

**DALAM MAHKAMAH RAYUAN MALAYSIA  
(BIDANG KUASA RAYUAN)  
RAYUAN SIVIL NO. B-02-1080-2001**

ANTARA

PEOPLE REALTY SDN. BHD.  
(No. Syarikat 119350-X)

... PERAYU

DAN

HONG LEONG BANK BERHAD

... RESPONDEN

(Dalam Mahkamah Tinggi Di Shah Alam  
Saman Pemula No. MT2-24-408-1999)

Coram: Mokhtar Sidin, J.C.A.  
Low Hop Bing, J.C.A.  
Raus Sharif, J.C.A.

## **JUDGMENT OF THE COURT**

1. This is an appeal by the defendant against an order for sale made by learned Judge Shah Alam on 29 June 2001 pursuant to section 256 of the National Land Code 1965 (“NLC”).
  
2. On 20 June 2007 we heard and dismissed the appeal. We now give our reasons. First, the relevant facts.
  
3. The plaintiff is a financial institution. The defendant was at the material time the plaintiff’s borrower and has extended a number of banking facilities to the defendant. On 6 October 1995, the plaintiff offered a term loan of RM3.5 million and overdraft facilities of RM2 million to the defendant. The offer was accepted, and on 19 October 1995 the defendant executed a charge under the NLC (“charge”) in favour of the plaintiff. The charge was created over two lots of land owned by the defendant, namely Lots No. S 5808 and 5809, C.T. No.S 20462

and 20463, Mukim Petaling, Daerah Kuala Lumpur (“the said land”).

4. On 30 October 1995 the defendant and the plaintiff entered into a facility agreement in respect of the term loan and overdraft facilities (“facilities agreement”). Arising from the facilities agreement, defendant on 7 November 1995 executed the power of attorney in favour of the plaintiff (“1<sup>st</sup> power of attorney”).
  
5. The defendant defaulted in the repayment of the principal sum of the term loan facility. At the defendant’s request, the plaintiff offered to restructure several of the defendant’s banking facilities provided by the plaintiff, including the term loan facility. The offer is included in the plaintiff’s letter dated 14 January 1998. The conditions attached to the offer include -
  - (i) the defendant to execute a power of attorney allowing the plaintiff to dispose of the said land; and

- (ii) the said land to be sold within 6 months and the total proceeds from the sale shall be used to reduce any outstanding loans with the plaintiff.
  
- 6. The defendant accepted the offer. Thus, on 24 April 1998, the appellant signed a second power of attorney which allows the plaintiff to sell the said land (“2<sup>nd</sup> power of attorney”). Subsequently, the defendant failed to make payment of the outstanding sum. Instead of selling the said land under the 2<sup>nd</sup> power of attorney, the plaintiff on 1 March 1999 issued the statutory notice of default of the charge in Form 16D of the NLC (Form 16D) to the defendant. The defendant was given a prescribed period to remedy the breach. The defendant failed to do so.
  
- 7. On 26 March 1999 the plaintiff filed an originating summons in the Shah Alam High Court applying for an order for sale. On 29 June 2001, the Shah Alam High Court allowed the plaintiff’s application. Hence, this appeal by the defendant.

8. The learned counsel for the defendant submitted before us that the learned High Court Judge had seriously erred in both appreciation of law and appreciation of facts in failing to find there was in existence an exceptional event which gave rise to cause to the contrary under section 256 (3) of NLC against making the order for sale of the said land. He advanced five main grounds, namely -

- (i) the plaintiff had wrongfully elected to obtain the order for sale despite the existence of the 2<sup>nd</sup> power of attorney;
- (ii) the charge was defective because the letter of offer and facilities agreement were not annexed to and not registered with the charge. Thus, the plaintiff has therefore wrongfully relied on the terms of the letter of offer and facilities agreement when applying for the order for sale;

- (iii) the Form 16D was defective because the plaintiff did not issue a demand before issuing Form 16D notice and the plaintiff also did not specify the breach committed by the defendant;
- (iv) the defendant's affidavit in support of the originating summons did not comply with a number of requirements under O 83 r 2 and r 3 of the Rules of the High Court ("RHC"); and
- (v) the prayers sought in the originating summons did not comply with s 257 of NLC.

9. It is our respectful view that the grounds advanced by the defendant do not constitute cause to the contrary under section 256 (3) of NLC. It is trite law that the defendant, being the chargor, has the onus of establishing cause to the contrary as to why an order for sale should not be made. The Supreme Court in **Low Lee Lian v Ban Hin Lee Bank Bhd. [1997] 2**

**CLJ 36** held that the cause to contrary may be established in three categories of cases namely:

- (i) the chargor demonstrates that the charge, the enforcement of which is sought, is defeasible based on one or more of the grounds specified under s 340 of NLC;
  - (ii) the chargor demonstrates that the charge has failed to meet the conditions precedent for making of an application for order for sale; and
  - (iii) the chargor demonstrates that an order for sale will be contrary to some rule of law or equity.
10. We find that defendant had failed to demonstrate any of the above. We say so for the following reasons -

(i) The 2<sup>nd</sup> Power of Attorney

11. The defendant contended that the plaintiff had wrongfully elected to apply and to obtain the order for sale of the said land despite the existence of the 2<sup>nd</sup> power of attorney. It is our respectful view that the 2<sup>nd</sup> power of attorney does not affect the plaintiff's right under the charge to apply and to obtain the order for sale. This is because the 2<sup>nd</sup> power of attorney was merely a security provided to the plaintiff. From facts, it is clear that the defendant was at all time in breach of its repayment obligations under the term loan facility. Following the breach, the plaintiff had agreed to restructure the defendant's numerous loan obligations to the plaintiff. The letter of offer dated 14 January 1998 imposed a conditions that the defendant was to sign the 2<sup>nd</sup> power of attorney in favour of the plaintiff in order to restructure the defendant's banking facilities. Therefore, the 2<sup>nd</sup> power of attorney was nothing more than a further security which the plaintiff was entitled to ask from the defendant under section 9.05 of the facilities agreement in consideration of

restructuring the defendant's loan obligations. The recital at (D) and 3<sup>rd</sup> paragraph of the 2<sup>nd</sup> power of attorney also clearly shows that the 2<sup>nd</sup> power of attorney was provided as part of the plaintiff's right to demand for further security under the facilities agreement. Since the 2<sup>nd</sup> power of attorney is nothing more than a security, it is trite law that the plaintiff has no obligation in law to exercise the powers under the 2<sup>nd</sup> power of attorney to sell the said land.

12. In any event the 2<sup>nd</sup> power of attorney contains express provisions that the plaintiff has no obligation to sell the said land. Page 4 of the 2<sup>nd</sup> power of attorney states that nothing in it shall be construed as imposing any obligation on the plaintiff to exercise any of the powers under the power of attorney. At the same page, it is also stated that the 2<sup>nd</sup> power of attorney is granted in addition to and not in derogation of and without prejudice to any rights and remedies exercised or to be exercised by the plaintiff on any securities obtained by the plaintiff. Further at page 5, it states that the defendant is not

entitled to take any action against the plaintiff in respect of the plaintiff's omission to execute the powers under the 2<sup>nd</sup> power of attorney. It is therefore apparent that the 2<sup>nd</sup> power of attorney does not restrict the plaintiff's right to obtain the order for sale for the said land pursuant to the charge.

(ii) Letter of Offer and Facilities Agreement were not annexed to and registered with the charge

13. The defendant contended that although the charge made reference to the letter of offer and facilities agreement, they were not annexed to and registered with the charge. As such, according to the defendant, the plaintiff cannot rely on the terms of the letter of offer and facilities agreement, in particular the provisions relating to interest. With respect, we are unable to agree. Firstly, there is no requirement under sections 243 and 244 of the NLC that the two documents need to be annexed and registered with the charge before the terms and conditions of the two documents were to form part of the charge. Secondly, Form 16A does not impose any requirement that, in

a situation like this, the two documents must also be annexed and registered. Finally, section 11.32 of the charge expressly states that the terms and conditions of the letter of offer and facilities agreement form part of the terms and conditions of the charge. Thus, the terms of the letter of offer and facilities agreement are deemed to have been incorporated into the charge (see **Chai Yen v Bank of America National Trust And Savings Association [1981] 2 MLJ 141**).

- (iii) No prior demand prior to the issuance of Form 16D
14. The defendant contended that Form 16D should have only been issued after the plaintiff had first issued a notice of demand. With respect, we disagree. There is no requirement for a notice of demand to precede the issuance of Form 16D (see **Multi-Purpose Bank Bhd. v Maimoon bte Abdul Razak [1999] 6 MLJ 215**). Moreover section 4.01 (b) of the charge clearly provides that all monies due and owing by the defendant, including the principal sum and all interest accrued,

shall become forthwith due and payable if an event of default occurs under s 12.01 of the facilities agreement. Section 12.01 (b) of the facilities agreement provides that default in the payment of any monies due and owing under the charge shall become an event of default. In the instant case Form 16D sent to the defendant clearly stated that the defendant had defaulted in repayment of the monies due and owing under the loan. The defendant was given a prescribed period to remedy the breach. That itself is and has become a notice to the defendant. Thus, there is no requirement for prior demand before the issuance of Form 16D.

15. There is also no substance in the defendant's contention that Form 16D was defective because it did not specify the breach committed by the defendant. A proper examination of Form 16D will show that the breach has been specified. It clearly stated that the defendant had failed to settle the principal sum as well as interest and the amount demanded was supported by a certificate of indebtedness.

- (iv) Plaintiff's affidavit had not complied with the Requirements of Order 83 RHC

16. It is the contention of the defendant that this being a claim including a claim for possession of land the plaintiff has failed to comply with Order 83 Rules 2, 3 and 7 of RHC in that –

- (i) Failed to comply with Order 83 Rules 2 (3) as the notice informing the defendant that the plaintiff intends at the hearing to apply for an order for the defendant to deliver up to the plaintiff possession of the said land was not endorsed on the outside fold of the copy of the affidavit served on the defendant;
- (ii) Failed to comply with Order 83 Rule 3 (2) as the original charge was not exhibited to the affidavit or alternatively a copy of the certificate of charge has not been produced;

- (iii) Failed to comply to Order 83 Rule 3 (3) as the plaintiff has failed to show the circumstances under which the right to possession arose;
  - (iv) Contrary to Order 83 Rule 3 (3) (c) as the plaintiff has failed to state the amount owing at the date of the plaintiff's affidavit in support of the plaintiff's application;
  - (v) Contrary to Order 83 Rule 7 as the plaintiff has failed to state the amount of a day's interest although the plaintiff's claiming interest to judgment and even beyond.
17. It is our respectful view that Order 83 Rule 2 (3) has no application in this case. Order 83 Rule 2 (3) applies only to circumstances where the defendant did not enter appearance, which is not the case here. (See **Malaysia Building Society Berhad v Univein Sdn. Bhd. [2002] 2 CLJ 81**). We are also of the view that the plaintiff has complied with requirements of Order 83 Rule 3 (2) of RHC as the certified true copy of the charge was exhibited. There is no requirement to exhibit the

original charge or produce the charge certificate, especially when the defendant is not disputing the existence of the charge (see **Oriental Bank Bhd. v Cipta Permai Sdn. Bhd. [2003] 7 CLJ 471**).

18. It may be true that the plaintiff did not state the amount owing at the date of the plaintiff's affidavit in support of the plaintiff's application but the actual amount due and owing has always been confirmed in the other affidavits filed by the plaintiff from time to time including the interest. This the plaintiff was not in breach of Order 83 Rule 3 (3) neither Order 83 Rule 7.
  
19. In any event, we are of the view that the non-compliance alleged by the defendant are minor and technical. The non-compliance of procedural requirements should not be treated as invalidating any action or other proceeding or step taken, unless it occasions a substantial miscarriage of justice. (See **Chong Keat Realty Sdn. Bhd. V Ban Hin Lee Bank Bhd.**

**[2003] 3 MLJ 321**). In the present case it is not shown how the non-compliance has prejudiced the defendant.

(v) Prayers in the originating summons

20. The defendant contended that the prayer in the originating summons did not state that the sale to be alternatively held 'as soon as possible' as required under s 275 (1) (b) of NLC. Our short answer is that under s 275 of NLC does not require such a stipulation.

Conclusion

21. On the foregoing grounds, it is our respectful view that the defendant had failed to meet the requisite legal test of what amounts to a cause to the contrary. It follows that the learned High Court Judge was right in making the order for sale. Accordingly, we dismissed the appeal with ½ costs to the plaintiff.

Dated 13 September 2007.

Raus Sharif  
Judge  
Court of Appeal Malaysia

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