BANK KERJASAMA RAKYAT MALAYSIABHD v. EMCEE CORPORATION SDN BHD
COURT OF APPEAL, KUALA LUMPUR
ABDUL HAMID MOHAMAD, JCA; RICHARD MALANJUM, JCA; ARIFFIN ZAKARIA, JCA
CIVIL APPEAL NO: N-02-421-1999
29 JANUARY 2003
[2003] 1 CLJ 625

***BANKING**: Charge - Order for sale - Loan facility granted under Islamic Banking principle - Whether Bank could enforce charge upon default in loan repayments - Whether remedy available under National Land Code and Rules of the High Court 1980*

***LAND LAW**: Charge - Order for sale - Cause to the contrary - Whether established - Whether trial judge rightfully dismissed application for order for sale*

The appellant had granted the respondent a loan facility of RM20 million under the Islamic banking principle of Al-Bai Bithaman Ajil. The respondent defaulted in the loan repayments and the appellant issued a Form 16D notice under the National Land Code. The respondent failed to comply with the notice and the appellant sought for an order for sale of the security charged under the loan facility. The High Court dismissed the application on the fact that the appellant had breached its agreement with the respondent to release an initial sum of RM5 million to the respondent. The appellant appealed to this court. The main issue was whether there was a failure by the appellant to release the amount of RM5 million to the respondent based on the agreements made between the parties so as to establish a "cause to the contrary" under s. 256(3) NLC to refuse an order for sale.

Held:

Per Abdul Hamid Mohamad JCA

[1] The facility given by the appellant to the respondent was an Islamic banking facility. But that did not mean that the law applicable in this application was different from the law applicable if the facility was given under conventional banking. The charge was a charge under the National Land Code. The remedy available and sought was a remedy provided by the National Land Code. The procedure is provided by the Code and by the Rules of the High Court 1980. The court adjudicating it was the High Court. Therefore, the same law was applicable, the same order that would be, if made, and the same principles that should be applied in deciding the application.

[2] The applicable law was s. 256 NLC. The leading case on the subject was *Low Lee Lian v. Ban Hin Lee Bank Bhd* and the issue was whether the alleged breach of contract by the appellant fell under one of the three categories of cases mentioned therein to establish "cause to the contrary" under s. 256(3).

[3] It was clear from the agreements made between the parties that the first instalment should be paid after the appellant released the facility to the Marginal Deposit Account. There was no dispute that the appellant had released RM4,345,831.05. Nowhere in the agreements was it provided that the first instalment would become due after RM5 million was released. Neither was the amount of first release mentioned or the phrase "first release" defined. That the instalment period began to run upon the first release being made was quite reasonable and it was beyond any doubt that there was a first release or releases. The instalments became payable and were paid partly. In the circumstances, the demand by the appellant could not be said to be premature.

[4] The validity of the charge was not in issue. The statutory procedural requirements had been complied with. There was nothing that brought the application within the three categories of cause to the contrary established in *Low Lee Lian* to warrant the refusal of the order for sale.

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu bank telah memberikan responden satu kemudahan pinjaman wang RM20 juta di bawah prinsip urusan bank Islam Al-Bai Bithaman Ajil. Responden memungkiri perjanjian berkenaan pembayaran ansuran pinjaman tersebut dan justerunya perayu mengeluarkan satu notis Borang 16D di bawah Kanun Tanah Negara ('KTN') terhadap responden. Responden gagal menepati notis tersebut dan perayu seterusnya memohon untuk satu perintah jualan sekuriti yang digadaikan di bawah kemudahan pinjaman wang tersebut. Mahkamah Tinggi menolak permohonan itu atas alasan bahawa perayu telah memungkiri perjanjian dengan responden untuk melepaskan jumlah wang ('pelepasan pertama') sebanyak RM5 juta terdahulu kepada responden seperti yang dijanjikan. Maka, rayuan perayu ini. Isu utama ialah sama ada perayu memang gagal untuk melepaskan jumlah wang sebanyak RM5 juta kepada responden berdasarkan perjanjian-perjanjian yang dibuat di antara mereka dan sama ada ianya merupakan satu "cause to the contrary", iaitu, sebab-sebab sebaliknya bagi menolak permohonan perayu untuk perintah jualan di bawah s. 256(3) KTN.

Diputuskan:

Oleh Abdul Hamid Mohamad HMR

[1] Kemudahan yang diberikan oleh perayu kepada responden adalah satu kemudahan di bawah urusan bank Islam. Tetapi ini tidak bermakna bahawa undang-undang yang terpakai dalam permohonan ini berbeza daripada undang-undang yang terpakai jika kemudahan tersebut telah diberikan di bawah urusan bank biasa. Gadaian tersebut adalah satu gadaian di bawah KTN. Remedi yang tersedia dan yang dipohon ditetapkan di bawah KTN. Prosedur yang patut diikuti ditetapkan di bawah KTN dan Kaedah-kaedah Mahkamah Tinggi 1980. Mahkamah yang membicarakannya adalah Mahkamah Tinggi. Dengan itu, undang-undang sama terpakai, perintah sama yang akan dibuat dan prinsip-prinsip sama patut terpakai dalam memutuskan permohonan tersebut.

[2] Undang-undang terpakai adalah s. 256 KTN. Kes penting berkenaannya adalah *Low Lee Lian v. Ban Hin Lee Bank Bhd* dan isunya adalah sama ada mungkir kontrak perayu jatuh di bawah salah satu kategori kes-kes yang dibentangkan dalam kes tersebut untuk merupakan satu "cause to the contrary" di bawah s. 256(3).

[3] Adalah jelas daripada perjanjian-perjanjian di antara perayu dengan responden bahawa ansuran pertama patut dibayar oleh responden selepas perayu melepaskan kemudahan tersebut ke akaun deposit margin. Tidak dipertikaikan bahawa perayu telah pun melepaskan RM4,345,831.05. Tiada apa pun dalam perjanjian-perjanjian yang menetapkan bahawa ansuran pertama patut dibayar hanya selepas RM5 juta dilepaskan. Juga amaun untuk dilepaskan tidak disebutkan dan tiadanya definasi frasa "first release". Bahawa masa untuk membuat pembayaran ansuran mula berjalan selepas amaun pertama dilepaskan adalah wajar dan tidak diragui bahawa terdapatnya pelepasan pertama atau pelepasan-pelepasan wang. Ansuran-ansuran pembayaran sepatutnya dibuat dan telah pun dibayar sebahagiannya. Dalam keadaan ini, tuntutan perayu tidak boleh dikatakan pramasa.

[4] Keesahan gadaian tersebut bukanlah satu isu. Keperluan prosedur statutori telah dipatuhi. Tiada apapun yang membawa permohonan untuk perintah jualan tersebut di bawah salah satu kategori kes-kes "cause to the contrary" yang dibentangkan oleh *Low Lee Lian* untuk menolak permohonan untuk perintah jualan.

Rayuan dibenarkan dengan kos; deposit dikembalikan kepada perayu.]

Reported by Usha Thiagarajah

Case(s) referred to:

*Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 FC (**refd**)*

Legislation referred to:

National Land Code, s. 256(1)

Counsel:

For the appellant - Arshad Ismail (Lucy Tan); M/s Mohamed Ismail & Co

For the respondent - Kevin Danker (Peter Skelchy); M/s Danker & Co

JUDGMENT

Abdul Hamid Mohamad JCA:

The appellant (plaintiff in the court below) granted the respondent (defendant in the court below) a facility of RM20 million under the Islamic banking principle of Al-Bai Bithaman Ajil. Both parties executed two agreements on the same date ie, 2 May 1996. The first is the property purchase agreement ("the first agreement"). Under that agreement the respondent sold 22 pieces of land to the appellant for RM20 million. The second agreement is the property sale agreement. By that agreement the appellant sold to the respondent the same

properties upon deferred payment terms. Clause 3.1 provides for 36 monthly instalments totaling RM23,571,864.

As a security for the repayment of the sale price of RM23,571,864 under the second agreement, the respondent, on 2 May 1996, charged to the appellant 15 pieces of the land under the National Land Code 1965.

The respondent failed to pay the instalments under the second agreement. The appellant issued a form 16D notice under the National Land Code 1965 against the respondent. The respondent having failed to comply with the form 16D notice, the appellant filed an originating summons against the respondent for an order for sale under s. 256 of the National Land Code 1965.

Prior to the issuance of the form 16D notice, the respondent had made some payments to the appellant under the second agreement and the total amount paid was RM167,393. 86.

The learned judge dismissed the application. The appellant appealed to this court.

Judgment Of The High Court

The judgment is a one-and-a-half-page judgment. The learned judge noted, *inter alia*, that:

(a)the appellant failed to pay a portion of the instalments due of RM2,556,001.28 as on 11 February 1998;

(b)the respondent did not claim the whole of the purchase price because the respondent had only utilised the facility up to RM4,934,220.48, leaving a balance of RM15,654,168.50 unused.

The learned judge dismissed the application for an order for sale. The learned judge's grounds are as follows:

Saya tolak permohonan plaintif kerana plaintif mungkir janji tidak dapat memenuhi komitmennya untuk membayar RM5 juta kepada defendan dari akaun margin dan kemungkinan itu menjadi punca defendan ketiadaan modal kerja dan ini menyebabkan projek menjadi terbengkalai. Plaintif mengakui tidak menunaikan notis drawdown bertarikh 3.6.96 untuk jumlah RM3,000,000 tetapi dikatakan defendan belum menepati syarat. Saya puashati plaintif gagal membayar wang yang kena dibayar pada masa defendan memerlukannya. Maka saya tolak permohonan plaintif dengan kos.

The Law

As was mentioned at the beginning of this judgment the facility is an Islamic banking facility. But that does not mean that the law applicable in this application is different from the law that is applicable if the facility were given under conventional banking. The charge is a charge under the National Land Code. The remedy available and sought is a remedy provided by the National Land Code. The procedure is provided by the Code and the Rules of the High Court 1980. The court adjudicating it is the High Court. So, it is the same law that is applicable, the same order that would be, if made, and the same principles that should be

applied in deciding the application.

The main source of the applicable law is s. 256 of the National Land Code:

256(1) This section applies to land held under:

(a)registry title;

(b)the form of qualified title corresponding to registry title: or

(c)subsidiary title,

and to the whole of any divided share in, or any lease of, any such land.

(2) Any application for an order for sale under this Chapter by a chargee of any such land or lease shall be made to the court in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure.

(3)On any such application, the court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary.

The leading case on the subject is *Low Lee Lian v. Ban Hin Lee Bank Bhd.* [1997] 2 CLJ 36 (FC). In opposing an application for an order for sale under the same section, it was *inter alia* argued that: (a) the bank had varied the rate of interest without giving any notice of the same to appellant; and (b) the bank had, without the appellant's knowledge permitted the third party to breach the terms of the agreement between them:

Held, dismissing the appeal:

(1)'Cause to the contrary' within s. 256(3) of the Code might be established only in three categories of cases: (i) when a chargor was able to bring his case within any of the exceptions to the indefeasibility doctrine in s. 340 of the Code; (ii) when a chargor could demonstrate that the chargee had failed to meet the conditions precedent for the making of an application for an order for sale; and (iii) when a chargor could demonstrate that the grant of an order for sale would be contrary to some rule of law or equity. If no cause to the contrary could be shown, the court would be obliged to make an order for sale (see pp. 82F-G, 83F and 83H-I); *Murugappa Chettiar v. Letchumanan Chettiar* [1939] MLJ 296 and *Keng Soon Finance Bhd. v. MK Retnam Holdings Sdn. Bhd & Anor* [1989] 1 MLJ 457 followed.

(2)In the instant case, it was not sufficient to allege mere breaches by the bank of the loan agreement between the bank and the third party or even of the terms of the annexure to the charge in order to resist the application under s. 256(3) of the Code. The allegation that the bank acted in breach of contract, while it might give rise to an independent action in personam, was insufficient *per se* to defeat the ad rem rights of the bank under its registered charge to an order for sale. It was clear that the appellant had failed to meet the requisite legal test of what amounted to a cause to the contrary. The judge therefore correctly made the order for sale (see pp. 87H and 89C).

So, the issue is whether the alleged breach falls under one of the three categories mentioned

in *Low Lee Lian.*

We shall now look at the charge and the annexture thereto. Clause 1 (Security) of the annexture, *inter alia*, provides:

1. The said Land together with the buildings erected or to be erected thereon is hereby charged to the Bank with the payment on demand of the sum of... (RM23,571,864.00)....

Clause 2 (Covenant) provides:

2. Without prejudice to the right of the Bank to require full payment on demand, the chargor will pay to the Bank the indebtedness at the times and in the manner set out in the Security Documents.

Clauses 6 (Default) and 7 (Event of Default) provide, respectively:

6. In the event an Event of Default set out in Clause 6.1 of the Property Sale Agreement (hereinafter referred to as "Event of Default") occurs, then and in any of such cases the Bank may declare that an Event of Default has occurred and simultaneously or at any time thereafter, irrespective of whether such event mentioned herein is continuing the Bank may at its absolute discretion by written notice to the Chargor declare the Indebtedness immediately due and payable.

7. In the event of the occurrence of any Event of Default (including default in the agreement or covenant to pay the sum for the time being owing to the Bank on demand as aforesaid) occurring and continuing for a period of not less than seven (7) days it shall be lawful for the Bank forthwith to give the statutory notice pursuant to the provisions of the National Land Code requiring the Chargor to remedy the said breach within a period of not less than seven (7) days and service of such notice may be effected as may be prescribed in the National Land Code.

Clause 6.1 of the second agreement provides a list of "Events of Default", the relevant one being para. (a):

(a)if the customer defaults in the payment of any one or more of the instalments of the Sale Price set out in Clause 3.1 (a) hereof or the redemption sums referred to in Clause 3.1(b) hereof or any other monies whatsoever herein or in any of the other Security Documents agreed to be paid; or

This clause, in turn, refers to cl. 3.1:

3.1 Payment of Sale Price

The Customer shall settle the Sale Price to the Bank within a period of thirty six (36) months from the date of the first release of the Facility by the Bank pursuant to the Property Purchase Agreement (hereinafter referred to as "the Payment Period") by the two following modes whichever shall be earlier:

(a)by thirty six (36) monthly instalments as follows:

MonthAmount per Instalment Total

(RM) (RM)

1st to 9th 91,666.67 825,000.03

10th to 35th842,476.4421,904,387.44

36th842,476.53 842,476.53

_____

23,571,864.00

==========

and the first of such instalments shall be paid on the first day of the month next following the month in which the Bank releases the Facility to the Marginal Deposit Account pursuant to Clause 3.1 of the Property Purchase Agreement and the subsequent instalments shall be paid at monthly intervals thereafter (hereinafter collectively referred to as "the Payment Dates") PROVIDED that the Bank may at its absolute discretion extend any of the Payment Dates upon such terms and subject to such conditions as it deems fit; and

This cl. (3.1 of the second agreement) refers to cl. 3.1 of the first agreement. This clause contains a list of conditions precedent for the release of the facility to marginal deposit account and previous financier. The appellant is obliged to release the facility to the marginal deposit account only upon the fulfilment to the satisfaction of the bank of the conditions precedent. Among them are:

(n) no event of default shall have occurred.

(p) such other conditions as may be imposed by the Bank at its absolute discretion.

That clause ends with the words:

Forthwith upon releasing the Facility to the Marginal Deposit Account the Bank shall release the Redemption Sum to the Previous Financier and the difference if any between Ringgit Malaysia Five Million (RM5,000,000.00) and the Redemption Sum (hereinafter referred to as "the said Difference") to the Customer.

It is clear that the first instalment shall be paid after the appellant bank releases the facility to the marginal deposit account. There is no dispute that the Appellant bank had released RM4,345,831.05. But, the respondent says that only after RM5,000,000 is released that the first instalment becomes due. Where is that provided for? The only place the figure RM5,000,000 appears is at the end of cl. 3.1 of the first agreement. That too is only when it is talking about the release of the Redemption Sum to the previous financier and the difference between RM5,000,000 and the redemption sum to the respondent. Indeed that paragraph beginning with "Forthwith...." seems to appear out of nowhere, as if something else before it is missing. But both parties rely on the same document. We accept it as it is.

Clause 3.1 of the second agreement talks about the first release of the facility but nothing is mentioned about the amount of first release. "First release" is not defined either. But, it says that upon the first release being made the instalment period begins to run. That is quite reasonable.

That there was a "first release" or "releases" is beyond any doubt. The instalments became payable and were paid partly. In the circumstances the demand cannot be said to be premature. Therefore it cannot be a cause to the contrary.

We also note that that the validity of the charge is not in issue. The statutory procedural requirements have been complied with. There is nothing that brings it within the three categories of cause to the contrary established in *Low Lee Lian*. In the circumstances, we are of the view that the respondent has failed to show a cause to the contrary that warrants the refusal of the order for sale. We would therefore allow the appeal with costs and order that the deposit be refunded to the appellant.