bank Berhad ('HLB') yang memegang tanah di bawah satu kaveat pemegang lien. Fakta menunjukkan bahawa tanah mulanya dibeli dari pemilik berdaftar oleh Staghorn Sdn Bhd ('Staghorn') yang membayar 10% deposit baginya. Berikutnya, tanah dipindah kepada syarikat sekutu Staghorn, Teck Lay Realty Sdn Bhd yang membayar baki harga belian melalui pinjaman yang diperolehi dari Bank Bumiputra Malaysia Berhad. Perkembangan selanjutnya membawa kepada Park Avenue, yang merupakan syarikat induk Teck Lay, menyerah-simpan geran hakmilik tanah dengan HLB bagi membolehkan HLB memasukkan kaveat pemegang lien atas pinjaman yang diberikannya kepada Park Avenue sebanyak RM5.5 juta. Apabila Park Avenue ingkar dalam pembayaran, HLB mendapat penghakiman yang membawa kepada perintah jualan. Tanah dijual melalui lelongan awam kepada seorang Wong Bin Chew ('Wong') yang kemudian diserahkan dengan sijil jualan. Berikutnya, Staghorn memohon kebenaran untuk mencelah di dalam prosiding bagi mengenepikan perintah jualan serta jualan lelong. Staghorn menuntut bahawa ia adalah pembeli tanah pada semua waktu material. Menurut Staghorn, ia sepatutnya menjual semula tanah kepada Teck Lay dan mentaklukkan tanah kepada gadaian pihak ketiga bagi mendapatkan pinjaman dari HLB untuk Park Avenue. Penjualan semula tersebut bagaimanapun tidak terjadi, dan oleh itu ia masih lagi menjadi pemilik benefisial tanah. Dikatakan juga bahawa perintah jualan telah melanggar s. 281 Kanun Tanah Negara ('KTN') menyebabkan perintah itu serta jualan lelong menjadi batal. Yang arif hakim Mahkamah Tinggi ('MT') membenarkan permohonan Staghorn untuk kebenaran mencelah yang dikatakan oleh beliau sebagai kebenaran di bawah A. 15 k. 6(2)(b) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') sekaligus mengenepikan perintah jualan dan jualan lelong. HLB dan Wong yang mencelah terhadap prosiding merayu kepada Mahkamah Rayuan ('MR'). Rayuan-rayuan dibenarkan oleh MR atas alasan bahawa tiada prosiding yang wujud ketika perintah untuk mencelah dibuat. Staghorn merayu ke Mahkamah Persekutuan ('MP') di mana MP memerintahkan rayuan-rayuan dikembalikan ke MR untuk didengar semula atas semua isu-isu termasuk isu pelaksanaan budibicara mahkamah, tetapi tidak termasuk isu bidangkuasa di bawah A. 15 k. 6 KMT. Berikutnya, MR menolak rayuan-rayuan oleh HLB dan Wong, membenarkan permohonan mencelah Staghorn dan mengenepikan perintah jualan dan jualan lelong. MR bagaimanapun tidak bersetuju dengan perintah-perintah MT

menyerahkan geran hakmilik kepada Staghorn atau mengisytiharkan Staghorn sebagai pemilik benefisial sebenar tanah. Keputusan MR ini membawa kepada tiga rayuan oleh HLB, Wong dan Staghorn di sini.

Kebenaran diberi atas lima persoalan undang-undang. MP telah menangani isu yang pertama, iaitu sama ada satu pihak yang tidak mempunyai hak pemilikan pada tanah boleh dibenarkan untuk mencelah bagi mengenepikan peintah jualan. Persoalan-persoalan selainnya adalah berkaitan dengan: (1) sama ada seorang pemilik berdaftar tanah boleh menyerah-simpan geran hakmiliknya sebagai jaminan bagi suatu pinjaman kepada seorang pihak ketiga dan sama ada penghakiman boleh diperolehi terhadap pihak ketiga tersebut di bawah s. 281 KTN; (2) sama ada geran hakmilik boleh diserah-simpan oleh pihak ketiga dengan persetujuan pemilik berdaftar; dan (3) sama ada perintah jualan yang dibuat berdasarkan satu kaveat pemegang lien, yang didaftar ekoran penyerah-simpanan geran hakmilik oleh pihak ketiga dengan persetujuan pemilik berdaftar, tak sah dan boleh diketepikan.

Diputuskan (membenarkan rayuan-rayuan terhadap perintah memberi kebenaran untuk mencelah dan terhadap pengenepian perintah jualan):

Oleh Abdul Hamid Mohamad KHN (Azmel Maamor HMP menyetujui):

> **(1)** Permohonan untuk mengenepikan perintah jualan oleh satu pihak semasa kepada prosiding boleh dibuat sebelum perintah muktamad disempurnakan, di mana selepas itu hakim akan menjadi *functus officio*.
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> **(2)** Permohonan untuk kebenaran mencelah bagi mengenepikan perintah jualan oleh satu pihak yang belum lagi menjadi pihak kepada prosiding hendaklah dibuat di bawah A. 15 k. 6 KMT. Permohonan boleh dibuat "Di mana-mana peringkat prosiding..." bermakna sebelum penghakiman. Jika sebaliknya, ia bermakna prosiding sudah pun ditutup dan tiada lagi apa-apa prosiding untuk pihak mencelah masuk. Hakim juga sudah *functus officio*.
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> **(3)** Permohonan untuk kebenaran mencelah adalah disokong oleh afidavit. Oleh yang demikian, hakim hanya membuat keputusan atas keterangan afidavit sama ada untuk memberi kebenaran. Pada peringkat itu, hakim tidak harus membuat apa-apa dapatan fakta tertentu kerana, seperti yang dinyatakan oleh A. 15 k. 6 KMT, itu hanya boleh dibuat selepas semua keterangan telah dikemukakan dalam perbicaraan yang menyusul nanti.
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> **(4)** Mana-mana pihak sama ada pihak dalam prosiding asal atau sebaliknya, yang ingin mencabar perintah jualan atau mana-mana penghakiman, selain dari penghakiman ingkar atau di mana ia dinyatakan secara spesifik dalam mana-mana kaedah, hanya boleh berbuat demikian dengan memfailkan satu tindakan baru.
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> **(5)** Di mana prinsip-prinsip seperti yang dibentang di dalam *Pegang Mining* mengenai pelaksanaan budibicara terpakai, kesemua kehendak-kehendak A. 15 k. 6(2) KMT masih perlu dipatuhi.
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> **(6)** Yang arif hakim MT membenarkan Staghorn untuk mencelah selepas tiga tahun dan lima bulan perintah jualan dibuat. Dari penghakimannya, yang arif

hakim telah merujuk kepada A. 15 k. 6 KMT tetapi gagal mempertimbang ungkapan pembukaan, "Di mana-mana peringkat prosiding...". Yang arif hakim sebaliknya bergantung kepada *Pegang Mining Co. Ltd v. Choong Sam & Ors* ('*Pegang Mining* ') dan *Arab MalaysianMerchant Bank Bhd v. Jamaludin Dato Mohd Jarjis* ('*Arab Malaysian* ') untuk prinsip-prinsip yang terpakai. Sementara prinsip-prinsip yang dibentang oleh *Pegang Mining* berkaitan pelaksanaan budibicara memang terpakai, yang arif hakim sepatutnya menangani isu pertama terlebih dahulu, iaitu sama ada prosiding wujud bagi membolehkan Staghorn mencelah. Hanyalah jika prosiding wujud maka prinsip-prinsip di dalam *Pegang Mining* boleh terpakai.

(7) Yang arif hakim MT telah menimbang isu *functus officio* namun gagal bertanyakan dirinya sama ada perintah yang muktamad telah dibuat dan disempurnakan. Sebaliknya, yang arif hakim telah menimbang dengan panjang lebar persoalan sama ada perintah jualan telah dibuat dengan sahnya seolah-olah mendengar suatu rayuan. Setelah mendapati bahawa perintah jualan adalah salah di sisi undang-undang dan harus diketepikan, yang arif hakim memutuskan bahawa hakim yang membuat perintah jualan tidak *functus officio* sekaligus membenarkan permohonan Staghorn untuk mencelah. Pendekatan sebegini adalah jelas salah.

(8) Dalam satu permohonan untuk mencelah oleh seorang yang bukan pihak kepada prosiding, seorang hakim, pertama sekali, hendaklah memutuskan sama ada prosiding wujud. Kedua, sama ada pemohon telah menunjukkan bahawa "there **may** exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter". Hakim tidak harus membuat dapatan fakta atau dapatan undang-undang tertentu berdasarkan fakta-fakta yang belum lagi dikemukakan.

(9) MR gagal menumpukan perhatian kepada A. 15 k. 6(2) KMT atau bertanyakan dirinya sama ada yang arif hakim MT telah mengarahkan mindanya kepada peruntukan tersebut semasa melaksanakan budibicaranya memberikan kebenaran untuk mencelah. Cuma kerana yang arif hakim merujuk kepada *Pegang Mining* dan *Arab Malaysian*, MR terus sahaja merumuskan bahawa yang arif hakim telah berpijak kepada fakta-fakta yang relevan. MR gagal menimbangkan sama ada "there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter". Yang jelas, tiada lagi isu yang perlu diputuskan apabila perintah telah dibuat, disempurnakan dan dilaksanakan sepenuhnya.

(10) MT dan MR hanya memberi perhatian kepada kesahan perintah jualan dan tidak kepada A. 15 k. 6 KMT. Setelah mendapati ianya tidak dibuat secara sah, permohonan untuk mencelah telah dibenarkan dengan bergantung kepada pengecualian di dalam kes *Badiaddin Mohd Mahidin v. Arab Malaysian Finance Bhd* ('*Badiaddin* '). Di peringkat permohonan untuk mencelah di

bawah A. 15 k. 6 KMT, pertimbangan harus diberi kepada peruntukan kaedah itu sendiri, iaitu, sama ada atau tidak permohonan memenuhi kehendak-kehendak kaedah tersebut. Pada peringkat ini *Badiaddin* adalah tidak relevan. Ia hanya relevan dalam mempertimbangkan sama ada perintah terdahulu mahkamah boleh diketepikan dalam satu tindakan yang baru.

(11) Sebagai satu perkara polisi kehakiman, seorang hakim tidak boleh dibenarkan membuka semula kes, mengenepikan penghakiman yang terdahulu ataupun memerintah dan menggantikan dengan penghakimannya sendiri. Seorang litigan tidak boleh menangguhkan point mengenai ketidaksahan untuk kegunaan akan datang tanpa menggunakannya di perbicaraan atau semasa rayuan darinya. (Peh Swee Chin HMP). Cuma kerana hakim kedua berpendapat bahawa perintah hakim pertama telah mengakibatkan ketidakadilan, tidak bererti bahawa satu perintah untuk mencelah boleh diberi. Kehendak-kehendak kaedah masih perlu dipenuhi.

(12) Dapatan-dapatan fakta oleh MR berhubung hak-hak Staghorn tidak menyokong ujian yang dipakai olehnya. MR jelas mendapati bahawa Staghorn telah melupuskan hak-hak dan kepentingannya dalam tanah tersebut. Oleh itu, Staghorn tidak boleh dikata sebagai telah memenuhi ujian mempunyai kepentingan untuk mencelah.

[Rayuan Staghorn ditolak.]

[Appeal from Court of Appeal, Civil Appeal Nos: B-02-132-1995, B-02-183-1995, B-02-138-1995 & B-02-228-1995]

Case(s) referred to:

Arab Malaysian Merchant Bank Berhad v. Dr A Jamaluddin Dato' Mohd Jarjis [1991] 2 CLJ 862; [1991] 1 CLJ (Rep) 19 SC ***(refd)***

Badiaddin Mohd Mahidin v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Chan Yee v. Chan Yoke Fong [1990] 2 CLJ 737; [1990] 1 CLJ (Rep) 36 SC ***(refd)***

Eu Finance Berhad v. Lim Yoke Foo [1982] 1 LNS 21 FC ***(refd)***

Gurtner v. Circuit [1968] 1 All ER 328 ***(refd)***

Hock Hua Bank Bhd v. Sahari Murid [1980] 1 LNS 92 FC ***(refd)***

Hong Leong Finance Bhd v. Staghorn Sdn Bhd [1995] 3 CLJ 368 CA ***(refd)***

Isaacs v. Robertson [1985] AC 97 ***(refd)***

Mui Bank Bhd v. Cheam Kim Yu (Beh Sai Ming, Interverner) [1992] 4 CLJ 2229; [1992] 1

CLJ (Rep) 222 SC ***(refd)***

Nite Beauty Industries Sdn Bhd & Anor v. Bayer (M) Sdn Bhd [2000] 6 CLJ 151 HC ***(refd)***

Palaniappa Chetty v. Dupire Brothers & Another [1919] FMSLR 370 ***(refd)***

Pegang Mining Co Ltd v. Choong Sam & Ors [1968] 1 LNS 96; [1969] 2 MLJ 52 ***(refd)***

Shell Malaysia Trading Sdn Bhd v. Leong Yuet Yeng & Ors [1990] 3 MLJ 254 ***(refd)***

Tai Choi Yu v. Syarikat Tingan Lumber Sdn Bhd [1998] 4 CLJ 293 CA ***(refd)***

Tohtonku Sdn Bhd v. Superace (M) Sdn Bhd [1992] 1 CLJ 344 (Rep); [1992] 2 CLJ 1153; [1992] 2 MLJ 63 SC ***(refd)***

Tong Swee King v. Pegang Mining Co Ltd & Ors [1967] 1 LNS 198; [1967] 2 MLJ 214 ***(refd)***

United Asian Bank Berhad v. A Subramaniam (as the personal representative of Roshammah Samual (Deceased) & Ors [1994] 3 CLJ 681 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 96(a)

Malay Reservations Enactment (FMS Cap 142), s. 13

National Land Code, s. 218(1), (2), (3)

Rules of the High Court 1980, O. 13 r. 8, O. 14 r. 11, O. 15 rr. 6(2)(b)(i), (ii), O. 42 r. 13, O. 70 rr. 18(6), 20(9), O. 81 r. 7

Trade Descriptions Act 1972, s. 16

Transitional Rules 1963, r. 43

Counsel:

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For Staghorn Sdn Bhd - Yusuf Khan (KL Wong & Wee Su Lin with him); M/s Yusuf Khan & Fong

For Wong Bin Chen - S Sivaneindiran (KL Pang & Puteri Shahnaz Majid with him); M/s Cheah Teh & Su

Reported by Usha Thiagarajah

Case History:

Court Of Appeal : [2005] 2 CLJ 1
Court Of Appeal : [2003] 3 CLJ 473
Court Of Appeal : [1995] 3 CLJ 368
High Court : [1995] 1 LNS 276

JUDGMENT

Abdul Hamid Mohamad CJ:

[1] It began on 11 April 1988 when Hong Leong Finance Berhad which subsequently became known as Hong Leong Bank Berhad (Hong Leong) filed an Originating Summons No. S6-31-958-88 in the High Court at Kuala Lumpur, for an order for sale. (This originating summons was later registered at Shah Alam High Court as Originating Summons No. 24-391-1990). The defendants in the originating summons were Wong Cham Mew, Low Chin Pau as trustee of the Estate of Low How Siew, deceased, and Tech Lay Realty Sdn. Bhd. (in Liquidation) (Teck Lay Realty). The order for sale sought was in respect of land comprised in Certificate of Title No. 23316, Lot No. 1996, Mukim of Semenyih, which was held under Hong Leong's lien-holder's caveat, Presentation No. 4556/81 Jilid 9 Folio 196. This was sought to satisfy the sum of RM5.5 million due and owing by Park Avenue Homes Sdn. Bhd. (Park Avenue), the borrower, and secured by the said lien-holder's caveat.

[2] On 9 August 1991 Wan Yahya J (as he then was) made the order for sale. There was no appeal against the order for sale. Hence there was no grounds of judgment. The land was successfully auctioned on 16 November 1991. The certificate of sale was issued on 18 February 1992.

[3] On 4 Disember 1993 Staghorn Sdn Bhd filed a summons-in-chambers praying, first, that it be allowed to intervene in the proceedings and, secondly, that the order for sale dated 9 August 1991 and the auction sale of the said land on 16 November 1991 be set aside. The affidavit in support was affirmed by Set Kon Kim, as the managing director of Staghorn. (This Set Kon Kim was the very same person who had earlier signed the sale and purchase agreement, loan documents and correspondences by Teck Lee Realty and Park Avenue as director/managing director of each company respectively). On 30 January 1995, Faiza Tamby Chik J made the order allowing Staghorn to intervene in the proceedings. Against this order, Hong Leong appealed to the Court of Appeal in Civil Appeal No. B-02-132-1995 while Wong Bin Chen, the successful bidder at the auction sale and also an intervener appealed to the Court of Appeal in Civil Appeal No. B-02-138-1995.

[4] On 27 April 1995, Faiza Tamby Chik J made another order, in substance, setting aside the order for sale and granting other orders enumerated in the said order of 27 April 1995. Against that decision, Hong Leong appealed to the Court of Appeal in Civil Appeal No. B-02-183-1995. Likewise Wong Bin Chen appealed to the Court of Appeal in Civil Appeal No.

B-02-228-1995.

[5] On 15 June 1995 the Court of Appeal (Zakaria Yatim, NH Chan and Mahadev Shanka JJCA) allowed Hong Leong's appeal in B-02-132-1995 and Wong Bin Chen's appeal in B-02-138-1995 on the ground that there was no proceeding in existence in the originating summons on 30 January 1995 when the order for intervention was made or even on 4 December 1993 when the summons seeking intervention was issued. - see [1995] 2 MLJ 847.

[6] Against this judgment of the Court of Appeal, Staghorn appealed to the Federal Court in Federal Court Civil Appeal No. 02-08-1996 (B). On 5 August 1997, the Federal Court (Hj. Azmi Dato' Hj. Kamaruddin FCJ, Gopal Sri Ram JCA and Haji Abu Mansor Ali JCA) made the following order:

> **MENDENGAR** Peguam-Peguam yang dinamakan di atas **MAKA Adalah Diperintahkan** bahawa Rayuan ini dibenarkan **DAN ADALAH DIPERINTAHKAN SELANJUTNYA** bahawa Perintah Mahkamah Rayuan bertarikh 15hb. Jun 1995 didalam keempat-empat rayuan diketepikan dan Perintah Hakim Mahkamah Tinggi dipulihkan semula **DAN ADALAH DIPERINTAHKAN SELANJUTNYA** bahawa Rayuan Responden ke Mahkamah Rayuan di dalam Rayuan Sivil B-02-132-95, B-02-183-95, B-02-138-95 dan B-02-228-95 ini diserahkan balik ke Mahkamah Rayuan bagi perbicaraan atas kesemua isu-isu yang berada di hadapan Mahkamah Rayuan dalam Rayuan-rayuan Sivil No. B-02-132-95 disatukan bersama B-08-183-95 dan B-02-138-95 disatukan bersama B-02-228-95 termasuk penggunaan budibicara Mahkamah kecuali atas isu bidangkuasa di bawah Aturan 15, Kaedah 5, Kaedah-Kaedah Mahkamah Tinggi 1980. (emphasis added)

[7] In other words, the appeals were reverted back to the Court of Appeal for it to hear and determine on all issues including the exercise of the court's discretion but excluding the issue of jurisdiction under O. 15 r. 6 of the RHC 1980.

[8] So, the appeals came to the Court of Appeal for the second time. (I shall skip what happened at the Court of Appeal regarding the preliminary objection which I shall deal with later.) On 25 October 2004 after hearing the appeals, the Court of Appeal made the following orders:

> (i) That the appeal by Hong Leong in Civil Appeal No. B. 02-132-1995 and the appeal by Wong Bin Chen in Civil Appeal No. 02-138-1995 be dismissed;
>
> (ii) that in respect of the appeal by Hong Leong in Civil Appeal No. B.08-183-1995 and the appeal by Wong Bin Chen in Civil Appeal No. B-02-228-1995:
>
> > (a) paragraphs (i) (*ie*, the setting aside of the order for sale) and (ix) (*ie*, the order regarding costs) of the order dated 27 April 1995 made by the learned High Court judge be affirmed;
> >
> > (b) all other orders made in the same order *ie*, paras. (ii) to (ix) of the order set aside;
> >
> > (c) the stakeholder, Ms. Wong Kim Lin, do forthwith deliver to

Hong Leong the issue document of title of the said land.

[9] From that decision there are three appeals to this court:

(1) Civil Appeal No. 02-14-2005(B) by Hong Leong regarding the intervention by Staghorn (Civil appeal No. 02-132-1995 in the Court of Appeal) and regarding the setting aside of the order for sale (Civil Appeal No. B-02-183-1995 in the Court of Appeal).

(2) Civil Appeal No. 02-15-2005(B) by Wong Bin Chen, also on the issue of intervention by Staghorn (Civil Appeal No. 02-138-1995 in the Court of Appeal) and regarding the setting aside of the order for sale (Civil Appeal No. l B-02-228-1995 in the Court of Appeal).

(3) Civil Appeal No. 02-17-2005(B) by Staghorn against part of the orders made by the Court of Appeal on 25 October 2004.

[10] This court, on 24 August 2005, had granted leave to all the parties on the following questions:

1. In proceedings for an order for the sale of land [pursuant to a lien-holder's caveat]:

(a) Whether the Court, after the order for sale is made, may permit or allow a party which is found to have no proprietary rights in the said land, to intervene in the said proceedings with a view to setting aside the said order;

(b) Whether an order for sale may be set aside on the application of an intervener who is found to have no proprietary interest in the said land and in the absence of any challenge by the registered proprietor and/or the beneficial owner of the said land.

2. Whether sections 281(1) and 330 of the National Land Code (NLC) envisage that a registered proprietor of land may deposit his issue document of title as security for a loan only to the said proprietor and never to a third party.

3. If a registered proprietor of land deposits his issue document of title as security for a loan to a third party, whether the judgment that is required to be obtained under section 281(2) of the NLC is a judgment to be obtained against the borrower of the loan or against the registered proprietor of the said land.

4. Does section 281(1) of the NLC require as a condition precedent for validity of a lien holder's caveat that the registered proprietor do personally effect the deposit of his issue document of title or would the requirements of section 281(1) of the NLC be satisfied by evidence that the said issue document of title had been deposited by a third party (*ie*, a person or party other than the registered proprietor) on the instructions or with the authorization or the

consent of the registered proprietor.

5. Is an order for sale made pursuant to a lien-holder's caveat created by the deposit of the issue document of title by a third party with the consent of the registered proprietor considered to be illegal and consequently liable to be set aside.

Preliminary Objection

[11] I shall first deal with the preliminary objections raised by Staghorn before this court. The notice of preliminary objections contains three objections. However, as the learned counsel for Staghorn submitted on the first objection only, I shall only reproduce that particular objection which reads:

> The appeal was not properly before the Court of Appeal being incompetent by reason that the previous panel of the Court of Appeal had vide order dated 5th May 2003 dismissed with costs the notices of motion dated 2nd August 2001 filed in Civil Appeal No. B-02-132-1995 and dated 31st July, 2001 in Civil Appeal No. B-08-183-1995 wherein the Appellant (Hong Leong Bank Bhd) in the present appeals had applied to include the orders of the High Court appealed against, *viz* dated 30th January 1995 allowing the Respondent to intervene in the proceedings before it and that dated 27th April, 1995 which set aside the order of sale and the auction sale and granted consequential orders to Staghorn.

[12] We dismissed the preliminary objection and proceeded to hear the appeal proper. It must be remembered that when the appeals were heard for the first time by the Court of Appeal, no objection was raised. When the appeals were heard by this court for the first time, no objection was raised. Only when the Court of Appeal heard the appeal for the second time, *ie*, on 26 July 2001, did Staghorn raise the preliminary objection that the records of appeal (of the Court of Appeal) were incomplete because the orders appealed against were not included in the records of appeal even though the draft orders were included.

[13] On 31 July 2001, when the appeals came up for hearing again but before a different panel, Hong Leong filed a separate application in the respective appeals for leave to include the two orders of the High Court. The Court of Appeal dismissed the applications but ordered Hong Leong to file one record only in Civil Appeal No. B-02-132-1995 for all the four appeals. Hong Leong did so and included the two orders in the appeal record filed by it. On 24 February 2004, the Court of Appeal heard the appeals. On 25 October 2004, when the Court of Appeal sat to continue with the hearing of the appeals Staghorn objected to the inclusion of the two orders. However, the Court of Appeal refused to entertain the objection and proceeded to hear the appeals and gave its decision on the appeal.

[14] Now, when the appeals were fixed for hearing in this court, learned counsel for Staghorn raised the same objection again.

[15] I consider the current objection by Staghorn as an abuse of the process of the court. The complaint is about the inclusion of the orders in the record of appeal of the Court of Appeal, not the record of appeal of this court. In the circumstances, I do not think it is proper for the learned counsel for Staghorn to raise it again here by way of a preliminary objection. It is true

that the applications to include the orders in the appeal record of the Court of Appeal were dismissed by the Court of Appeal. However, the court made a further order for Hong Leong to file a fresh appeal record in one of the appeals only. I do not see anything improper for Hong Leong, when filing the new appeal record as directed by the court, to include the orders. No one was prejudiced. Indeed, the complaint should have been made if they were not included. Even if they were not included, I would not consider it a miscarriage of justice even if the Court of Appeal were to receive it from the bar when the appeal was heard. It is too trivial a matter to be made an issue about, what more to dismiss the appeals for, without hearing them.

Intervention By Staghorn

[16] As has been pointed out, the appeals by Hong Leong and Wong Bin Chen, respectively, are, first, on the granting of leave to intervene and, secondly, on the setting aside of the order for sale. This judgment only concerns the granting of leave to intervene. We have also seen that the only question posed to this court that concerns leave to intervene is question 1(a). There are two limbs to that question, *ie*, whether:

> (a) after the order for sale has been made;
>
> (b) a party which is found to have no proprietary rights in the said land may be allowed to intervene in the said proceedings with a view to setting aside the said order for sale.

[17] Even though I was a member of the panel that granted leave and approved the questions drafted by learned counsel for the appellants, now, having heard the full arguments in the appeals, having read the appeal record and the written submissions, having done my own research on the law, I am afraid that I will have to address some very basic questions first, even though they are not part of the questions framed for this court to answer. These questions relate to the scope of O. 15 r. 6(2) of the Rules of the High Court 1980, (RHC 1980), the decisions of the courts in this country on applications for leave to intervene, the approach taken by Faiza Tamby Chik J when he granted the leave, the first judgment of the Court of Appeal, the decision of this court when the appeals came up before it for the first time and the approach taken by the Court of Appeal in its second judgment on the issue of leave to intervene. I am of the view that I have to state what the law is. If this court were to remain silent about it and only deals with the issues posed to this court, I fear that it would appear as if this court agrees with the approach taken by Faiza Tamby Chik J, disagrees with the first judgment of the Court of Appeal, as a matter of law agrees with the contrary view assumed to have been taken by this court on that judgment (I say "assumed" because no judgment was given by this court when it allowed the appeal regarding intervention earlier)and also agrees with the approach taken by the second Court of Appeal in its second judgment on the issue of intervention. The net effect would be that a party may intervene even after an order has been made, perfected and executed, even where the court has been *functus officio* and even where the judge hearing the application to intervene as if he were hearing an appeal is of the opinion that the order of the first judge is wrong in law. In my view, such a state of affairs is quite disturbing and the issue should be considered in depth. For this reason, I am constrained to address the issue in detail even though it is not framed as a question for us to decide, which is quite understandable, in view of the approach taken by both Faiza Tamby Chik J and the second Court of Appeal. However, it is the core question in

an application to intervene.

[18] I have mentioned that the Court of Appeal when hearing the appeals for the first time, on 15 June 1995, allowed Hong Leong's and Wong Bin Chen's appeals purely on the ground that the High Court (Faiza Tamby Chik J) should not have allowed the intervention because, even at the time when the summons seeking intervention was issued (14 Disember 1993) there was no longer any proceeding in existence since not only the order for sale had been made, the order perfected and the auction sale completed, but even the certificate of sale had been issued.

[19] However this court disagreed and remitted the appeals back to the Court of Appeal for further consideration on all issues including the exercise of the discretion under O. 15 r. 6(2) of the RHC 1980 but excluding the issue of jurisdiction under the said rules. Unfortunately this court did not give its grounds for the ruling.

[20] That ruling certainly binds the Court of Appeal. It also binds this court, as far as this case is concerned. In the absence of the ground of judgment, it is not absolutely clear what it means. However, considering that jurisdiction was the only issue upon which the first Court of Appeal decided the appeals, I can only conclude that what this court meant was that this court did not agree with the Court of Appeal that an application to intervene may not be made when there is no longer a proceeding in existence. In other words, the words "At any stage of the proceedings" in O. 15 r. 6(2) include even after the proceedings have concluded, in this case after the order for sale had been made and perfected, the auction sale had been completed and the certificate of sale had been issued. If that is what that order means, without the grounds of judgment to support it, I am afraid, it becomes our duty to look at it closely, consider it, decide on it and give our reasons for it. (However, I must make it clear here that my view on that specific issue will not affect this case. This case is bound by the decision given by this court in the earlier appeal, on that particular issue.)

[21] Let us now take a close look at the provision of O. 15, in particular r. 6(2). The first thing to be remembered about this provision is that it is a procedural provision regarding "misjoinder and non-joinder of parties", as the heading states.

[22] Rule 6(2) provides:

> (2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application:
>
> (a)...
>
> (b) order any of the following persons to be added as a party, namely:-
>
> (i)...
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it

> would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter;

[23] Logically, all these happen at a very early stage of a proceeding and before trial. Secondly, this is a general provision applicable in all civil proceedings whether in a writ action, summons, motion, petition and so on. It is not a provision that applies specifically in an application for an order for sale under the National Land Code.

[24] Thus, in *Chan Yee v. Chan Yoke Fong [1990] 2 CLJ 737; ([1990] 1 CLJ (Rep) 36 (SC)*, Lee Hun Hoe CJ (Borneo) at pp. 740-741 (p. 40) said:

> The main object of the rule is to prevent multiplicity of proceedings. Under the rule the court has a very wide discretion to make the order that he made so that all matters in dispute could be effectively and completely determined and adjudicated upon.

[25] It should be noted that in that case, two motorcycles were involved in an accident resulting in the death of the pillion rider. After the appellant/plaintiff who was the father of the deceased pillion rider sued the respondent/defendant for damages, the respondent/defendant applied by summons for leave to bring in one Lee Hoy Mun as a co-defendant under the said rule. Clearly that was done before the trial.

[26] In *Shell Malaysia Trading Sdn. Bhd. v. Leong Yuet Yeng & Ors.* [1990] 3 MLJ 254 the plaintiff filed a suit against the defendants as co-administrators of an estate. As the grant had not been extracted, the plaintiff proceeded to enter judgment in default of defence against the defendants in their personal capacity. When the grant was finally extracted, the third defendant was replaced as co-administrator by one Lim Chin Hoe. The plaintiff then applied to amend the judgment and all pleadings and documents filed by changing the name of the third defendant to that of Lim Chin Joo. The application was made under O. 15 r. 6 of the RHC 1980. Gunn Chit Tuan J (as he then was) *inter alia*, held that "O. 15 r. 6 must necessarily only apply to proceedings where the substitution of any of the parties to the cause or matter was made **before** final judgment." (emphasis added).

[27] The Court of Appeal judgment in *Tai Choi Yu v. Syarikat Tingan Lumber Sdn. Bhd. [1998] 4 CLJ 293* is directly on point. There, an application was made by a summons-in-chambers to intervene in a suit where a default judgment has already been entered against the defendant. Again the application was made under O. 15 r. 6(2) of the RHC 1980.

[28] The Court of Appeal held:

> (1) Although O. 15 r. 6(2)of the Rules of the High Court 1980 states that an application to intervene could be made 'at any stage of the proceedings', this does not mean that such application can be made after final judgment had been entered. In the present case, the applicant took out the application after judgment had been perfected (see pp. 2771 and 278A-C); *Shell Malaysia Trading Sdn. Bhd. v. Leong Yuet Yeng & Ors* [1990] 3 MLJ 254 followed.

[29] In *Nite Beauty Industries Sdn. Bhd. & Anor. v. Bayer (M) Sdn. Bhd. [2000] 6 CLJ 151*, Bayer, an unsecured creditor, who was bound by the scheme of arrangement and compromise

approved by an order of court, applied to be added as a party to the proceedings before the court and also to declare, *inter alia*, the order a nullity. The application was also made under O. 15 r. 6(2) of the RHC 1980. Jeffrey Tan J, *inter alia* held:

> (3) Although O. 15 r. 6(2) states that such an application could be made at any stage of the proceedings, its scope should be limited to an application made before final judgment had been entered and not after because the proceedings would then have come to an end. Thus the would-be intervener who will be directly affected, either legally or financially, by any order which may be made in the action, must intervene before that order is perfected and whilst the court is still not *functus officio*. All proceedings came to an end upon the approval of the scheme of arrangement and compromise on 14 May 1999, thus the court no longer has any jurisdiction to make any order under O. 15 r. 6(2) (see pp 318H-319B, E, I).

[30] Thus, we see that our courts have been very consistent regarding the scope of the application of this rule. This is very sensible as the words "At any stage of the proceedings..." necessarily mean that there is a proceeding pending. Once the judgment is entered, the proceeding has come to an end. Furthermore, O. 15 is concerned with the very early stage of a proceeding, to have all the necessary parties in before the trial begins. Thus, r. 8 provides that, when the order under r. 6 has been made, the plaintiff must accordingly amend the writ and serve the amended writ on the new defendant and upon service the new defendant is given the right to enter an appearance. All these happen before the trial.

[31] Another point to note is this, para. (3) of r. 6 also provides:

> (3) An application by any person for an order under paragraph (2) adding him as a party must, except with leave of the Court, be supported by an affidavit showing his interests in the matters in dispute in the cause or matter or, as the case may be, the question or issue to be determined as between him and any party to the cause or matter.

[32] The provision categorically states that at that early stage, all that the applicant has to do is to show by way of affidavit that "there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter." The court decides whether or not to exercise the discretion to allow or not to allow him to intervene based on affidavit evidence alone, because the evidence has not been adduced since the trial has not started.

[33] The cases of *Pegang Mining Co. Ltd. v. Choong Sam & Ors. [1968] 1 LNS 96*; [1969] 2 MLJ 52, PC and *Arab Malaysian Merchant Bank Berhad v. Dr. A. Jamaluddin bin Dato Mohd. Jarjis [1991] 2 CLJ 862; [1991] 1 CLJ (Rep) 19 SC*, were relied on by the learned High Court judge, and also the Court of Appeal. I agree with the principles laid down by those two cases as to how the discretion should be exercised.

[34] But, first, let us look at *Pegang Mining (supra)* more closely. (I am also referring to the judgments of the learned judges of the Federal Court which were reported under the name of *Tong Swee King v. Pegang Mining Co. Ltd. & Ors. [1967] 1 LNS 198*; [1967] 2 MLJ 214). Confining myself to the facts relevant to the present discussion, one Choong Sam (the

respondent in the Privy Council) was given the right to work the mining lands which Tong Swee King (the appellant in the Federal Court) had derived through two agreements. It was Choong Sam who had requested Tong Swee King to bring the action in the High Court against *Pegang Mining* (the respondent in the Federal Court and appellant in the Privy Council) and who had undertaken to indemnify Tong Swee King against all costs and expenses arising therefrom. After the High Court had given judgment in favour of *Pegang Mining*, *Tong Swee King* filed a notice of appeal to the Federal Court against the whole of the decision given against her. Then, by an agreement made in secret between *Pegang Mining* and *Tong Swee King*, the latter accepted RM10,000 from Pegang Mining as payment for not proceeding with her appeal. Under those circumstances, Choong Sam applied to the Federal Court for leave to intervene praying that his name or the 2nd respondent's name be substituted for that of Tong Swee King on record.

[35] The Federal Court, by a majority allowed the application, and the decision was affirmed by the Privy Council.

[36] It is important to note that at that point of time, the Federal Court (Civil Appeals) (Transitional) Rules 1963 (L.N. 242/63) (the Transitional Rules 1963) contained the following provision in r. 43:

> 43. Where by reason of marriage, death or bankruptcy, or any other event occurring after the commencement of an appeal, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the appeal, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties, and such new party or parties, may be obtained *ex parte* on application to the Court or Judge, upon an allegation of such change, or transmission of interest or liability, or of any such person interested having come into existence.

(This rule later became rule 84 in the Rules of the Federal Court 1980 (P.U.(A) 33/80) and rule 71 in the Rules of the Federal Court 1995).

[37] It is surprising that the judgments of the Federal Court made no reference to that rule. The judgments of the Federal Court also made no reference to O. 16 r. 11 of the Rules of the Supreme Court 1957 ("RSC 1957") (now O. 15 r. 6 of the RHC 1980). The editor of the Malayan Law Journal added the reference "RSC 1957, O. 16") in the summary of the headnote. However, the judgment of the Privy Council did mention O. 16 r. 11 of the RSC 1957 but not r. 43 of the Transitional Rules 1963.

[38] The fact remains that at that point of time when the Federal Court and the Privy Council decided *Pegang Mining (supra)*, r. 43 of the Transitional Rules 1963 was in existence and it was that rule that governed the application to intervene in the Federal Court. However, if an application to intervene is made in the High Court as in this case the governing provision is O. 15 r. 6(2) of the RHC 1980. The main difference is that an application under O. 15 r. 6(2) of the RHC 1980 may be made "at any stage of the proceedings", which words were/are not to be found in the rules applicable to the Federal Court. In any event, in *Pegang Mining (supra)*, the application was made before the appeal was heard by the Federal Court. So,

while the Privy Council in *Pegang Mining (supra)* laid down the principles as to how the discretion to allow or not to allow intervention is to be exercised, *Pegang Mining (supra)* said nothing about at what stage a party may be allowed to intervene if the application were made in the High Court.

[39] All that I need to say about *Arab Malaysian (supra)* is that in that case the application to intervene was made to set aside a judgment obtained in default of appearance. There is a specific provision for that in O. 13 r. 8 of the RHC 1980. However, the Supreme Court did not refer to that provision but decided on the provision of O. 15 r. 6(2) of the RHC 1980, without saying anything regarding at what stage intervention may be allowed. Again, while the principle regarding the exercise of the discretion to allow to intervene, following *Pegang Mining (supra)*, is valid, Arab Malaysian is no authority regarding at what stage intervention under O. 15 r. 6 of the RHC 1980 may be allowed.

[40]*Tohtonku Sdn. Bhd. v. Superace (M) Sdn. Bhd. [1992] 1 CLJ 344 (Rep); [1992] 2 CLJ 1153*; [1992] 2 MLJ 63 SC (see also High Court judgment reported in [1989] 2 MLJ 298) is no authority regarding at what stage an application to intervene may be made. There, the application was to intervene to set aside an *ex parte* order pursuant to s. 16 of the Trade Descriptions Act 1972. There was no discussion at all on the phrase at "any stage of the proceedings". Indeed the Supreme Court judgment made no reference at all to O. 15 r. 6(2) of the RHC 1980.

[41] The learned author of the *Malaysian High Court Practice* Vol. 1 under the heading "[15.6.2] When and how application to be made" says:

> Although no limit is placed on time within which an application may be made for an order, it should be made as soon as possible to avoid inconvenience.

[42] So, when we talk about as soon as possible at any stage of the proceedings it must necessarily mean that even if the proceedings are still pending, it must be made as soon as possible.

[43] Considering all these authorities, my conclusion is that an application to intervene under O. 15 r. 6(2) of the RHC 1980 must be before judgment. To set aside an order or judgment, there must be a provision in the Rules that can be relied on for the purpose. This is provided for in O. 42 r. 13 of the RHC 1980:

> 13. Setting aside or varying judgments and orders (O. 42 r. 13)
>
> Where in these Rules provisions are made for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment must make his application to the Court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him.

[44] Examples of such provisions are O. 13 r. 8, O. 14 r. 11, O. 70 r. 18(6) and 20(9) and O. 81 r. 7 of the RHC 1980. In other cases, setting aside may only be done by a fresh action - see *Hock Hua Bank Bhd. v. Sahari bin Murid [1980] 1 LNS 92*.

[45] Let us now look at cases involving challenges to an order for sale by a person not

already a party to the proceedings leading to the order for sale being made who intervenes in order to set aside the order for sale.

[46] Before going any further, it must be remembered that where a non-party tries to intervene in the proceedings, he must necessarily do so under O. 15 r. 6 of the RHC 1980. There is no other provision under the National Land Code ("NLC") or any other law or rule for him to rely on. So, like interveners in other civil proceedings, he too must comply with the provisions of O. 15 r. 6 of the RHC 1980.

[47] I shall take the cases in chronological order.

[48] In *Hock Hua Bank Bhd. v. Sahari bin Murid* [1981] 1 MLJ 143 FC, (I am quoting the headnote):

> The learned judge had made an order for sale in a foreclosure proceeding. The order was made after hearing all the parties and was made despite a claim of *non est factum* and allegations of fraud and forgery by the respondent. The order was drawn up and perfected. There was no appeal against it. The respondent applied to set aside the judgment and this application was refused. Subsequently the respondent applied again to set aside the previous order. The learned judge thereupon set aside his order. The appellant appealed.
>
> Held: (1) the learned judge was *functus officio*;
>
> (2) the court had no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it had been entered or an order after it has been drawn up, except under the slip rule, so far as is necessary to correct errors in expressing the intention of the court, unless it is a judgment by default or made in the absence of a party at a trial or hearing;
>
> (3) if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment;
>
> (4) in this case the learned judge had no jurisdiction to set aside his own order and the original order must be restored, leaving it to the respondent to take out a fresh action to set aside the order on the ground of fraud.

[49] In this case, O. 15 r. 6 of the RHC 1980 was not an issue as the application was made by a party to the proceedings, not by an intervener. Thus, the Federal Court approached the matter from the angle of *functus officio*.

[50] In *Eu Finance Berhad v. Lim Yoke Foo [1982] 1 LNS 21*, FC it was held:

> (1) as soon as the Collector made the first order under section 263 of the National Land Code he was *functus officio* save as to his power under section 264(3) to postpone the sale ordered or to formally rectify the first order within the purview of section 33 with no power to make another order or subsequent order of sale under section 263;

> (2) the second order on which the respondent relied was no order at all and was a nullity and devoid of any effect.

[51] Again, this case did not concern O. 15 r. 6 of the RHC 1980 as there was no application to intervene since the applicant was already a party to the proceedings. Secondly, even though the second collector did not set aside the first order for sale, by issuing the second order for sale, the first order was suspended. This the Federal Court held the collector had no power to do as he was *functus officio*.

[52] Unfortunately, very often no one pays any attention to the real decision of the court. What is often quoted is the passage on an order which is a nullity.

[53] In *Mui Bank Bhd. v. Cheam Kim Yu (Beh Sai Ming, Interverner) [1992] 4 CLJ 2229; [1992] 1 CLJ (Rep) 222*, MUI Bank applied for and obtained an order for sale. After several unsuccessful attempts to auction the land, the land was eventually sold to one Ng Choon Meng. The full purchase price was paid and the registrar issued the certificate of sale by the court. In the meantime, the respondent (the debtor) had approached a buyer (the intervener) for the land and offered to sell the land to him. The offer was accepted by the intervener and MUI Bank consented to the sale on terms. Subsequently, the intervener applied to court to intervene in the said proceedings. The learned judge allowed the application and ordered, *inter alia*, that the public auction of the land be set aside. The Supreme Court, reversing the judgment of the High Court, *inter alia*, held:

> The application to intervene in the present proceedings was not made until a week after the issue of the certificate of sale by which time the auction sale was completed. The learned judge was clearly *functus officio* by then. Indeed, following *Hock Hua Bank Bhd. v. Sahari bin Murid*, the learned judge was *functus officio* after he made the order for sale on 29 August 1998. In the *Hock Hua* case, the allegations of fraud and forgery were made after the judge had made the order for sale but before the auction sale and the Federal Court held that the judge was *functus officio* after he made the order for sale in foreclosure proceedings when the order had been drawn up and perfected. True, after making an order for sale, the judge has the power to make other orders, including changes in the reserve price and the auction sale dates, but such orders are consequential to the order for sale. The point here is that the order for sale is a final order unless appealed against. Once the order for sale is made, drawn up and perfected, as here, the learned judge is *functus officio* and therefore has no power to set aside the order for sale.

[54] It is to be noted that even though in this case the application to set aside the order for sale was made by an intervener (not a party in the original proceedings), the judgment made no reference to O. 15 r. 6 of the RHC 1980. The court instead approached it from the angle of *functus officio*. It may well be that at that stage, leave was no longer an issue. It may also be that to lawyers who argued the case and to the court too the two approaches *ie*, at any stage of the proceedings and *functus officio* would, in substance, be similar and would lead to the same result. However, in my view, it would be clearer to everybody's mind if, in an application to intervene by a non-party, the focus is on O. 15 r. 6 of the RHC 1980. On the other hand, where the application to set aside an order is made by an existing party, then the court considers whether the judge is *functus officio*.

[55] In *United Asian Bank Berhad v. A. Subramaniam (as the personal representative of Roshammah a/p Samual (Deceased) & 4 Ors. [1994] 3 CLJ 681*, an order for sale was made and an auction date was fixed. Two days before the sale was to take place, the intervenors, the children of the borrower, filed an application for the sale to be stayed pending the disposal of their application to be substituted or added as defendants. They claimed that the order for sale was unlawful. The court granted the stay and the intervenors were added as defendants. The question before the court was whether, in the light of the issues raised by the defendants, their application to set aside the order for sale should be allowed. Mahadev Shanker J, (as he then was) dismissed the application to set aside the order for sale. However, in his judgment, he did touch on intervention under O. 15 r. 6(2)(b)(i) and (ii) of the RHC 1980. This is what the learned judge said:

> The order for sale which the intervenors are now seeking to set aside is a final order unless appealed against. Once it was made, drawn up and perfected this Court is *functus officio* and has no power to set it aside. It was so held by the Supreme Court in *Mui Bank Bhd. v. Cheam Kim Yu (Beh Sai Ming, Intervenor) [1992] 4 CLJ 2229; [1992] 1 CLJ (Rep) 222*. In that case the public auction was completed. Thereafter the registered owner purported to sell the land to the intervenor. To that extent the facts can be distinguished because in our case the intervenors sought to come in two days before the sale actually took place. Should they have been permitted to do this? I hope enough has been said to demonstrate the conclusion that this purported intervention should never have seen the door of this court.
>
> Intervention to be legitimate must qualify with the conditions prescribed by O. 15 r. 6 2(b)(i) or (ii) of the Rules of the High Court 1980. It may be permitted at any stage of the proceedings. This means it must be applied for before the final order is made, not after it has been perfected and extracted. Secondly a person can only be regarded as a proper party if his presence before the Court is imperative for the adjudication. In a general sense what this means is that the intervenor must have a direct legal or financial interest in the action.

[56] This, as far as I can find, is the clearest, most direct and accurate observation regarding intervention to set aside an order for sale. I agree with the learned judge entirely.

[57] What conclusions can be drawn from the provisions of O. 15 r. 6 of the RHC 1980 and the cases discussed above? I think, they are as follows:

[58] First, an application to set aside an order for sale by an existing party to the proceeding may be made before the final order is perfected, otherwise the judge is *functus officio*.

[59] Secondly, an application for leave to intervene in order to set aside an order for sale by a party not already a party to the proceedings must be made under O. 15 r. 6 of the RHC 1980. The application may be made "at any stage of the proceedings" meaning before judgment, otherwise the proceedings have concluded and there is no longer a proceeding in existence for the party to intervene in. The judge has also become *functus officio*. Even then, the application must be made promptly. Order 15 r. 6 of the RHC 1980 applies to all civil proceedings whether commenced by a writ, motion or summons etc.

[60] Thirdly, an application for leave to intervene is supported by an affidavit. In other words,

in such an application, the judge merely decides on affidavit evidence, whether or not leave should be granted. At that stage, the judge should not make a definite finding of facts which, as envisaged by O. 15 r. 6 of the RHC 1980, will and can only be made after all evidence has been adduced in the trial which will follow subsequently.

[61] Fourthly, any party, whether a party in the original proceeding or not, who wants to challenge the order for sale, or for that matter, any judgment, other than a default judgment or where it is specifically provided for in the rules, may only do so by filing a fresh action.

[62] Fifthly, while the principles laid down in *Pegang Mining* as to exercise of discretion are applicable, all the requirements of O. 15 r. 6(2) must be satisfied.

[63] What happened in the instant case? The application to intervene was made about one year and ten months after the date of the issuance of the certificate of sale, about two years after the successful auction and about two years and three months after the order for sale was made.

[64] What did the learned High Court judge decide? On 30 January 1995, *ie*, three years and five months after the order for sale was made, he allowed Staghorn to intervene. The judgment runs into 55 pages, just on the application for leave to intervene.

[65] From the judgment, it can be seen that, while the learned Judge did refer to O. 15 r. 6 of the RHC, he failed to consider the opening words "At any stage of the proceedings". He straight away relied on *Pegang Mining (supra)* and *Arab Malaysian (supra)* for the principles applicable. As I have said, while the principle laid down in *Pegang Mining (supra)* as to exercise of discretion are applicable, the learned judge should have addressed the first point first *ie*, whether there was a proceeding in existence for Staghorn to intervene in. Only if there was a proceeding still pending, would the principles in *Pegang Mining (supra)* become applicable. Had the learned judge referred to the judgments that I have mentioned earlier, he would have seen straight away that it was too late for Staghorn to apply to intervene. That would have put an end to the matter.

[66] Of course, the learned Judge did discuss the issue of *functus officio*. However, he held that the issue of *functus officio* "which was correctly applied in *Mui Bank (supra)* " (to translate his words) was not applicable in this case. He said that in *Mui Bank (supra)*, the order for sale could not be challenged because it was made in compliance with all statutory provisions. On the other hand, in the instant case, the order for sale was not obtained in strict compliance with the statutory provisions, *inter alia*, s. 281(2) and (3) of the NLC. The learned judge then devoted more than thirty pages of his judgment to this and came to the following conclusions:

> (1) Hong Leong's lien-holder's caveat was not valid.
>
> (2) Third party charge by Teck Lay Realty was not valid and wrong in law.
>
> (3) The memorandum of transfer of Teck Lay Realty was not valid and wrong in law.

[67] The learned judge in para. 32 of his judgment then said this:

> In this case the court is not *functus officio* and as such the court is competent to set aside the orders that were invalidly obtained; consequently all the orders and even the sale conducted thereunder must be set aside.

[68] The following points should be made. First, the learned judge did not consider at all the opening words of O. 15 r. 6(2) ("At any stage of the proceedings..."). He did consider the issue of *functus officio*. However, in considering whether the court was*functus officio*, he did not ask himself the question whether the final order had been made and perfected. Instead, he went at great length to consider whether the order for sale was validly made as if he was sitting in this court or the Court of Appeal hearing an appeal on merit against the order for sale. Having held that the order for sale was wrong in law and should be set aside, he held that the judge that made the order for sale was not *functus officio* and allowed Staghorn to intervene.

[69] With respect, the approach is clearly wrong. In an application to intervene by a non-party in a proceeding all that a judge has to do is, first, to determine whether there is a proceeding still pending. Where a final order, in this case the order for sale, has been made and perfected clearly the proceeding has concluded. It is then too late to intervene under O. 15 r. 6(2)(b)(ii) of the RHC 1980.

[70] Secondly, even in considering whether or not to grant the intervention, assuming that there was still a proceeding in existence, all that the judge should do was to be satisfied that the applicant has shown that "there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter...". This is done on affidavit evidence. The judge is not called upon and should not make a definite finding of facts or law based on the facts which, by right, had not been adduced yet.

[71] Thirdly, in an application to intervene under O. 15 r. 6 of the RHC 1980, the issue of *functus officio* merges with the issue whether there is any proceeding still in existence. It is another way of looking at the same thing. The issue is whether the final order has been made and perfected, not whether the judge is of the opinion that the order made by the earlier judge is, in his view, right or wrong in law.

[72] Fourthly, the learned judge merely mentioned O. 5 r. 6 of the RHC 1980. He did not direct his mind to its provisions and asked himself the question whether each of the requirements of the rule has been complied with. Instead, he jumped straight to and quoted the Supreme Court Practice and the principles laid down in *Pegang Mining (supra)* and said that the test had been followed by the Supreme Court in *Arab Malaysian (supra)*. The provisions of the rule were ignored.

[73] I come now to the judgment of the Court of Appeal. Here, I shall only deal with the first part of the judgment *ie*, on intervention. First, the Court of Appeal took into account the restriction imposed on it by this court, which, I must say, it correctly understood when it said:

> Faced with this situation, we comprehend that the restriction placed upon us by the Federal Court is only confined to the issue of there being no proceedings in existence after the Order for Sale and thus the Court had no

jurisdiction thereafter to make any order under O. 15 r. 6(2).

[74] However, as will be elaborated later, the Court of Appeal missed one point, that is the part of the order that says "termasuk budibicara mahkamah" (including the exercise of the court's discretion). That was not excluded by the Federal Court. The Court of Appeal would still have to determine whether the High Court, in granting the leave to intervene, had exercised its discretion correctly.

[75] The Court of Appeal then cited passages from *Pegang Mining (supra)* and *Arab Malaysian (supra)* as the authority without analyzing the facts and the circumstances surrounding the cases and held that the "learned judge in considering this application before him to intervene was firmly in grip of the aforesaid tests." Of course, the learned judge too had cited the two cases, but also without analyzing them. The Court of Appeal then went on to consider the issue of *functus officio* which, in its view, was "materially different from the previous ruling of there being no proceedings in existence" and therefore, not prevented by the order of this court of 5 August 1997. The Court of Appeal, following *Mui Bank Bhd. (supra)*, without really saying so, did conclude that the learned judge was *functus officio* and therefore had no power to set aside the order for sale. But it did not stop there. It went on to apply the "exception" made in *Badiaddin bin Mohd. Mahidin v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75*, because, as found by the learned High Court judge (Faiza Tamby Chik J), the order for sale made by the earlier judge (Wan Yahya J) contravened a substantive statutory provision *ie*, s. 281(1) and (2) of the National Land Code. First, the mandatory requirement for the creation of the lien holder's caveat was not complied with since it was Teck Lay Realty or its solicitors and not the registered proprietor who had deposited the document of title of the said land with Hong Leong. Secondly, the loan was for the nominee of Teck Lay Realty, again not the registered proprietor. Thirdly, judgment was obtained by Hong Leong against the borrower (Park Avenue) instead of the registered proprietors. As a result the order for sale was tainted with illegality. The Court of Appeal then concluded:

> When the substantive law is breached the court is permitted to depart from the *functus officio* concept laid down in *Mui Bank Bhd. v. Cheam Kim Yu (supra)*, and set aside, *ex debito justitiae*, the Order for Sale under the rule expressed in *Badiaddin bin Mohd. Mahidin v. Arab Malaysian Finance Bhd. (supra)*.
>
> With these, we find that Staghorn has a right to apply to intervene....

[76] I have the following comments to make about the judgment of the Court of Appeal on intervention.

[77] First, while, as directed by this court (even though in my view wrongly) the Court of Appeal rightly refrained from considering whether there was a proceeding still in existence, the Court of Appeal failed to focus its mind on the provision of O. 15 r. 6(2) of the RHC 1980 and ask itself the question whether the learned High Court judge had himself addressed his mind to the said provision in the exercise of his discretion to grant the leave to intervene. Just because the Court of Appeal found the learned High Court judge had cited *Pegang Mining (supra)* and *Arab Malaysian (supra)* it concluded that the learned High Court Judge "was firmly in grip with the aforesaid test". It failed to consider whether "there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or

matter." Instead, like the learned High Court judge, the Court of Appeal had placed the cart before the horse by deciding that the order for sale was wrongly made and therefore leave to intervene should be granted. That was not what it should consider, at least not at that stage. It should consider whether the requirements of the rule have been satisfied. How does one say that there is an issue that "would be just and convenient to determine" when the order had been made, perfected and carried out completely? There is simply no more issue left to be determined in that proceeding.

[78] Instead of focusing on the provision of O. 15 r. 6 of the RHC 1980, both the Court of Appeal and Faiza Tamby Chik J focused on the order for sale to see whether it was validly made or not. Having found, at that stage, that it was not validly made, then relying on *Badiaddin (supra)*, it allowed the application to intervene.

[79] It is not my intention to make a detailed analysis or give any final opinion on *Badiaddin* 's case *(supra)*, except to make a few points. First, in *Badiaddin (supra)*, the appellants commenced a fresh action to have the second order of the High Court declared null and void and to have it set aside on the ground that it contravened the provisions of s. 13 of the Malay Reservations Enactment (FMS Cap. 142.) This court in that case was dealing with the inherent jurisdiction of the court to set aside a final order. The judgment of this court on that issue was a split decision: Mohd. Azmi FCJ and Gopal Sri Ram JCA were of the view that it could be done while Peh Swee Chin FCJ disagreed. Even Azmi FCJ talked about the "extraordinary circumstances" of the case and said that "the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction." The learned judge further added that "The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice."

[80] On the contrary, here we are dealing with an application to intervene under O. 15 r. 6 of the RHC 1980. The consideration is the provision of that rule itself, whether the application satisfies the requirement of the rule. So, *Badiaddin (supra)*, at that stage, is not relevant. So, even if *Badiaddin (supra)* is good law, it is not relevant in an application to intervene under O. 15 r. 6 of the RHC 1980. It is, as in that case, relevant in considering whether the previous order of the court could be set aside, in a fresh action.

[81] Secondly, it is one thing for the apex court to look at the order of a lower court and say that the order is null and void because it contravenes a written law, especially as in *Badiaddin (supra)* where the contravention is glaring. But, let us reverse the position. Let us assume that a case has reached the Federal Court and that the Federal Court has made an order. Subsequently, the losing party commences a fresh action in the High Court to set aside the order on the ground of illegality for contravention with a written law. Following *Badiaddin (supra)* and the dictum in *Eu Finance Bhd. (supra)* the High Court would be at liberty to reopen the case, declare the Federal Court order null and void and set it aside! I dread to think of such a situation.

[82] Even where it involves a judgment of a court of co-ordinate jurisdiction, a second judge scrutinizing an earlier judgment or order of another judge may easily find a point which he disagrees with, even in law. Maybe that point was not even raised or argued before the first judge. As a matter of judicial policy, should the second judge be allowed to reopen the case, set aside the earlier judgment or order and substitute it with his own? If he can do it, why

can't a third judge do the same with the second judge's order, and so on? That will encourage "judge shopping." The same process can also happen at every level of the court system.

[83] The abuse voiced by Peh Swee Chin FCJ *eg*, where he said "Further, a point of illegality could not be reserved by a litigant for future use without deploying it at the trial or in an appeal therefrom" should not be taken lightly. That is exactly what had happened in this case.

[84] Even in applying the principles laid down in *Pegang Mining (supra)*, the Court of Appeal appears to be only concerned with the dicta of Lord Diplock which it quoted, that "... one of the principal objectives of the rule is to enable the court to prevent injustice being done to a person whose rights **will be affected** by its judgment **by proceeding to adjudicate** upon the matter in dispute in the action without his being given an opportunity of being heard. To achieve this object calls for flexibility of approach..." (emphasis added).

[85] The Court of Appeal also quoted the passage on "the test" expressed by the Privy Council which I would also like to reproduce here before I give my comment:

> A better way of expressing the test is: **will** his rights against or liabilities to any party to the action in respect of the subject-matter of the action be directly affected by any order which **may** be made in the action. (emphasis added)

[86] The first point to note is that, bearing in mind the words underlined, it is very clear that Lord Diplock was talking about a future order that may be made in the action. This is consistent with the provision of O. 15 r. 6 of the RHC 1980 as I have discussed at length earlier. Furthermore, as has been pointed out earlier, in that case, the application to intervene was made before the Federal Court heard the appeal and made any order and there was a provision for that in the Transitional Rules 1963.

[87] Secondly, "to prevent injustice being done" is not the only consideration. It is "one of the principal objectives", even in the words of Lord Diplock. That does not mean that just because the second judge is of the view the order of the first judge had caused injustice, the order to intervene should be given. The requirements of the rule still have to be satisfied.

[88] Thirdly, the finding of facts of the Court of Appeal regarding the rights of Staghorn does not seem to support the test that it applies. The judgment of the Court of Appeal clearly says (here, I am afraid I have to refer to the second part of the judgment):

> ... we are not in agreement with the learned Judge in ordering the handing over of the document of title to Staghorn, **more so** declaring Staghorn as the "rightful true beneficial owner of the said land". All documentary evidence concludes that **Staghorn has divested its rights and interest in the said land to** the 3rd defendant (Teck Lay Realty - my addition)... To accede to the demand of Staghorn for the return of the document of title, is, in our view, inequitable and without logic, and to register Staghorn as the registered proprietor is far fetched when evidence positively identifies the 3rd. defendant as the beneficial owner of the land that is to be changed to the Plaintiff (Hong Leong - my addition).... (emphasis added).

[89] So, if Staghorn has divested its rights and interest and has no beneficial interest in the

said land, how does Staghorn satisfy the test?

[90] In the final analysis, in this case, we have the following scenario.

Judge No. 1 High Court (Wan Yahya J)

[91] On 9 August 1991, Wan Yahya J heard the application for an order for sale, gave his decision, made the order prayed for, which had been perfected, and the auction was successfully carried out on 16 November 1991.

Judge No. 2 High Court (Faiza Tamby Chik J)

[92] There was an application to intervene before Faiza Tamby Chik J pursuant to O. 15 r. 6(2) RHC 1980. What the learned Judge should have done was to consider (1) whether there was a proceeding still pending; (ii) whether the requirement of para (ii) of r. 6(2) of O. 15 RHC 1980 was fulfilled. He may apply the principles laid down in *Pegang Mining (supra)*. That was all.

[93] Instead he failed to pay attention to the provisions of O. 15 r. 6(2). Thus he did not consider at all whether there was proceeding still pending. He did not consider whether it was convenient to have the issues determined as between the parties. Instead, he examined the order made by Wan Yahya J as if he was hearing an appeal, decided that the order for sale made by Wan Yahya J contravened the provisions of s. 218 of the National Land Code and therefore wrong in law, and, because of that, granted leave for Staghorn to intervene.

Court Of Appeal No. 1

[94] That short judgment of the Court of Appeal dated 15 June 1995 had hit the nail on the head. It was absolutely correct. At that point of time when the application to intervene was made, there was no longer any proceedings in existence. So, the application was not made at any stage of the proceedings.

Federal Court No. 1

[95] This court when hearing the appeals the first time, on 5 August 1997 reversed the judgment of the Court of Appeal No. 1 sending the appeals back to the Court of Appeal to hear all issues including the exercise of the discretion but excluding the jurisdiction of the High Court No. 2 under O. 15 r. 6(2) of the RHC 1980. Unfortunately no reasoned judgment was given.

Court Of Appeal No. 2

[96] The Court of Appeal was right when it took the view that because of the order of this court, it was not open to it to consider the issue whether there was a proceeding still pending when the application to intervene was made. But it failed to realize that that was the only issue that was not open for it to consider. All the other requirements of O. 15 r. 6 of the RHC 1980 must still be considered. But, like Faiza Tamby Chik J, it did not. Instead, like Faiza Tamby Chik, purporting to rely on *Badiaddin (supra)*, it held that the order for sale was wrongly made and, because of that, allowed Staghorn to intervene.

[97] I am of the view that both Faiza Tamby Chik J and the Court of Appeal had misdirected themselves in their judgments to allow Staghorn to intervene. This is in spite of taking into account the order of this court hearing the appeal for the time which I hold to be binding on the Court of Appeal in this case.

[98] In the circumstances, in my judgment, the appeals against the order for leave to intervene in Civil Appeals No. 02-14-2005(B) and 02-15-2005(B) should be allowed. As a consequence, the appeals against the setting aside of the order for sale should also be allowed as the orders cannot stand anymore. Both appellants are entitled to their costs in their respective appeals in this court and in the courts below. Further, Staghorn's appeal in Civil Appeal No. 02-17-2005(B) should be dismissed with costs in this court and in the courts below. The deposits paid in respect of Civil Appeals 02-14-2005(B) and 02-15-2005(B) should be refunded to Hong Leong and Wong Bin Chen respectively and the deposit paid in respect of Civil Appeal No. 02-17-2005(B) should be paid to Hong Leong on account of taxed costs.

[99] My brother Azmel Haji Maamor FCJ has read this judgment in draft and agreed with it. My brother Abdul Aziz Mohamad FCJ also agrees with the conclusions and the orders mentioned in the preceding paragraph. However he will issue a separate judgment. In the circumstances, this court unanimously orders accordingly.

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