Bank Kerjasama Rakyat Malaysia Bhd v Emcee Corporation Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO N–02–421 OF 1999
ABDUL HAMID MOHAMAD, RICHARD MALANJUM AND ARIFIN ZAKARIA JJCA
29 JANUARY 2003

Land Law *— Charge — Order for sale — Charge under National Land Code 1965 — Loan facility an islamic banking facility — Whether position under Islamic banking different from conventional banking — Whether there existed cause to the contrary — National Land Code 1965 s 256(3)*

The appellant granted the respondent a facility under the Islamic banking principle of Al-Bai Bithaman Ajil. Both parties executed two agreements on the same date. The first was the property purchase agreement (the first agreement). Under the first agreement, the respondent sold 22 pieces of land to the appellant for RM20m. The second agreement was the property sale agreement (the second agreement). By that agreement, the appellant sold to the respondent the same properties upon deferred payment terms. Clause 3.1 provided for 36 monthly installments. As security for the repayment of the sale price under the second agreement, the respondent charged to the appellant 15 pieces of the land under the National Land Code. The respondent failed to pay the installments under the second agreement. The appellant issued a Form 16D notice under the National Land Code against the respondent. The respondent failed to comply with the Form 16D notice and the appellant filed an originating summons against the respondent for an order for sale under s 256 of the National Land Code. The High Court dismissed the application. The appellant appealed to the Court of Appeal.

Held, allowing the appeal:

(1) Although the facility was an Islamic banking facility, that did not mean that the law applicable in this application was different from the law that was 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 Code. The procedure was provided by the National Land Code and the Rules of the High Court 1980. The court adjudicating it was the High Court. So, it was the same law that was applicable, the same order that would be, if made, and the same principles that should be applied in deciding the application (see p 411G–I).

(2) It was clear that the first installment should be paid after the appellant bank released the facility to the marginal deposit

account. Clause 3.1 of the second agreement talked about the first release of the facility but nothing was mentioned about the amount of first release. 'First release' was not defined either, but it said that upon the first release being made the installment period began to run. That there was a 'first release' or 'releases' was beyond any doubt. The installments became payable and were paid partly. In the circumstances, the demand could not be said to be premature. There was nothing that brought it within the three categories of cause to the contrary established in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77. In the circumstances, the respondent failed to show a cause to the contrary that warranted the refusal of the order for sale (see p 414E, G–I).

[Bahasa Malaysia summary

Perayu telah memberi kepada responden suatu kemudahan di bawah prinsip perbankan Islam Al-Bai Bithaman Ajil. Kedua-dua parti telah melaksanakan dua perjanjian pada tarikh yang sama. Pertama adalah perjanjian pembelian hartanah (perjanjian pertama). Di bawah perjanjian ini, responden telah menjual 22 bidang tanah kepada perayu untuk RM20j. Perjanjian kedua adalah perjanjian jualan hartanah (perjanjian kedua). Melalui perjanjian itu, perayu telah menjual kepada responden hartanah-hartanah yang sama pada terma-terma bayaran yang lain. Klausa 3.1 memperuntukkan 36 ansuran bulanan. Sebagai jaminan untuk bayaran balik harga jualan di bawah perjanjian kedua, responden telah menggadai 15 bidang tanah kepada perayu di bawah Kanun Tanah Negara. Responden telah gagal membayar ansuran di bawah perjanjian kedua. Perayu telah mengeluarkan notis Borang 16D di bawah Kanun Tanah Negara terhadap responden. Responden telah gagal mematuhi notis Borang 16D dan perayu telah memfailkan saman pemula terhadap responden untuk satu perintah jualan di bawah s 256 Kanun Tanah Negara. Mahkamah Tinggi telah menolak permohonan itu. Perayu telah merayu kepada mahkamah ini.

Diputuskan, membenarkan rayuan:

(1) Walaupun kemudahan itu adalah kemudahan perbankan Islam, ini tidak bermakna bahawa undang-undang yang terpakai di dalam permohonan ini berlainan daripada undang-undang yang terpakai jika kemudahan ini diberi di bawah perbankan biasa. Gadaian tersebut adalah suatu gadaian di bawah Kanun Tanah Negara. Remedi yang ada dan yang dipohon merupakan remedi yang diperuntukkan oleh Kanun Tanah Negara. Prosedur diperuntukkan oleh Kanun Tanah Negara dan Kaedah-Kaedah Mahkamah Tinggi 1980. Oleh itu, undang-undang yang sama terpakai, perintah yang akan, jika dibuat, adalah sama, dan

prinsip-prinsip yang patut dipakai adalah sama dalam memutuskan permohonan itu (lihat ms 411G–I). A

(2) Ia adalah jelas bahawa ansuran pertama patut dibayar selepas bank perayu mengeluarkan kemudahan itu kepada akaun simpanan margin. Klausa 3.1 perjanjian kedua adalah mengenai keluaran pertama ('first release') kemudahan tetapi tiada apa-apa yang menyatakan tentang jumlah keluaran pertama itu. 'First release' tidak ditafsirkan tetapi telah dikatakan bahawa setelah keluaran pertama dibuat tempoh ansuran bermula. Tiada keraguan tentang adanya 'first release' atau 'releases'. Ansuran tersebut telah menjadi berbayar dan telah dibayar sebahagiannya. Di dalam keadaan ini, tuntutan bukan pramasa. Tiada apa-apa yang membuatnya termasuk ke dalam kategori-kategori kausa yang bertentangan yang ditetapkan di dalam *Low Lee Lian v Ban Hin Lee Bank Bhd* [1977] 1 MLJ 77 yang mewajarkan penolakan perintah jualan itu (lihat ms 414E, G–I). B C D

Notes

For cases on order for sale, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue), paras 1939–2020. E

Cases referred to

Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77 (refd)

Legislation referred to F

National Land Code 1965 s 256
Rules of the High Court 1980

Arshad Ismail (*Lucy Tan* with him) (*Mohamed Ismail & Co*) for the appellant.

Kevin Danker (*Peter Skelchy* with him) (*Danker & Co*) for the respondent. G

Abdul Hamid Mohamad JCA (delivering judgment of the court): The appellant (the plaintiff in the court below) granted the respondent (the defendant in the court below) a facility of RM20m 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 RM20m. 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 installments totaling RM23,571,864. H I

As 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.

The respondent failed to pay the installments under the second agreement. The appellant issued a Form 16D notice under the National Land Code 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.

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 installments 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 utilized 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 RM5j 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 Jun 1996 untuk jumlah RM3j tetapi dikatakan defendan belum menepati syarat. Saya puas hati 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 Code'). The remedy available and sought is a remedy provided by the Code. The procedure is provided by the National Land 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:

> (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.
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> (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.
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> (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] 1 MLJ 77. 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 the 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:
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> (1) 'Cause to the contrary' within s 256(3) of the Code [National Land 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.
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> (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 Annexure, inter alia, provides:

> 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) ...

Clause 2 (Covenant) provides:

> 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 ('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.
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> 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):

> 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:

> 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 ('the Payment Period') by the two following modes whichever shall be earlier:
>
> (a) by thirty six (36) monthly instalments as follows:

Month	Amount per Instalment (RM)	Total (RM)
1st to 9th	91,666.67	825,000.03
10th to 35th	842,476.44	21,904,387.44
36th	842,476.53	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 clause (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 the 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) and the Redemption Sum ('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 RM5m is released that the first instalment becomes due. Where is that provided for? The only place the figure RM5m 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 RM5m 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 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

A order for sale. We would therefore allow the appeal with costs and order that the deposit be refunded to the appellant.

Appeal allowed.

Reported by Peter Ling

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