PERWIRA HABIB BANK MALAYSIA BHD v. LUM CHOON REALTY SDN BHD
FEDERAL COURT, PUTRAJAYA
STEVE SHIM, CJ (SABAH & SARAWAK); ABDUL HAMID MOHAMAD, FCJ; PAJAN SINGH GILL, FCJ
CIVIL APPLICATION NO: 02-13-2003 (W)
10 AUGUST 2005
[2005] 4 CLJ 345

***LAND LAW**: Charge - Foreclosure - Whether requirements of O. 83 r. 3(3) RHC 1980 to be complied with in situations of foreclosure or sale of charged Property - Whether incumbent for chargee to provide particulaRs in consonance with O. 83 r. 3(3) RHC 1980 in foreclosure proceedings - Whether procedural requirements of O. 83 r. 3(1), (3), (6) and (7) must be complied with strictly for purpose of seeking enforcement of charge*

***LAND LAW**: Charge - Order for sale - Whether delay in applying to set aside order for sale will bar application to set aside order for sale that is so fundamentally flawed - Whether any third party will suffer prejudice due to the delay in applying to set aside order for sale*

On 29 November 1986 the appellant issued a letter of demand to the respondent (chargor) demanding payment within seven days of the "outstanding sum of M$47,884,178.68 as at 26 November 1986 together with interest thereon at the aforesaid rate from 27 November 1986 to date of full settlement." On 6 December 1986, a Form 16D was issued. On 10 January 1987 the appellant filed an originating summons for an order for sale "to satisfy the sum of $47,884,178.68 due and owing to the plaintiff under the first charge and second charge as at 26 November 1986 together with interest thereon at a rate per annum, which is 6% above the plaintiff's base lending rate currently at 10.5% per annum on monthly rests with effect from 27 November 1986 until date of full settlement."

On 25 February 1987, the respondent entered a memorandum of appearance through its solicitors, MessRs. Choo, Yeang & Co. On 9 April 1987, the notice of appointment to hear originating summons was filed by the appellant and it was served on the respondent's solicitors on 12 August 1987. On 15 October 1987, the originating summons was heard and the order for sale was granted in the absence of the respondent or its solicitors. On 17 December 1987, a summons for direction was filed. It was heard on 15 January 1988 and the order prayed for was given. Again, neither the respondent nor its solicitors appeared. On 13 June 1988 the respondent filed a notice of change of solicitors appointing MessRs. Harjit Singh Sangay in place of its Form er solicitors. On 8 May 1992, the appellant filed an application for a new auction date. It was heard on 25 June 1992 and the respondent's solicitor appeared at the hearing of the application. On 26 August 1992 the respondent filed an application to set aside the order for sale dated 15 October 1987.

The High Court dismissed the application. The Court of Appeal allowed the respondent's appeal and set aside the order for sale. Federal Court granted the appellant leave to appeal on the following issues: (i) whether or not the failure to state the precise amount due to the chargee in the letter of demand preceding the statutory notice under the National Land Code ('NLC) would render an application for an order for sale of the charged land defective; (ii) whether or not the failure of a chargee to comply with the provisions of O. 83 r. 3(3)(c) and

O. 83 r. 3(7) Rules of the High Court 1980 ('RHC 1980') by not stating the amount of interest in arreaRs as at the date of the originating summons and the amount of daily interest would render an order for sale defective and to be set aside; (iii) whether the decision of the Court of Appeal in holding that there had been non-compliance by the chargee with the provision of O. 83 r. 3 RHC 1980 to wit, by including in the sum claimed as due in the order for sale, interest, notice of variation of which had not been given, and thus holding that the order for sale was defective was in conflict with the decision of the Federal Court in *Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36*.

Held (dismissing the appeal with costs)

Per Abdul Hamid Mohamad FCJ (dissenting):

[1] The respondent conceded that the authorities show that the failure to state the precise amount due to the chargee in the letter of demand preceding the statutory notice under the NLC would not render an application for an order for sale of the charged land defective.

[2] The concept of the English mortgage is not consistent with the Torrens System. This is because in a mortgage the title passes from the mortgagor to the mortgagee whereas a duly registered charge under the NLC only creates a legal interest in the land. In a mortgage, the title passes to the mortgagee with the mortgagor retaining the right of redemption, when the mortgagor defaults in the payment of the mortgage debt, the mortgagor "forecloses" *ie*, baRs the mortgagor from exercising the right of redemption. On the other hand, in a charge, the title remains with the chargor. If the chargor defaults in the payment of the debt, the chargee may apply for an order of sale. As a result, English land law terms are being used interchangeably but erroneously with the terms used in the NLC: "mortgage" for "charge", "foreclosure" for "order for sale", "redemption" for "discharge" etc. leading to confusion as they have different legal meanings. To avoid confusion, it is better to stick to the terms used in the NLC and ignore those English land law terms even though they are used in O. 83 RHC 1980. Order 83 is not land law and it cannot override or add to the provisions of the NLC regarding substantive land law.

[3] There are two categories of remedies available to a mortgagee; one is a personal action against the mortgagor for the recovery of the debt and the other is by enforcement of the security that includes possession, sale and foreclosure. On the other hand, the NLC provides only two remedies to a chargee *ie*, sale and possession. The NLC does not talk about action for recovery of debt because the NLC only refeRs to the remedies of a chargee to enforce the charge. It does not refer to a personal action, which is a separate matter based on the covenant to pay under the agreement, which is quite properly provided for in O. 83 RHC 1980.

[4] The order for sale applied for is specifically provided for by the NLC. The NLC only requires three things to be stated in the notice: specifying the breach, requiring the breach to be remedied and warning of the danger of non-compliance with the notice - s. 254. When the order is made, the order should specify the total amount due as on the date the order is made - s. 257(1)(e).

Under the NLC, that is all that is required to be disclosed to a court regarding the amount due to enable the court to specify the amount in the order.

[5]Order 83 r. 3 RHC 1980 only applies to a charge action in which the plaintiff is the chargee and claims delivery of possession (under Chapter 4, Part Sixteen of the NLC) or for payment of moneys secured by the chargee or both. The rule says clearly that it applies to application for delivery of possession and for payment of moneys secured by a charge, but does not say that it is applicable to an application for an order of sale. Effect must be given to it.

[6] The court agreed with Abdul Aziz Mohamad J's opinion in*Perwira Affin Bank Berhad v. Tan Tian Ser* that O. 83 r. 3 RHC 1980 is not applicable to an application for an order for sale puRs uant to s. 257 NLC. It applies to a claim for vacant possession and a claim for payment of moneys secured by the charge, or both, as the rule clearly says.

[7] Under s. 257(1)(c) NLC it is provided that the order for sale shall "specify the total amount due to the chargee at the date on which the order is made." That is all that is required to be stated by the NLC as far as the amount due is concerned. The "total amount due" clearly includes interest. So, the inclusion of the interest in the "total amount due" in the order for sale is a requirement of the section. It has to be included. The particulaRs mentioned in r. 3(3) RHC 1980 need only be given where the chargee claims payment of moneys secured by the charge. This is an application for an order for sale.

[8]Order 83 r. 3(3)(c) and r. 3(7) RHC 1980 do not apply to an application for an order for sale under s. 256 NLC. Therefore, the failure to comply with the said rules does not render the order for sale defective and to be set aside. Even if the said rule applies, the circumstances of this case do not warrant the order for sale to be set aside.

[9] If the Court of Appeal meant to say that failure to give notice to vary the rate of interest amounts to "cause to the contrary", it would be contrary to *Low Lee Lian (supra)*. *Low Lee Lian (supra)* did not decide whether O. 83 r. 3 RHC 1980 must be complied with. As such, it cannot be said whether non-compliance thereof is in conflict with *Low Lee Lian (supra)* or not.

*[**Bahasa Malaysia** Translation of Headnotes*

Pada 29 November 1986 perayu telah megeluarkan satu surat tuntutan kepada responden (penggadai) menuntut bayaran dalam masa tujuh hari "outstanding sum of M$47,884,178.68 as at 26 November 1986 together with interest thereon at the aforesaid rate from 27 November 1986 to date of full settlement." Pada 6 Disember 1986, Borang 16D telah dikeluarkan. Pada 10 Januari 1987 perayu telah memfailkan satu saman pemula untuk satu perintah jualan "to satisfy the sum of $47,884,178.68 due and owing to the plaintiff under the first charge and second charge as at 26 November 1986 together with interest thereon at a rate per annum, which is 6% above the plaintiff's base lending rate currently at 10.5% per annum on monthly rests with effect from 27 November 1986 until date of full settlement".

Pada 25 Februari 1987, responden telah memasukkan satu memorandum kehadiran melalui peguamcaranya, Tetuan Choo, Yeang & Co. Pada 9 April 1987, notis temujanji untuk mendengar saman pemula telah difailkan oleh perayu dan telah disampaikan kepada peguamcara responden pada 12 Ogos 1987. Pada 15 Oktober 1987, saman pemula tersebut telah didengar dan satu perintah jualan telah diberikan dalam ketidakhadiran responden atau peguamcaranya. Pada 17 Disember 1987, satu saman untuk arahan telah difailkan. Ianya telah didengar pada 15 Januari 1988 dan perintah yang dipohon telah diberikan. Sekali lagi, responden dan peguamcaranya tidak hadir. Pada 13 Jun 1988 responden telah memfailkan notis penukaran peguamcara melantik Tetuan Harjit Singh Sangay untuk menggantikan peguamcara lamanya. Pada 8 Mei 1992, perayu telah memfailkan satu permohonan untuk tarikh lelongan baru. Ianya telah didengar pada 25 Jun 1992 dan peguamcara responden telah hadir di pendengaran permohonan ini. Pada 26 Ogos 1992 responden telah memfailkan satu permohonan untuk mengenepikan perintah jualan bertarikh 15 Oktober 1987 tersebut.

Mahkamah Tinggi telah menolak permohonan ini. Mahkamah Rayuan telah membenarkan rayuan responden dan mengenepikan perintah jualan tersebut. Mahkamah PeRs ekutuan telah memberikan perayu kebenaran bagi merayu atas isu-isu berikut: (i) sama ada kegagalan menyatakan jumlah sebenarnya yang terhutang kepada penerima gadaian dalam surat tuntutan yang dikeluarkan sebelum notis berkanun di bawah Kanun Tanah Negara akan menjadikan permohonan untuk satu perintah jualan bagi tanah yang digadaikan itu cacat; (ii) sama ada kegagalan oleh penerima gadaian untuk mengikuti peruntukkan-peruntukkan A. 83 k. 3(3)(c) dan A. 83 k. 3(7) Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT 1980') dalam tidak menyatakan amaun faedah yang terakru pada tarikh saman pemula dan amaun faedah harian akan menjadikan satu perintah jualan itu cacat dan boleh diketepikan; (iii) sama ada keputusan Mahkamah Rayuan yang memutuskan bahawa terdapat ketidak-patuhan oleh penerima gadaian dengan peruntukkan A. 83 k. 3 KMT 1980, kerana memasukkan dalam jumlah tuntutan dalam perintah jualan faedah untuk yang mana notis mengenai pemindaannya tidak diberikan, dan dengan itu memutuskan bahawa perintah jualan adalah cacat, adalah bertentangan dengan keputusan Mahkamah PeRs ekutuan dalam kes *Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36*.

Diputuskan (menolak rayuan dengan kos)

Oleh Abdul Hamid Mohamad HMP (menentang):

> **[1]** Responden telah mengaku bahawa otoriti-otoriti menunjukkan yang kegagalan untuk menyatakan jumlah amaun yang tepat yang perlu dibayar kepada penerima gadaian dalam surat tuntutan yang dikeluarkan sebelum notis berkanun di bawah KTN tidak akan menjadikan satu permohonan untuk perintah jualan bagi tanah yang digadaikan itu cacat.
>
> **[2]** Konsep gadai-janji English adalah tidak konsisten dengan Sistem Torrens. Ini adalah kerana dalam satu gadai-janji, hakmilik akan berpindah daripada penggadai janji kepada pemegang gadai-janji manakala satu gadaian yang didaftarkan di bawah KTN hanya mewujudkan satu kepentingan undang-undang dalam tanah. Dalam satu gadai-janji, hakmilik akan berpindah kepada pemegang gadai-janji dengan penggadai janji mengekalkan haknya untuk menebus, apabila penggadai janji gagal membayar balik hutang gadai-janji, penggadai janji "menghalangtebus" iaitu menghalang penggadai janji daripada melaksanakan haknya untuk menebus. Manakala, dalam satu gadaian,

hakmilik akan kekal pada penggadai. Sekiranya penggadai gagal membayar balik hutangnya, penerima gadaian boleh memohon untuk satu perintah jualan. Oleh yang demikian, terma-terma undang-undang tanah English yang sedang digunakan secara bertukar ganti, tetapi dengan salah, dengan terma-terma yang digunakan di dalam KTN : "gadai-janji" untuk "gadaian", "halangtebus" untuk "perintah jualan", "penebusan" untuk "pelepasan gadaian" dsb. yang membawa kepada kekeliruan oleh kerana mereka mempunyai makna undang-undang yang berlainan. Untuk mengelakkan kekeliruan, adalah lebih baik untuk kekal menggunakan terma-terma yang dipakai dalam KTN dan tidak menghiraukan terma-terma undang-undang tanah English walaupun mereka digunakan dalam A. 83 KMT 1980. Aturan 83 bukanlah undang-undang tanah dan tidak boleh mengatasi atau menambah kepada peruntukkan-peruntukkan KTN mengenai undang-undang tanah substantif.

[3] Terdapat dua kategori remedi yang terbuka kepada seseorang pemegang gadai-janji satu adalah tindakan peRs endirian terhadap penggadai janji untuk mendapat kembali hutang dan satu lagi ialah melalui pelaksanaan sekuriti yang termasuk milikan, jualan dan tindakan halangtebus. Manakala, KTN memperuntukkan hanya dua remedi kepada seseorang penerima gadaian iaitu jualan dan milikan. KTN tidak memperuntukkan tentang tindakan untuk mendapat kembali hutang kerana KTN hanya merujuk kepada remedi-remedi penerima gadaian untuk melaksanakan gadaian. Ianya tidak merujuk kepada satu tindakan peRs endirian yang mana adalah satu perkara yang berasingan berdasarkan waad untuk membayar di bawah perjanjian, yang mana adalah diperuntukkan di bawah A. 83 KMT 1980.

[4] Perintah jualan yang dipohon itu adalah secara spesifik diperuntukkan di bawah KTN. KTN hanya memerlukan tiga perkara dinyatakan di dalam notis tersebut: memperincikan pengingkaran tersebut, memerlukan pengingkaran tersebut diremedikan dan memberi amaran mengenai bahaya akibat ketidak-patuhan dengan notis - s. 254. Apabila perintah tersebut dibuat, perintah tersebut perlu memperincikan jumlah amaun yang terhutang pada tarikh perintah tersebut dibuat - s. 257(1)(e). Di bawah KTN, itu sahaja yang perlu didedahkan kepada mahkamah mengenai amaun yang terhutang untuk membolehkan mahkamah menyatakan jumlah tersebut dalam perintah.

[5]Aturan 83 k. 3 KMT 1980 hanya terpakai kepada tindakan gadaian di mana plaintif adalah penerima gadaian dan kepada tuntuan penghantaRs erahan milikan (di bawah Bab 4, Bahagian Enambelas KTN) atau untuk bayaran wang-wang yang dijamin oleh penerima gadaian atau kedua-duanya. Kaedah tersebut dengan jelas menyatakan bahawa ianya terpakai kepada permohonan untuk penghantaRs erahan milikan dan untuk bayaran wang-wang yang dijamin oleh gadaian tetapi tidak menyatakan bahawa ianya terpakai kepada satu permohonan untuk perintah jualan. Efek mesti diberikan kepadanya.

[6] Mahkamah beRs etuju dengan pendapat Abdul Aziz Mohamad J dalam kes*Perwira Affin Bank Berhad v. Tan Tian Ser* bahawa A. 83 k. 3 KMT 1980 tidak terpakai kepada satu permohonan untuk perintah jualan di bawah s. 257 KTN. Ianya terpakai kepada satu tuntutan untuk milikan kosong dan kepada satu tuntutan untuk bayaran wang-wang yang dijamin oleh gadaian atau

kedua-duanya, seperti yang dinyatakan dengan jelas oleh kaedah tersebut.

[7] Di bawah s. 257(1)(c) KTN adalah diperuntukkan bahawa perintah jualan tersebut mesti menyatakan jumlah amaun yang terhutang kepada penerima gadaian pada tarikh bila perintah dibuat. Itu sahaja yang diperlukan dinyatakan oleh KTN berkenaan amaun yang terhutang. Jumlah amaun yang terhutang adalah dengan jelasnya termasuk faedah. Jadi, kemasukkan faedah dalam jumlah amaun yang terhutang dalam perintah jualan adalah satu keperluan seksyen tersebut. Ianya mesti dimasukkan. Butir-butir yang dinyatakan di dalam k. 3(3) KMT 1980 perlu diberikan hanya di mana penerima gadaian menuntut bayaran wang-wang yang dijamin oleh gadaian. Ini adalah satu permohonan untuk perintah jualan.

[8]Aturan 83 k. 3(3)(c) dan (7) KMT 1980 tidak terpakai kepada permohonan untuk satu perintah jualan di bawah s. 256 KTN. Oleh yang demikian, kegagalan mematuhi kaedah-kaedah tersebut tidak akan menjadikan perintah jualan tersebut cacat dan perlu diketepikan. Walaupun kaedah tersebut terpakai, keadaan kes ini tidak memerlukan perintah jualan tersebut diketepikan.

[9] Sekiranya Mahkamah Rayuan berniat mengatakan bahawa kegagalan memberikan notis untuk memindahkan kadar faedah boleh menjadi satu "kausa sebaliknya", ianya akan bertentangan dengan *Low Lee Lian (supra).Low Lee Lian (supra)* tidak memutuskan samada A. 83 k. 3 mesti dipatuhi. Oleh yang demikian, tidak boleh dikatakan samada ketidak-patuhan kepadanya adalah bertentangan dengan *Low Lee Lian (supra)* atau tidak.

Case(s) referred to:

Akberdin Hj Abdul Kadir & Anor v. Majlis Peguam Malaysia [2002] 4 CLJ 689 CA ***(refd)***

Asia Commercial Finance (M) Bhd v. Kimden Housing Development Sdn Bhd [1993] 1 CLJ 487 HC ***(refd)***

Asiah Abdul Manap & Anor v. Capital Insurance Bhd [1998] 4 CLJ 257 FC ***(refd)***

Bank Bumiputra Malaysia Bhd v. Doric Development Sdn Bhd & ORs [1988] 1 CLJ 311; [1988] 1 CLJ (Rep) 361 HC ***(refd)***

Bank Pertanian Malaysia v. Zainal Abidin Kassim Ors [1995] 1 LNS 33; [1995] 2 MLJ 537 ***(refd)***

Chong Keat Realty Sdn Bhd v. Ban Hin Lee Bank Bhd [2003] 3 CLJ 532 CA ***(refd)***

Citibank, NA v. Ibrahim Othman [1993] 1 LNS 104; [1994] 1 AMR 7 ***(refd)***

Ghazali Mat Noor v. Southern Bank Bhd & Other Appeals [1989] 1 CLJ 35 (Rep); [1989] 2

CLJ 380; [1989] 2 MLJ 142 ***(refd)***

Diamond Peak Sdn Bhd v. United Merchant Finance [2003] 2 CLJ 8 CA ***(refd)***

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

Lum Choon Realty Sdn Bhd v. Perwira Habib Bank Malaysia Bhd [2003] 3 CLJ 791 CA ***(refd)***

Mahadevan Mahalingam v. Marilal & Sons (M) Sdn Bhd [1984] 1 CLJ 286; [1984] 1 CLJ (Rep) 230 FC ***(refd)***

Maimunah Megat Montak v. Mayban Finance Bhd [1996] 3 CLJ 9 FC ***(refd)***

Malayan Banking Bhd lwn. Dagang Bina Sdn Bhd [1991] 3 CLJ 1739; [1991] 1 CLJ 678 HC ***(refd)***

Mokhtar Amin v. Mohamed Mokhtar Omar [2001] 4 CLJ 489 CA ***(refd)***

Nothman v. Barnet London Borough Council [1978] 1 WLR 220 ***(refd)***

Perwira Affin Bank Bhd v. Tan Tian Ser [1995] 2 CLJ 133 HC ***(refd)***

Re Wong Su Tiung, ex p Yeo Hiap Seng Trading Sdn Bhd [1989] 2 CLJ 691; [1989] 2 CLJ (Rep) 652 HC ***(refd)***

Rugly Joint Water Board v. Foothit [1972] 1 All ER 1057 ***(refd)***

Shaheen Abu Bakar v. Perbadanan Kemajuan Negeri Selangor & Other Cases [1996] 2 CLJ 965 CA ***(refd)***

Sunk Yong International Inc v. Malayan Rubber Development Corporation Bhd [1992] 1 CLJ 310 (Rep); [1992] 3 CLJ 1531; [1992] 2 MLJ 146 ***(refd)***

Tan Chwee Geok & Anor v. Khew Yen-Yen & Anor [1975] 1 LNS 178; [1975] 2 MLJ 188 ***(refd)***

Vincent Tan See Yin v. Noone & Company & Anor [1995] 2 CLJ 195 SC ***(refd)***

Legislation referred to:

Limitation Act 1953, s. 2(1)

National Land Code, ss. 254, 256(2), (3), 257(1)(b), (c), (e), 266, 270, 271, 272, 273, 274, 275, 276, 277

Rules of the High Court 1980, O. 2 r. 1(2), O. 83 rr. 1(1), (2), 3(1), (3)(c), (6), (7)

Rules of the High Court 1970 [Sing], O. 83

Rules of the Supreme Court 1965 [Eng], O. 88

Other source(s) referred to:

Chang Min Tat, *Mallal's Supreme Court Practice*, 2nd edn, vol 1, pp 1152, 1153, 1159

ELG Tyler, *Fisher and Lightwood's Law of Mortgage*, 9th edn, pp 268-269

Teo Keang Sood & Khaw Lake Tee, *Land Law in Malaysia*, p 225

Counsel:

For the appellant - Porres P Royan (SM Yoong & MF Wong with him); M/s Shook Lin & Bok

For the respondent - Mahinder Singh Dulku (Harjit Singh Harbans Singh with him); M/s Harjit Singh Sangay & Co

Reported by Amutha Suppayah

Case History:

Court Of Appeal : [2003] 3 CLJ 791
Court Of Appeal : [2000] 3 CLJ 119
High Court : [2001] 1 LNS 60
High Court : [1999] 1 CLJ 748
High Court : [1996] 1 LNS 19

JUDGMENT

Abdul Hamid Mohamad FCJ (dissenting):

To appreciate what had transpired in this case, it is important that the chronology of events be given.

On 27 July 1982, the first charge was created.

On 28 October 1983, the second charge was created.

On 29 November 1986, the appellant issued a letter of demand to the respondent (chargor) demanding payment within seven days of the "outstanding sum of M$47,884,178.68 as at 26 November 1986 together with interest thereon at the aforesaid rate from 27 November 1986

to date of full settlement."

On 6 December 1986, Form 16D was issued, reciting the breach as follows:

> Whereas you have committed a breach of the provisions of these charges by defaulting in payment on demand made by us through our solicitors puRs uant to their letter dated November 29 1986 of the sum of M$47,884,178.68 due to us and outstanding as at November 26 1986 on your overdraft of M$10,000,000.00 and two (2) Bank Guarantee facilities of the principal sums of US$6,000,000 and M$14,000,000.00 respectively together with interest thereof at a rate per annum which is 6% above our Base Lending Rate of 10.3% per annum on monthly rests basis from November 27 1986 till date of full payment and secured by these Charges.

On 10 January 1987 the appellant filed an originating summons for an order for sale "to satisfy the sum of $47,884,178.68 due and owing to the plaintiff (appellant - added) under the first charge and second charge as at 26 November 1986 together with interest thereon at a rate per annum, which is 6% above the plaintiffs (appellants - added) Base Lending Rate currently at 10.5% per annum on monthly rests with effect from 27 November 1986 until date of full settlement;"

On 25 February 1987, the respondent entered a memorandum of appearance through its solicitors, MessRs. Choo, Yeang & Co.

On 9 April 1987, the notice of appointment to hear originating summons was filed by the appellant and it was served on the respondent's solicitors on 12 August 1987.

On 15 October 1987, the originating summons was heard and the order for sale was granted in the absence of the respondent or its solicitors.

On 17 December 1987, a summons for direction was filed. It was heard on 15 January 1988 and the order prayed for were given. Again, neither the respondent nor its solicitors appeared.

On 13 June 1988 the respondent filed a notice of change of solicitors appointing MessRs. Harjit Singh Sangay in place of its Form er solicitors.

On 8 May 1992, the appellant filed an application for a new auction date. It was heard on 25 June 1992 and the respondent's solicitor appeared at the hearing of the application.

On 26 August 1992 the respondent filed an application to set aside the order for sale dated 15 October 1987.

On 20 April 1996, the High Court dismissed the application.

On 11 Jun 1998, the Court of Appeal allowed the respondent's appeal.

On 23 September 2003 the Federal Court granted the appellant leave to appeal.

It is to be noted that, even though the respondent, a company, entered appearance by its solicitors and was served with the notice of appointment to hear originating summons, neither

the respondent nor its solicitors appeared on the date the originating summons was heard and the order for sale granted. Neither the respondent nor its solicitors appeared at the hearing of the summons for directions. However, when the application for a new date for auction was heard, the respondent's new solicitors appeared. Three months later and, almost five yeaRs after the order for sale was made, the respondent applied to set aside the order for sale.

It is also interesting to note and that in 1991, ie, about a year before the application to set aside the order for sale was made, Abdul Razak J delivered his judgment in *Malayan Banking Bhd. lwn. Dagang Bina Sdn. Bhd. [1991] 3 CLJ 1739; [1991] 1 CLJ (Rep) 678* which will be referred to later. Prior to that, the Supreme Court in *Ghazali bin Mat Noor v. Southern Bank Berhadand Four Other Appeals [1989] 1 CLJ 35 (Rep); [1989] 2 CLJ 380*; [1989] 2 MLJ 142 pronounced its judgment that for a bankruptcy notice to be valid it should state the exact amount due at the date of the bankruptcy notice. The judgment debtor must know the exact amount he has to pay to avoid bankruptcy. He does not have to make calculations or enquires. That issue became a popular defence subsequently. See, for example, *Re Wong Su Tiung, ex parte Yeo Hiap Seng Trading Sdn. Bhd. [1989] 2 CLJ 691; [1989] 2 CLJ (Rep) 652*.

Reading the grounds for the application to set aside the order for sale, those decisions could well have influenced the respondent to make the application in 1992.

In dismissing the application, the learned High Court Judge considered a number of issues. I shall only refer to the issues relevant in this appeal. The Court of Appeal gave its decision on 11 June 1998. However, the "judgment of the court" was only issued on 5 August 2003, more than five yeaRs later. By that time two of the judges who heard the appeal had retired. So, while I personally symphatise with the learned judge who alone had to shoulder the burden left by his two brotheRs, for all intends and purposes, the grounds are his alone. He too dealt with a number of issues. Again, I shall only refer to those that are relevant in this appeal and for which the leave to appeal to this court was granted and they are:

> (1) Whether or not the failure to state the precise amount due to the Chargee in the letter of demand preceding the statutory notice under the National Land Code, 1965 would render an application for an order for sale of the charged land defective.
>
> (2) Whether or not the failure of a Chargee to comply with the provisions of O. 83 r. 3(3)(c) and O. 83 r. 3(7), Rules of the High Court by not stating:
>
> (i) the amount of interest in arreaRs as at the date of the Originating Summons;
>
> (ii) the amount of daily interest;
>
> would render an Order for Sale defective and to be set aside.
>
> (3) Whether the decision of the Court of Appeal in holding that there had been non-compliance by the Chargee with the provision of O. 83 r. 3, Rules of the High Court, to wit, by including in the sum claimed as due in the Order for Sale, interest, notice of variation of which had not been given, and thus holding that the Order for Sale was defective, was in conflict with the decision of the Federal Court in *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 1 MLJ

77.

Question 1

Before us, learned counsel for the respondent conceded that the authorities show that the failure to state the precise amount due to the chargee in the letter of demand preceding the statutory notice under the National Land Code ("NLC") would not render an application for an order for sale of the charged land defective. In the circumstances that question need not be answered.

Question 2

It is important to note that the originating summons in question is an application to court for an order for sale under s. 256 of the NLC. Section 254 that provides for Form 16D requires the chargee to give notice to the chargor:

> (a) specifying the breach in question;
>
> (b) requiring it to be remedied within one month of the date on which the notice is served, or such alternative period as may be specified in the charge; and
>
> (c) warning the danger that, if the notice is not complied with, he will take proceedings to obtain an order for sale.

In the case of an application to court for an order for sale, s. 256(2) provides:

> (2) Any application for an order for sale under this Chapter by a chargee of any such land or leases 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.

That is only a general provision as to how the application is to be made which is usually provided for in the Acts.

Under s. 257(1)(c) it is provided that the order for sale shall "specify the total amount due to the chargee at the date on which the order is made."

That is all that is required to be stated by the NLC as far as the amount due is concerned.

We now come to O. 83 of the Rules of the High Court 1980 ("RHC 1980"). The heading is "charge actions".

Rule 1 of the order provides:

> 1 Application and interpretation (O. 83 r. 1)
>
> (1) This Order applies to any action (whether begun by writ or originating summons) by a chargee or chargor or by any person having the right to foreclose or redeem any charge, being an action in which there is a claim for

any of the following reliefs namely:

(a) payment of moneys secured by the charge;

(b) sale of the charged property;

(c) foreclosure;

(d) delivery of possession (whether before or after foreclosure or without foreclosure) to the chargee by the chargor or by any other person who is or is alleged to be in possession of the property;

(e) redemption;

(f) reconveyance of the property or its release from the security;

(g) delivery of possession by the chargee.

(2) In this Order "charge" includes a legal and an equitable charge.

(3) An action to which this Order applies is referred to in this Order as a charge action.

(4) These rules apply to charge actions subject to the following provisions by this Order.

Rule 3 of the order provides:

3 Action for possession or payment (O. 83 r. 3)

(1) The affidavit in support of the originating summons by which an action to which this rule applies is begun must comply with the following provisions of this rule.

This rule applies to a charge action begun by originating summons in which the plaintiff is the chargee and claims delivery of possession or payment of moneys secured by the charge or both.

(2) The affidavit must exhibit a true copy of the charge and the original charge or, in the case of a registered charge, the charge certificate must be produced at the hearing of the summons.

(3) Where the plaintiff claims delivery of possession the affidavit must show the circumstances under which the right to possession arises and, except where the Court in any case or class otherwise directs, the state of the account between the chargor and chargee with particulaRs of:

(a) the amount of the advance;

(b) the amount of the repayments;

(c) the amount of any interest or instalments in arrear at the date of issue of the originating summons and at the date of the affidavit; and

(d) the amount remaining due under the charge.

(4) Where the plaintiff claims delivery of possession, the affidavit must give particulaRs of every person who to the best of the plaintiff's knowledge is in possession of the charged property.

(5) If the charge creates a tenancy other than a tenancy at will between the chargor and chargee, the affidavit must show how and when the tenancy was determ ined and if by service of notice when the notice was duly served.

(6) Where the plaintiff claims payment of moneys secured by the charge, the affidavit must prove that the money is due and payable and give the particulaRs mentioned in paragraph (3).

(7) Where the plaintiff's claim includes a claim for interest to judgment, the affidavit must state the amount of a day's interest.

Before considering the provisions in detail, perhaps something should be said about the background of this order. This order was taken from O. 83 of the Rules of the High Court 1970 (Singapore) which was in turn taken from O. 88 of the Rules of the Supreme Court 1965 (England). While the English and the Singapore Rules are exactly the same, some changes were made when it was adopted for use in Malaysia. The word "mortgage", "mortgagee" and "mortgagor" were substituted with the words "charge", "chargee" and "chargor". The rest of the order remains the same.

The reason for the changes is not difficult to fathom: the NLC provides for "charge" not "mortgage". Indeed, the word mortgage is nowhere to be found in the NLC. The reason for that is again undeRs tandable. In England, the land law is not based on the Torrens System. The concept of the English mortgage is not consistent with the Torrens System. This is because in a mortgage the title passes from the mortgagor to the mortgagee whereas a duly registered charge under the NLC only creates a legal interest in the land. Regarding the differences between an English mortgage and a NLC charge, Peh Swee Chin J (as he then was) in *Bank Bumiputra Malaysia Bhd. v. Doric Development Sdn. Bhd. & 2 ORs. [1988] 1 CLJ 311; [1988] 1 CLJ (Rep) 361* pointed out:

In the first place, the premise that a charge under National Land Code is the same as an English mortgage at common law is patently erroneous. A charge is governed by detailed statutory provisions of the National Land Code while an English mortgage at common law was a hors e of a different colour altogether. It is not necessary to delve into all the differences between a charge and a mortgage beyond mentioning one or two of such differences. In an English mortgage at common law, the mortgaged property was transferred to the name of the mortgagee on the creation of the mortgage with a proviso for redemption. Under the said proviso, the mortgagee agreed to re-transfer the mortgaged property by a certain date beyond which it was stated to be

> irredeemable. Equity stepped in and provided the equity of redemption, by which the right to redeem was extended beyond the said date and would be lost only on foreclosure or sale.

Teo Keang Sood and Khaw Lake Tee, in their book *"Land Law in Malaysia"* at p. 225 point out the differences very clearly:

> A charge under the National Land Code 1965 diffeRs from a common law mortgage in that the person in whose favour the charge is created acquires only an interest in the land with a statutory right to enforce his security by way of a sale of the land (section 253) or to take possession thereof (section 271) in the event of default whereas the legal title or owneRs hip to the said land remains vested in the name of the registered proprietor. However, in the case of a mortgage, the legal title or owneRs hip to the land is vested in the mortgagee with the mortgagor having only a right in equity to redeem the land from the mortgagee upon repayment of the loan to the latter.

Mallal's Supreme Court Practice, 2nd edn by Chang Min Tat Vol. 1 also explains the differences very clearly at p. 1152:

Differences between the Malaysian Order and the Singapore Order:

The main difference lies in calling such an action a charge action in Malaysia and a mortgage action in Singapore. This is entirely due to the fact that under the National Land Code, Act No. 56 of 1965, (NLC) which now is in force in all the States of Malaya, - no mortgage is possible but any alienated land or lease may be charged with the repayment of any debt, or the payment of any sum other than a debt; or the payment of any annuity or other periodic sum; s. 241(1) NLC.

A charge takes effect upon registration, while a mortgage takes effect immediately upon execution. Another difference is that a mortgage conveys the title to the land to the mortgagee subject to the equity of redemption, while a charge merely makes the land a security for the loan.

In fact, the learned author also noted at p. 1159:

> There is no such thing as the English mortgage in the Malay States: *Haji Abdul Rahman v. Mohamed Hassan* [1917] 1 FMSLR 290; [1917] AC 209; *Wong See Leng v. Saraswathy [1953] 1 LNS 123*; [1954] MLJ 141, CA, however, cf. *Yaacob bin Lebai Jusoh v. Hamisah binti Saad [1950] 1 LNS 100*; [1950] MLJ 255; *Nawab Din v. Mohamed Shariff* [1953] MLJ 12.

These are judgments of British Judges who should be more familiar with "English mortgage" and were given prior to the enactment of the NLC.

As a result of the adoption of the English rules by changing only the word and words related to the word "mortgage" with the word and words related to the word "charge", we find that such words as "redeem", "redemption", "foreclosure", "reconveyance", "equitable charge" are still retained in the Malaysian rules. They are actually out of place.

Take "foreclosure" for example. This is what the learned author says at p. 1153 of *Mallal's Supreme Court Practice* and I agree with him:

> (c) Foreclosure: When a mortgagor has failed to pay off the mortgage debt within the time agreed, the mortgagee may foreclose, ie, he may bring an action asking that a date be fixed on which the mortgagor must pay off the debt or be foreclosed of his equity of redemption, ie, deprived or debarred of his right to redeem. Another effect of the foreclosure is to vest the property absolutely in the mortgagee: s. 30(2) Conveyancing and Law of Property Act Cap. 268.

A foreclosure action is not available under the NLC. The chargee can apply to Court for sale of the charged lands under the NLC. But even in England, foreclosure actions are now comparatively rare in practice, as the mortgagee's remedy by sale, under the power of sale conferred on him by the mortgage deed or by the Law of Property Act 1925, s. 101, is in general more speedy and convenient.

In other words, since, in a mortgage, the title passes to the mortgagee with the mortgagor retaining the right of redemption, when the mortgagor defaults in the payment of the mortgage debt, the mortgagor "forecloses" ie, baRs the mortgagor from exercising the right of redemption. On the other hand, in a charge, the title remains with the chargor. If the chargor defaults in the payment of the debt, the chargee may apply for an order of sale.

Shanker J (as he then was) in *Citibank, N.A. v. Ibrahim b. Othman [1993] 1 LNS 104*; [1994] 1 AMR 7, in trying to give some sensible meaning to the word "foreclosure" in the light of our NLC, said, at p. 376:

It seems to me pertinent to add that the ture meaning of "foreclosure" is a process whereby the mortgaged land "becomes absolutely his ie, the mortgagees." (See *Stroud's Judicial Dictionary* 5th edn. At p 1010.) Subject to correction the word "foreclosure" does not seem to appear anywhere in Part Sixteen of the NLC. Charged land in Selangor can only become the property of a chargee if he successfully bids for it in a sale ordered by the Court. In a loose sense therefore the term foreclosure is being used to mean the steps taken for the sale of the mortgaged property by a Court order or by a power of sale contained in the mortgage so that the sale proceeds can be used to pay off the debt.

Regarding the word "equitable charge" in r. 1(2) of O. 83, the question is, is there such a thing in our land law? Is it not contrary to the term "charge" as provided in the NLC? If there is such a thing as an "equitable charge" and since it is not a "charge" under the NLC could the remedies provided in the NLC be made available in relation to such a "charge"? The Form er Federal Court in *Mahadevan s/o Mahalingam v. Marilal & Sons (M) Sdn. Bhd. [1984] 1 CLJ 286; [1984] 1 CLJ (Rep) 230* seems to think that our law recognize "equitable charge". But, the court was actually interpreting the words "mortgage or other charge" in s. 2(1) of the Limitation Act 1953, an Act passed prior to the NLC and the cases relied on were pre-NLC cases. Thus Teo Keong Sood and Khaw Lake Tee commented at p. 233 " it is doubtful what his Lordship meant by the term "equitable charge"". I shall say no more on this.

"Redemption" is another misplaced term used in O. 83. What is "redemption"? I shall again quote the learned author at p. 1153.

(e) Redemption: Redemption is the exercise of the right of the mortgagor to pay off the mortgage debt or charge upon the property and to have the property reconveyed to him free of the mortgage or charge. An action or suit for redemption is therefore one brought to compel the mortgagee to reconvey the property upon payment of the debt and interest.

Under the NLC the action is more properly one for discharge: s. 278.

So is "reconveyance". This is what the learned author says, at p. 1153:

(f) Reconveyance of the property or its release from the security: A mortgagee who has received the repayment of the debt and interest must reconvey the title to the mortgagor; a chargee discharges the charge, in other words, releases the land from the security.

In other words, since in a mortgage, the title passes to the mortgagee, when the right of redemption is exercised, the title is reconveyed to the mortgagor. On the other hand, in a charge, since the title remains with the mortgagor only the charge needs to be discharged.

As a result, such English land law terms are being used interchangeably but erroneously with the terms used in the NLC: "mortgage" for "charge", "foreclosure" for "order for sale", "redemption" for "discharge" etc. leading to confusion as they have different legal meanings. In my view, to avoid confusion, it is better that we stick to the terms used in the NLC 1965 and ignore those English land law terms even though they are used in O. 83. O. 83 is not land law and it cannot override or add to the provisions of the NLC regarding substantive land law.

Coming now to remedies. As regards the mortgagee's remedies, it is sufficient to quote a passage from *Fisher and Lightwood's Law of Mortgage*, 9th edn, by E.L.G. Tyler, M.A. (Oxon.), at pp. 268-269:

The mortgagee's remedies - The mortgagee's remedies for the recovery of the debt are either against the mortgagor personally, or by enforcement of the security. The remedy against the mortgagor personally is by an action for the debt. Usually the mortgage contains a covenant for payment, and the action is on the covenant. As just stated, the mortgagee is entitled to preservation of the security, and in general, he is entitled to enter into possession immediately upon the execution of the mortgage. In the latter case he may obtain repayment out of the rents and profits. Or, without entering into possession, he can appoint a receiver. Realisation of the security is effected by sale, or the mortgagee may by foreclosure, deprive the mortgagor of his equity of redemption, and himself become the owner of the property. Thus the mortgagee's remedies are: (I) action on the debt; (2) appointment of a receiver; (3) possession; (4) sale; and (5) foreclosure.

It must be stressed that that there are two categories of remedies available to a mortgagee, one is a personal action against the mortgagor for the recovery of the debt and the other is by enforcement of the security that includes possession, sale and foreclosure. For a detailed discussion on this, see *Low Lee Lian v. Ban Hin Lee Bank Bhd. [1997] 2 CLJ 36 (FC)*.

On the other hand, the NLC provides only two remedies to a chargee ie, sale and possession. It is undeRs tandable why the NLC does not talk about action for recovery of debt. That is because the NLC only refeRs to the remedies of a chargee to enforce the charge. It is not referring a personal action, which is a separate matter based on the covenant to pay under the

agreement, which is quite properly provided for in O. 83 of the RHC 1980.

The issue is whether r. 3(3)(c) and r. 3(7) of O. 83 of the RHC 1980 apply to an application for an order for sale. The order for sale applied for is specifically provided for by the NLC. And, as has been mentioned earlier, the Code only requires three things to be stated in the notice: specifying the breach, requiring the breach to be remedied and warning of the danger of non-compliance with the notice - s. 254. When the order is made, the order should specify the total amount due as on the date the order is made - s. 257(1)(e). Strictly speaking, under the Code, that is all that is required to be disclosed to court regarding the amount due, to enable the court to specify the amount in the order.

Coming now to r. 3 of O. 83. That rule itself beaRs the heading "Action for possession or payment". It must be noted that "Remedies of chargees: Possession" is also specifically and separately provided for in the NLC in ss. 270 to 277.

Rule 3(1) goes on to say:

This rule applies to a charge action begun by originating summons in which the plaintiff is the chargee and claims delivery of possession or payment of moneys secured by the charge or both.

What does the provision mean? Clearly, it means what it says: it only applies to a charge action in which the plaintiff is the chargee and claims delivery of possession (under Chapter 4, Part Sixteen of the NLC) or for payment of moneys secured by the chargee or both. That too is what the heading of r. 3 or O. 83 says.

I do not think that it is a question of what rule of interpretation to apply, literal or purposive. There is no ambiguity or absurdity about it. The rule says clearly that it applies to application for delivery of possession and for payment of moneys secured by a charge, but does not say that it is applicable to an application for an order of sale. Effect must be given to it.

Let us now look at the decided cases on this point.

In *Citibank, N.A. v. Ibrahim b. Othman [1993] 1 LNS 104*; [1994] 1 AMR 7, the chargee applied for an order for sale of the charged land. One of the issues discussed was whether O. 83 r. 3 of the "RHC 1980" applied to the case. Mahadev Shankar J (as he then was), *inter alia*, held:

Where Order 83 r. 3(3) applies, the affidavit must show the state of the account between the chargor and the chargee with particulaRs of the amount of the advance, the repayments, the interest in arreaRs at the date of the issue of the originating summons and the date of the affidavit and the amount remaining due under the charge. **This rule applies where the plaintiff claims delivery of possession.** The particulaRs (aforesaid) are hereafter referred to as the statutory particulaRs.

Order 83 r. 3(6) provides that **where the plaintiff claims payment of moneys secured by the charge,** the affidavit must prove that the money is due and payable and give the particulaRs mentioned in Order 83 r. 3(3). And by paragraph (7) if interest is claimed on the judgment the affidavit must state the amount of a days interest. (emphasis added).

It is to be noted from the passages quoted above, the learned judge was actually saying that O. 83 r. 3(3) applies where the plaintiff claims for delivery of possession and O. 83 r. 3(6) where the plaintiff claims for payment of moneys secured by the charge. And, if in such claims ie, for delivery of possession and/or for payment of moneys, interest is claimed, then para. (7) also applies.

However, having said that the learned judge held at p. 376:

Reading Order 83 r. 1(1)(a)(b) and (c), r. 3(3) and r. 3(6) together, I think it was incumbent on the plaintiff to provide the statutory particulaRs in the first affidavit.

Perwira Affin Bank Berhad v. Tan Tian Ser [1995] 2 CLJ 133 is an application for an order for sale puRs uant to s. 256 of the NLC. One of the grounds put forward was that the interest in arreaRs on the term loan was not stated as required by para. (c) of r. 3(3) of O. 83. Even though the judgment of the learned judge, Abdul Aziz Mohamad J (as he then was) on this point is rather long, I think it is worth quoting. It meticulously answeRs the arguments on the issues under discussion. This is what the learned judge says at p. 135 to 139:

The instances mentioned by learned Counsel for the defendant of non-compliance of the affidavit with para. (3) (of Order 83 rule 3 of the RHC 1980 - added) were that the amount of the overdraft facility actually used had not been stated, as required by subparagraph (a) of para (3), and that the interest in arreaRs on the overdraft and the instalments in arreaRs on the term loan had not been stated, as required by subparagraph (c).

Learned counsel for the defendant did not, however, question the correctness of the figures in the affidavit in support of this application or in any of the subsequent affidavits of the plaintiff.

In my opinion paras (2), (3) and (6) do not apply to this application and therefore do not have to be complied with by the affidavit in its support. My reasons follow.

Order 83 applies to charge actions. By para (1), read together with para (3), of r. 1, a charge action is:

> any action (whether begun by writ or originating summons) by a chargee or chargor or by any person having the right to foreclose or redeem any charge, being an action in which there is a claim for any of the following reliefs namely:
>
> (a) payment of moneys secured by a charge;
>
> (b) sale of the charged property;
>
> (c) foreclosure;
>
> (d) delivery of possession (whether before or after foreclosure or without foreclosure) to the chargee by the chargor or by any other person who is or is alleged to be in possession of the property;

(e) redemption;

(f) reconveyance of the property or its release from the security;

(g) delivery of possession by the chargee.

By the second sentence of para. (1) of r. 3, r. 3 only "applies to a charge action begun by originating summons in which the plaintiff is the chargee and claims delivery of possession of payment of moneys secured by the charge or both". The types of charge action intended by that sentence are those falling under subparagraphs (d) and (a) of para (1) of r. 1. So para (2) of r. 3 applied only to those two types of charge action. Paragraph (3) of r. 3 is expressed to be applicable to a case where the plaintiff claims delivery of possession and, by para (6) applies also to a case where the plaintiff claims payment of moneys secured by the charge. So the types of charge action to which para (3) applies are also those falling under subparagraphs (d) and (a) of para (1) of r. 1.

An application for an order for sale under s. 256 of the National Land Code, as the application in this case is, is not an action in which there is a claim for payment of moneys secured by the charge and therefore is not a type (a) charge action. The claim under s. 256 is for the sale of the charged property, which makes it a type (b) charge action, to which r. 3 does not apply. If the Rules Committee had intended that r. 3 should apply to the type of charge action in which there is a claim for the sale of the charged property, that is the type (b) charge action, they would, after expressly including that type in r. 1, have included a mention of it in r. 3, but there they have made mention only of types (a) and (d) charge action.

It may be thought that where a chargee applies for an order for sale under the National Land Code he is in effect bringing an action in which there is a claim for payment of moneys secured by the charge, that is a type (a) charge action, because the purpose of the sale is to get in moneys from the charged property in or towards settlement of the debt secured by the charge. But such an interpretation would be one that is contrived and that ignores the plain meaning of the words " A claim for (a) payment of moneys secured by the charge" in para (1) of r. 1. The plain fact is that where the amount secured by a charge is now, say, RM 500,000 and the chargee applies for an order for sale of the security, he is not asking the Court to order the chargor to pay him that amount. He is, as the Supreme Court said in *Kandiah Peter a/l Kandiah v. Public Bank Berhad* [1993] 2 AMR 49 3464, not suing for a debt. He is merely asking that the security that he holds be sold. The sale might bring in for the chargee only RM 300,000. There would still be another RM 200,000 owing, which the debtor is yet to be order to pay to the chargee.

Moreover, if the Rules Committee had intended the type (a) charge action to include or also mean a charge action where the chargee seeks the remedy of a sale of the charged property, which is what an application under s. 256 of the National Land Code is, they would not have needed to itemize expressly and separately the type (b) charge action in para (1) of r. 1.

I think the type (a) charge action should be construed as being confined to what it is plainly described as, namely " an action in which there is a claim for (a) payment of moneys secured by the charge", for which, I might add in passing, para (6) of r. 3 requires that the plaintiff must prove that the moneys are due and payable.

The question of the application of r. 3 of O. 83 to an application for an order for sale under s.

256 of the National Land Code was raised in *Citibank NA v. Ibrahim bin Othman* [1994] 1 MLJ 608, where Mahadev Shankar J, at pp 612 and 613, after agreeing with Abdul Razak J in *Malayan Banking Berhad lwn. Dagang Bina Sdn. Bhd. [1991] 1 CLJ 678 (Rep); [1991] 3 CLJ 1739*, and expressing his opinion on the meaning of "foreclosure", concluded:

Citibank here applied for an order of sale in order to effect payment of moneys secured by the charge. Reading O. 83 rr. 1(1)(a),(b),(c), 3(3) and 3(6) together. I think it was incumbent on the plaintiff to provide the statutory particulaRs in the first affidavit.

It would appear that he considered that an application for an order for sale is in effect a claim for payment of moneys secured by the charge, as to which I have already given my reasons for thinking otherwise.

Abdul Razak J, at p. 1740 of the above-mentioned case, had this to say:

Saya berpendapat sebaliknya plaintiff adalah terbabit kepada k. 3(3). Mungkin tindakan menjual adalah satu remedi yang berasingan, seperti mana k. 1(1)(a) itu mendedahkan, tetapi tidak dapat dielakkan, dengan secara langsung atau tidak langsung, tindakan memohon wang yang dihutang itu dibayar adalah juga tindakan yang ternyata mesti dilakukan terlebih dahulu, sebelum tanah cagaran itu boleh dijual. Oleh itu, sungguhpun k. 3(1) itu tidak menyebut ianya sebagai prosedur yang membabitkan penjualan tanah cagaran, pengertiannya tidak dapat tidak mestilah begitu, jika tidak keadaannya yang agak ganjil dan bercanggah akan berlaku, di mana apabila permohonan untuk mendapatkan wang yang dijamin oleh cagaran itu memerlukan kira-kiranya itu ditunjukkan, tetapi apabila harta yang dicagar itu hendak dijual, kira-kira itu tidak diperlukan walhal, apabila tanah itu hendak dijual kira-kira itu lebih-lebih lagi dipentingkan. Bahkan kedua-dua remedi itu berkait, kerana, sebelum ia boleh dijual, perlu dipasitkan wang yang dihutang itu belum dan tidak dibayar; tafsiran ini adalah sejajar dengan peruntukan di bawah s. 257 Kanun Tanah Negara yang mensyaratkan bahawa sebelum Mahkamah membuat perintah menjual, ia hendaklah menentukan jumlah wang yang dihutang, dan s. 256 menyatakan prosedurnya adalah mengikut prosedur sivil di Mahkamah yang tidak dapat tidak beRM akna kk. 83 itu sendiri. Kalau Mahkamah tidak dilengkapkan dengan prosedur menjual bagaimanakah tindakan itu boleh dilaksukan, jika Kanun Tanah Negara itu sendiri tidak mempunyai prosedur itu.

It does not appear that the reason he considered para (3) of r. 3 to be applicable to an application for an order for sale was because such an application is in effect an application for payment of moneys secured by the charge. His reason appears to be based on considerations of consistency of treatment. He thought that if a claim for payment of moneys secured by the charge must show the state of the account between the chargor and the chargee, there was greater need for it to be shown where the land charged is to be sold.

But the treatment of an application for an order for sale must necessarily be different from that of an action for payment of moneys secured by the charge because the conditions for the success of an application for an order for sale are subject to the National Land Code whereas the conditions for the success of an action for payment of moneys secured by the charge are not. Under s. 254 of the National Land Code, for a chargee to be entitled to apply for an order for sale, there must have been a breach by the chargor of any of his obligations under the charge for the prescribed period, followed by a notice in Form D specifying the breach and requiring it to be remedied within the prescribed period and warning that the chargee will take proceedings to obtain an order for sale if the notice is not complied with, and there must

have been a failure to remedy the breach at the expiry of the period. If all those requirements are met, the chargee is entitled to apply for an order for sale. Therefore his application need only prove those conditions. Under s. 255, to be entitled to apply for an order for sale, the chargee need only show that the principal sum secured by the charge is payable on demand, that there has been a demand in Form 16E, and there has been a failure to pay within the prescribed period. Under those sections there would be no necessity for the chargee, to qualify him to apply for an order for sale, to show the state of the account between the chargor and the chargee by giving the particulaRs specified in para (3) of r. 3. In fact, by virtue of subsection (3) of s. 256, the chargee, if his application shows the National Land Code preconditions for applying have been fulfilled, he is *prima facie* entitled to an order unless the existence of a cause to the contrary is shown. If the chargor thinks there exists a cause to the contrary, it is up to him to satisfy the court that it exists. If the correctness of the state of the account between him and the chargee is relevant to the cause, he may question the correctness of the account, giving his reasons, and the chargee may in reply try to defend the correctness of the account. So if the correctness of the account is relevant to determ ining whether in law there is cause against the making of an order for sale, that question may be raised by the chargor at a stage subsequent to the chargee's making of his application, without the chargee having to show particulaRs of the state of the account at the time that he makes his application. I might remark that it often happens that points about correctness of account that are raised by the chargor are not actually relevant to the question of "cause to the contrary" but rather to the question of specifying in the order for sale the correct total amount due to the chargee at the date on which the order is made, as required by para (c) of subsection (1) of s. 257. In those cases the breaches or defaults may be clear, no positive attempt may have been made to show that the chargor has not defaulted or been in breach, yet an attempt is made to question the correctness of the account between the chargor and the chargee.

While on the subject of the requirement of para (c) of subsection (1) of s. 257, I would like to make the following observations.

What is required for the purposes of that paragraph would be an affidavit filed before the date on which the order is expected to be made and stating what would be the amount due on that future date. If no order is given on that date and is expected to be given on a subsequent date, another such affidavit is put in before the subsequent date stating the amount that would be due on that date. The need for a affidavit as to the amount due to be put in every time that a hearing of an application for an order for sale is postponed is due solely to the requirement of para (c) of subsection (1) of s. 257.

I have noticed that these periodic affidavits for the purposes of para (c) of subsection (1) of s. 257 have tried to be faithful to the requirement of para (3) of r. 3 as to the giving of the particulaRs specified therein, with the particulaRs modified so ass to show also the amount due on the expected date of the order, and have sometimes been referred to as the affidavit in compliance with para (3) of r. 3 of O. 83. But I think those particulaRs are not meant to fulfil the needs of para (c) of subsection (1) of s. 257. Those particulaRs are to be given only once, that is - as stated in para (1) of r. 3 - in the affidavit in support of the originating summons by which the action to which the rule applies is begun. FurtheRM ore the particulaRs specified do not reflect the needs of para (c) of subsection (1) of s. 257 because there is no requirement as to stating the total amount due at the date on which the order for sale is to be made. In fact it would be impossible to lay down that requirement in r. 3 as it would be referring to an order for sale in a provision which, as expressly stated, applies only to claims for delivery of

possession and payment of moneys secured by the charge.

One of the ancillary prayeRs in this application, that is the sixth prayer, is "bahawa defendan hendaklah memberikan milikan kosong tanah tersebut dalam tempoh tujuh (7) hari selepas jualan tanah ini". The question is whether that prayer makes this application a type (d) charge action is delivery of possession to the chargee by the chargor or whoever else is in possession of the property. That relief must relate to the remedy of possession of the chargee which is dealt with in Chapter 4 (comprising ss. 270 to 277) of Part Sixteen of the National Land Code. The remedy of possession is an alternative to the remedy of sale, which is dealt with in Chapter 3 (comprising ss. 253 to 269), or *vice veRs a*. The chargee who wants a sale cannot be wanting possession. One cannot have possession and sell or sell and have possession, at the same time. Since in this case the plaintiff is seeking the remedy of sale, it cannot be that it also is seeking the remedy of possession. I should add in passing that the affidavit in support of the originating summons by which a chargee begins a type (d) charge action must, by para (4) of r. 3, "give particulaRs of every person who to the best of the plaintiff's knowledge is in possession of the charged property", but no such particulaRs have been given in the affidavit in support of this application.

It may be argued that the vacant possession intended by the sixth prayer is not vacant possession to the chargee but to the buyer. If that be the case, the relief sought is not included in r. 1 of O. 83, and the question does not arise at all whether that prayer makes this application a charge action to which O. 83, particularly r. 3, applies.

As, for cause against the making of an order for sale, the defendant relies only on non-compliance of the affidavit in support of this application with paras (2), (3) and (6) of r. 3, and as, in my opinion, r. 3 does not apply to this application, the defendant must fail in his opposition to the making of an order for sale and I must make the order.

Then comes the Supreme Court judgment in*Maimunah bte. Megat Montak v. Mayban Finance Bhd. [1996] 3 CLJ 9*. For the issue arising in that case I shall quote the judgment of Edgar Joseph FCJ, delivering the judgment of the court at p. 11:

It was common ground that the order for sale aforesaid had neither fixed the auction date nor stipulated the amount actually due under the charge as required by s. 257(1)(b) and (c) of the Code

So, the issue was non-compliance with the provisions of the NLC. Those two requirements mentioned are requirements of the NLC, not of O. 83 r. 3 of the RHC 1980. In a very brief judgment; the court held at p. 11:

At the conclusion of the argument, we were unanimously of the opinion, that the provisions of s. 257(1)(a) to (d) were mandatory, and as the order for sale in the present case had suffered from the defects herebefore mentioned, it was thereby invalidated.

Having said that, the judgment went on to say:

We would add, that insofar as there was a conflict of judicial opinion, as to the applicability of the provisions of O. 83 r. 3 of the Rules of the High Court 1980, to an application for an order seeking enforcement of a charge registered under the Code, by way of an order for sale, as appeared from the judgments of Shankar J (as he then was) in *Citibank NA v. Ibrahim bin*

Othman [1993] 1 LNS 104; [1994] 1 MLJ 608 on the one hand, and Abdul Aziz bin Mohamad J in *Perwira Affin Bank Bhd. v. Tan Tian Ser [1995] 2 CLJ 133* on the other, we preferred the reasoning and conclusion of Shankar J.

This paragraph is clearly an obiter. That was not the issue as stated by the learned judge himself which I have quoted above. The issue was non-compliance with the provisions of s. 257 of the NLC.

Secondly, the judgment did not give any reason why Shankar J's opinion was preferred. It merely said that the court "preferred the reasoning and conclusion of Shankar J" But, as has been shown, Shankar J had in fact said that r. 3 applies to a claim for delivery of possession. But, having said that the learned judge went on to hold that "it was incumbent on the plaintiff to provide the statutory particulaRs " Shankar J also held that the objective of O. 83 r. 3(3) was "to tell the defendant how much precisely is being claimed so that he can make up his mind to contest or pay-up."

With respect, that may be the objective of the provision, but the issue is whether the provision applies. The "objective" does not make a provision applicable if it is not applicable. In any event, having said that, the learned judge (Shankar J) went on to say at p. 379 to 380:

If he has any valid defences he must take them. It is in the public interest that there should be an end to litigation. I do not think it right where the final order states what is correctly due that a defendant, who has been duly served with proceedings and elects not to take defences open to him when he ought to do so, should be allowed to come long after the order has been perfected, the period of appeal has lapsed and perhaps even after the sale has been concluded to say that because there was earlier omission to recite some of the statutory particulaRs the entire order should be set aside. What applies to the defendant must equally apply to his successor in title.

What the chargor has lost where there is a failure to comply with O. 83 r. 3(3) is the opportunity to satisfy himself of the correctness of the amount claimed, and to challenge the figures if he is not. A bare denial of a debt was never enough. The chargor also has an onus if he denies the amount claimed to say how much he admits owing. In this kind of case the dismissal of the application for non-compliance with some aspect of the rules does not extinguish the debt. The chargee can start afresh but there will then be additional costs interest and delay.

This is the very situation which Order 2 r. 1(2) of the RHC 1980 was meant to cater for. The question is whether the failure to comply with the Rules can be cured by setting aside the proceedings in whole or in part or by allowing some amendment to be made; all of which must be on such terms as to costs or otherwise as the Court thinks just.

Could it be that the learned judge thought that he was dealing with a claim for delivery of possession? Having said what he had said and quoted above, it is also quite difficult to follow why he decided as he did. Unfortunately, the Supreme Court did not give its own reason why it agreed with Mahadev Shankar J and not with Abdul Aziz Mohamad J.

On my part and with respect I find Abdul Aziz Mohamad J's analysis of the provisions really admirable and his reasons are very sound. In the circumstances, I agree with Abdul Aziz Mohamad J's opinion that r. 3 of O. 83 of the RHC 1980 is not applicable to an application

for an order for sale puRs uant to s. 257 of the NLC. It applies to a claim for vacant possession and a claim for payment of moneys secured by the charge, or both, as the rule clearly says.

In *Asia Commercial Finance (M) Bhd. v. Kimden Housing Development Sdn. Bhd. [1993] 1 CLJ 487*, James Foong Cheng Yuen J (as he then was) in setting aside an order for sale, on other grounds as well, said in respect of O. 83 r. 3(3)(c) at p. 490:

The non-compliance with O. 83 r. 3(3)(c) and O. 83 r. 3(7) of the Rules of the High Court in this case, deprives the defendants of the knowledge of the exact amount outstanding and interest due under the charge. This is fundamental as the charge of the defendants' property to the plaintiffs is related to loans granted to the defendants. The defendants must be offered every opportunity to repay the said loan before his property, which is only a security, is taken from him for good. This opportunity for repayment, as seen in s. 266 of the National Land Code, extends to "any time before the conclusion of the sale" by public auction subsequent to an order for sale by the Court. The non-disclosure to the defendants of the exact amount and interest due at relevant dates, are failures to comply with statutory requirements that are so serious as to render an order so made therefrom to be set aside.

I am in full agreement with Mr. Justice Razak's decision in *Malayan Banking Bhd. lwn. Dagang Bina Sdn. Bhd. [1991] 1 CLJ 678 (Rep); [1991] 3 CLJ 1739* where an order for sale in a foreclosure proceeding was not allowed due to the failure of the plaintiff bank in complying with O. 83 r. 3(3) of the Rules of the High Court, to disclose the amount of any interest or instalment in arreaRs at the date of issue of their originating summons and at the date of their affidavit.

Actually, in that judgment it was assumed that the provision applies. There is no discussion whether it applies or not. The judgment, as in other judgments, talks about the desirability of such a provision. But whether it applies or not, the court should look at the clear words of the provision, not on its desirability, because, the function of the court is to interpret and apply the law, not to make law, even if it thinks it is desirable to do so.

In *Bank Pertanian Malaysia v. Zainal Abidin bin Kassim Oss. [1995] 1 LNS 33*; [1995] 2 MLJ 537, the application for an order for sale was dismissed for failure to comply with the provisions of O. 83 r. 3(3) and (6). In this case too, the judgment proceeded on the assumption that the provisions were applicable. It is pertinent to note that the learned judge made this finding at p. 541:

To my mind, in view of prayer 1 and 2, the present application is not merely for a sale of the charged property. It is actually a claim for both: for payment of moneys secured by the charge as well as for sale of the charged property. In other words it is a claim for the relief referred to in paragraph (1)(a) and (b) of r. 1 of O. 83.

There is no doubt that r. 3 of O. 83 applies to a claim for moneys secured by a charge.

The judgment of this court in *Low Lee Lian v. Ban Hin Lee Bank Bhd. [1997] 2 CLJ 36* was not concerned with the specific provision of O. 83 r. (3) of the RHC 1980. It was mainly concerned with "cause to the contrary" in s. 256(3) of the NLC. In the court's advice to judges this is what the judgment says at p. 51:

A judge hearing an application under s. 256 must bear in mind that the procedure under the section is meant to be speedy and summary in nature. He is first concerned with whether the chargee has given the appropriate statutory notices as stipulated in the Code. Next, he must ensure that the procedural requirements prescribed by O. 83 of the Rules of the High Court 1980 have been complied with. Next, he is concerned with the very narrow question whether the material produced before him by the chargor constitutes cause to the contrary.

That is a general reference to O. 83, not a specific reference to O. 83 r. 3. Therefore, that judgment is quite neutral on the applicability of r. 3 to an application for an order for sale.

In *Diamond Peak Sdn. Bhd. v. United Merchant Finance (Form erly known as MUI Finance Berhad and Malayan United Finance Berhad [2003] 2 CLJ 8 (CA)*, the order for sale was made on 2 September 1986 but no auction date was fixed by the learned judge. The usual procedures followed. A number of auction dates were fixed by the senior assistant registrar but the land could not be sold. Then on 3 April 1997, after about six yeaRs since the order for sale was made, the appellant (chargor) applied, *inter alia*, to set aside the order for sale. Two grounds were forwarded. first, the order was invalid for non-conForm ity with the provisions of s. 257(1)(b) of the NLC in that the action dated was not fixed by the learned judge. The second ground was that the respondent had failed to comply with the provisions of O. 83 r. 3(3)(c) and (6) of the RHC 1980.

On the first ground, the Court of Appeal, being bound by the decision of this court in *Maimunah bte Megat Montak v. Mayban Finance Berhad (supra)* held that the order for sale was invalid.

Of course, the Court of Appeal had no alternative but to so decide on that issue. As that issue is not before this court in the instant appeal, I reserve my comments on the view of this court in *Maimunah bt Megat Montak (supra).*

On the second ground, the Court of Appeal held that the respondent had "failed to comply with the mandatory requirements of O. 83 r. 3(3)(c) and (6) of the RHC 1980 the order for sale ought to be set aside."

Four months after that judgment was delivered, the Court of Appeal had another occasion to consider O. 83 r. (3) of the RHC 1980. This happened in *Chong Keat Realty Sdn. Bhd. v. Ban Hin Lee Bank Berhad [2003] 3 CLJ 532 (CA)*. The charge was executed in 1986. The appellant (chargor) having defaulted to make repayment, the respondent (chargee), in 1988, took out an originating summons for an order for sale. The originating summons was served on the appellant. The appellant entered appearance and retained counsel who appeared on the date appointed for the hearing of the summons. No affidavit in opposition to the bank's application was filed by the appellant. No objection was taken as to the non-observance of O. 83 r. (3) of the RHC 1980. On 5 April 1989, the judge made the order for sale. The usual procedural steps to have the land sold by public auction were taken by the respondent. But, the land could not be sold as there were no buyeRs. Then, on 9 March 1997, ie, eight yeaRs after the order for sale was granted, the appellant took out a summons to set aside the order for sale. The High Court dismissed the summons. The appellant appealed to the Court of Appeal. One ground was advanced ie, the order for sale was invalid because the affidavit in support of the originating summons did not comply with O. 83 r. 3 of the RHC 1980 as it did not state the amount due as at the date on which the court was being moved for the order for

sale.

The Court of Appeal dismissed the appeal. The court, *inter alia* held that the order for sale was not a nullity. Considering the delay in making the application and the circumstances of the case, the court held that was an abuse of the process of the court by the appellant.

Note the similarities of the facts in *Diamond Peak Sdn. Bhd. (supra)* with*Chong Keat Realty Sdn. Bhd. (supra)* and the instant appeal. In all the three cases, not only the facts are similar, the dates are proximate and even the solicitors and the and the counsel are the same. *Chong Keat Realty Sdn. Bhd. (supra)* was a later decision of the Court of Appeal and in fact *Diamond Peak Sdn. Bhd. (supra)* was referred to, discussed and distinguished. This is what Gopal Sri Ram JCA, delivering the judgment of the court said about *Diamond Peak Sdn. Bhd (supra)* said:

We have carefully examined that case and find it readily distinguishable from the present. In *Diamond Peak*, the principle ground of complaint was the breach by the chargee of the mandatory provisions of s. 257(1)(b) of the National Land Code 1965. This court found this complaint to be entirely justified. It accordingly set aside the order for sale despite a delay of six yeaRs on the part of the chargor in making its application and despite the order having been made in the presence of the chargor's counsel. This is entirely in keeping with the principle enunciated by Mohd. Azmi FCJ in *Badiaddin* and no difficulty is thereby occasioned. However, this court also relied on the chargee's failure to observe the mandatory requirements of RHC Order 83 r. 3as an added reason for setting aside the order for sale. This was not a point strictly necessary for the outcome of the case on its merits. It is therefore pure obiter. Had counsel for the chargee brought the decision of the Form er Federal Court in *Hock Hua Bank v. Sahari bin Murid* to the attention of the division of this court that heard the *Diamond Peak* 's case, the result may well have been different.

I agree with him.

I shall omit the other decisions of the High Court on the issue.

What do we have? The only judgment that thoroughly analyzed the provisions of O. 83 r. 3 is the judgment of Abdul Aziz Mohamad J in *Perwira Affin Bank Berhad (supra)*. He paid meticulous attention to the provisions of the order and the rule. The otheRs merely assumed that O. 83 r. 3(3)(c) applied to an application for an order for sale because it would enable the chargor to know the exact amount of interest or instalments in arrear at the date of the issue of the originating summons and at the date of the affidavit. I find the judgment of Mahadev Shankar J in *Citibank N.A. (supra)* quite difficult to follow, because having said that that rule applies to a claim for delivery of possession and that that was "the very situation which O. 2 r. 1(2) of the RHC 1980 was meant to cater for", went on to dismiss the application for an order for sale. The Supreme Court in *Maimunah bte Megat Montak (supra)* while saying, *albeit* obiter, that it preferred*Citibank N.A. (supra)* to *Perwira Affin Bank Berhad (supra)*, did not elaborate, nor gave its own reasons. The Court of Appeal, whether obiter or not in *Diamond Peak Sdn. Bhd.(supra)* without analyzing the provisions of the rule held that the requirement of the rule was mandatory. Four months later, the same court, in *Chong Keat Realty Sdn. Bhd. (supra)* "distinguished" it and in fact said that the view of the court in *Diamond Peak Sdn. Bhd. (supra)* was only obiter and took a different approach towards procedural irregularities.

I agree with the approach taken by the Court of Appeal in *Chong Keat Realty Sdn. Bhd. (supra)*. There are many other decisions to support that approach which I shall not discuss - see for example: *Mokhtar bin Amin v. Mohamed Mokhtar bin Omar [2001] 4 CLJ 489 (CA)*; *Shaheen bt. Abu Bakar v. Perbadanan Kemajuan Negeri Selangor & 2 Other Cases [1996] 2 CLJ 965 (CA)*; *Sunk Yong International Inc. v. Malayan Rubber Development Corporation Bhd. [1992] 1 CLJ 310 (Rep); [1992] 3 CLJ 1531*; [1992] 2 MLJ 146; *Vincent Tan See Yin v. Noone & Company & Anor [1995] 2 CLJ 195 (SC)*;*Asiah Abdul Mnap & Anor v. Capital Insurance Berhad [1998] 4 CLJ 257 (FC)*; *Tan Chwee Geok & Anor v. Khew Yen-Yen & Anor [1975] 1 LNS 178*; [1975] 2 MLJ 188 (FC).

As far as I am aware and have been shown to us, to date, Abdul Aziz Mohamad J's judgment in *Citibank N.A. (supra)* is the only judgment that had really and thoroughly analyzed the provisions of O. 83 r. 3 of the RHC 1980.

In the circumstances, I do not think that it can be said that the courts had consistently held that O. 83 r. 3 of the RHC 1980 was applicable to an application for an order for sale. It is still an open issue, at least as far as this court is concerned. On my part, I agree with Abdul Aziz Mohamad J that it is not applicable and for the reasons given by him. Where a rule specifically says that it is applicable to A and B, it is not for the court to say that it is also applicable to C. That amounts to amending the provision which is not the function of the courts.

Now, assuming for a moment that r. 3 of O. 83 is applicable to an application for an order for sale, should the order be set aside, considering the circumstances of the case? I do not think so. The reasons have been given by Gopal Sri Ram JCA, delivering the judgment of the court in *Chong Keat Realty Sdn. Bhd.*, with which I agree entirely. The application to set aside, in the circumstances of instant appeal, as in *Cheong Keat Realty Sdn. Bhd. (supra)* is an abuse of the process of the court. It is also wrong to treat every rule of court as mandatory and every breach of it results in an order being invalid. The requirements of s. 257 of the NLC stand on a different footing and a breach thereof could have a different effect as in *Maimunah bte Megat Montak (supra).*

Question 3

For clarity, I would paraphrase the third question this way. first, whether the decision of the Court of Appeal in holding that the non-compliance with the provisions of O. 83 r. 3 by including the sum claimed as due in the order for sale is in conflict with the decision of this court in *Low Lee Lian (supra)*. Secondly, whether in holding that the fact that the notice of variation of the interest rate had not been given rendeRs the order for sale defective conflicts with*Low Lee Lian (supra).*

first, let us look at *Low Lee Lian (supra)*. In *Low Lee Lian (supra)* the chargee applied for an order for sale which was resisted by the chargor. However, after a hearing, the order for sale was made. The chargor appealed. In the Court of Appeal, there were three issues but only one is presently relevant ie, the effect of the chargee varying the rate of interest without giving notice to the chargor. From my reading of the judgment the court did not specifically address the issue. Instead, it focussed on a larger issue of "cause to the contrary". The court held that as no "cause to the contrary" could be shown, the order for sale was rightly made. The court also held that it was not sufficient to allege mere breaches by the chargee of the loan agreement or even the terms of the annexture to the charge in order to resist an application

under s. 256(3) of the NLC. In other words, by alleging that the chargee had varied the interest rate without giving notice, which, if true, is merely a breach of the loan agreement and/or the annexture to the charge, is not sufficient to show "cause to the contrary".

Coming back to the instant appeal. The issue in the second limb as paraphrased by me ie, varying the rate of interest without giving notice, was not discussed by the learned High Court Judge. It could be that it was not argued as a separate point. However, in the Court of Appeal, this argument was raised, as can be seen from the judgment. In the judgment, the learned judge of the Court of Appeal said:

We agreed with the learned counsel for the appellant that when the second offer was made and accepted it was stated clearly that that offer would extinguish the first offer upon which the first charge was based and the first offer was of no consequence anymore. The second charge made it very clear that the rate of interest is 2% above BLR. As I had stated earlier, the rate of the BLR is not stated anywhere in the charge. As such, the appellant was left in the dark as to the actual rate of interest applicable. This was further confounded by the fact that in the amount claimed also included interest rate which had been varied. Secondly, the learned counsel for the appellant also contended that the respondent arbitrarily varied the interest rate from 15.5% per annum to 16.5% per annum when the respondent made the application for the order for sale. Nowhere in the affidavits of the respondent that the respondent had given notice in writing of the variation as required by the charge instrument. As such it is clear to us that the respondent had not complied with Order 83 rule 3 of the Rules of the High Court.

I am not sure whether the learned judge had "cause to the contrary" in mind when he talked about the failure to give notice to vary the rate of interest. All he said was that it was contrary to the requirement of O. 83 r. 3 of the RHC 1980 and because of that the order for sale was invalid. However, whether he had "cause to the contrary" and s. 256 of the NLC in mind or not, by holding that the order for sale should not have been made, he must have been satisfied that "cause to the contrary" had been shown. And, if he in fact meant that "cause to the contrary" had been shown because of the failure to give notice, then clearly that would be contrary to what had been held by this court in *Low Lee Lian (supra).*

Regarding the first limb of the third question as has been paraphrased by me, as has been pointed out, s. 257(1)(c) of the NLC requires that the order for sale "shall specify the total amount due to the chargee at the date on which the order is made." The "total amount due" clearly includes interest. So, the inclusion of the interest in the "total amount due" in the order for sale is a requirement of the section. It has to be included. So the issue really is, whether by not stating the amount of interest separately as required by O. 83 r. 3(3)(c) and (7) is in conflict with *Low Lee Lian (supra).* But, *Low Lee Lian (supra)* only mentions O. 83 in passing. It did not say whether failure to comply with O. 83 amounts to "cause to the contrary". In fact, it did not even say that O. 83 r. 3 must be complied with. So, it cannot be said whether such non-compliance was in conflict or not with *Low Lee Lian supra.*

In any event, as I have held, it must be pointed out that the particulaRs mentioned in para. (3) of r. 3 need only be given where the chargee claims payment of moneys secured by the charge. This is an application for an order for sale.

To summarize, my answer to the second question is that O. 83 r. 3(3)(c) and (7) of the RHC 1980 do not apply to an application for an order for sale under s. 256 of the NLC. Therefore,

the failure to comply with the said rules does not render the order for sale defective and should be set aside. Even if the said rule applies, the circumstances of this case do not warrant the order for sale to be set aside.

As regards the third question, if the Court of Appeal meant to say that failure to give notice to vary the rate of interest amounts to "cause to the contrary", it would be contrary to *Low Lee Lian (supra)*. *Low Lee Lian (supra)* did not decide whether O. 83 r. 3 must be complied. As such, it cannot be said whether non-compliance thereof is in conflict with *Low Lee Lian (supra)* or not.

In the circumstances, I would allow this appeal with costs, confirm the order of the learned judge of the High Court and direct that the deposit be refunded to the appellant.