Bumiputra-Commerce Bank Bhd v Abu Kassim bin Saidin & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02–2200 OF 2010
ABDUL WAHAB PATAIL, ABDUL AZIZ AB RAHIM AND MOHAMAD ARIFF JJCA
4 NOVEMBER 2014

Civil Procedure — Appeal — Record of — Defects in record of appeal — Inclusion in record of appeal of document which was not made an exhibit in court below — Whether document to be expunged — Whether injustice caused in striking off appeal without hearing merits — Avoidance of strict and slavish adherence to forms and rules

Civil Procedure — Rules — Avoidance of strict and slavish adherence to forms and rules — Whether appeal to be struck off just because of defect in record of appeal

Land Law — Charge — Order for sale — Failure to exhibit letter of demand — Default in repayment of facility not disputed — Letter of demand not mandatory — Whether failure to exhibit letter of demand fatal to appellant's claim — Whether failure to state that interest rates are variable fatal to appellant's claim — Whether order for sale to be granted — Rules of the High Court 1980 O 83 r 3 — National Land Code s 256(3)

The appellant appealed against the dismissal on 8 July 2010 of the appellant's application for an order for sale of the property charged by the respondents. The respondents had filed a notice of motion ('the notice of motion') to strike out the appeal on the grounds that a letter of demand dated 10 March 2000 ('the letter of demand') which appeared as exh WAT7 in the record of appeal was not the document produced as exh WAT7 in the High Court. Counsel for the appellant admitted the error complained of. The respondents never disputed that they had defaulted in the repayment of the facility. The following issues arose for consideration: (a) whether the inclusion in the record of appeal of the letter of demand as exhibited as exh WAT7 in the High Court when in fact it was not exhibited, was fatal to the appeal; and (b) if not, whether there was merit in the appeal.

Held, allowing the appeal:

(1) Exhibit WAT7 and exh WAT8 in the affidavit in support of the originating summons ('the affidavit') had exhibited the same documents. Paragraph 11 of the affidavit clearly intended to produce the letter of demand as exh WAT7. However, erroneously exh WAT7 had instead exhibited the same documents that were exhibited as exh WAT8. The first respondent's affidavit in reply in the High Court made no mention that exh WAT7 did not produce the letter of demand (see para 11).

(2) The letter of demand was to be expunged and struck off as exh WAT7. However, to strike out the appeal in the circumstances of this case, without considering the appellant's appeal on its merits was as much an injustice as taking the letter of demand as exh WAT7 when it should not have been. Strict and slavish adherence to forms and rules can sometimes hinder the administration of justice. Since there was no dispute that the documents at exh WAT7 and at exh WAT8 in the High Court were the same, the court was not unable to consider the appeal on its merits as before the High Court (see para 23).

(3) On the present facts, the letter of demand was not mandatory or a pre-requisite to the claim. Since the letter of demand was neither mandatory nor a pre-requisite, the failure to prove it was not fatal to the appellant's claim (see para 29).

(4) For the purposes of an order for sale, the particulars as required by O 83 r 3 of the Rules of the High Court 1980 had been provided, and since the three categories of cause to the contrary were not established by the respondents, the order for sale must, in accordance with s 256(3) of the National Land Code, be granted even if the claim for payment of moneys secured is dismissed (see para 41).

(5) Judicial notice may be taken that interest rates are rarely fixed interest rates but are variable. Where the interest rate upon a facility is based upon a base lending rate, changes in the interest rate is inherently agreed to (see para 42).

(6) The failure to exhibit the letter of demand in the context of the agreement between the parties here was not fatal to the claim. The appellant had satisfied the requirements of O 83 r 3 in respect of the moneys as claimed (see para 50).

[Bahasa Malaysia summary

Perayu telah merayu terhadap penolakan pada 8 Julai 2010 berhubungan dengan permohonan perayu untuk perintah jualan hartanah yang digadaikan oleh responden-responden. Responden-responden telah memfailkan notis usul ('notis usul tersebut') untuk membatalkan rayuan atas alasan bahawa surat tuntutan bertarikh 10 Mac 2000 ('surat tuntutan tersebut') yang dinyatakan sebagai eksh WAT7 di Mahkamah Tinggi. Peguam bagi pihak perayu

mengakui kesilapan yang diadukan. Responden-responden tidak pernah mempertikaikan yang mereka telah gagal dalam bayaran balik kemudahan itu. Berikutan isu-isu yang timbul untuk dipertimbangkan: (a) sama ada kemasukan dalam rekod rayuan untuk surat tuntutan seperti diekshibitkan sebagai eskh WAT7 di Mahkamah Tinggi walhal ia tidak diekshibitkan, adalah memudaratkan rayuan itu; dan (b) jika tidak, sama ada rayuan itu bermerit.

Diputuskan, membenarkan rayuan:

(1) Ekshibit WAT7 dan eksh WAT8 dalam afidavit sokongan kepada saman pemula ('afidavit') telah mengekshibitkan dokumen-dokumen sama. Perenggan 11 afidavit jelas berniat untuk mengemukakan surat tututan sebagai eksh WAT7. Walau bagaimanapun, secara tersilap eksh WAT7 sebaliknya telah mengekshibitkan dokumen-dokumen sama yang telah diekshibitkan sebagai WAT8. Afidavit jawapan responden pertama di Mahkamah Tinggi tidak menyatakan bahawa eksh WAT7 tidak mengemukakan surat tuntutan itu (lihat perenggan 11).

(2) Surat tuntutan itu telah dihapuskan dan dibatalkan sebagai eksh WAT7. Walau bagaimanapun, untuk membatalkan rayuan tanpa mempertimbangkan rayuan perayu atas meritnya, sama seperti suatu ketidakadilan seperti menganggap surat tuntutan sebagai eksh WAT7 walhal tidak sepatutnya begitu. Pematuhan ketat kepada bentuk dan peraturan kadang-kadang boleh menghalang pentadbiran keadilan. Oleh kerana tiada pertikaian bahawa dokumen-dokumen pada eksh WAT7 dan pada eksh WAT8 di Mahkamah Tinggi adalah sama, mahkamah tidak dapat mempertimbangkan rayuan atas meritnya di hadapan Mahkamah Tinggi (lihat perenggan 23).

(3) Berdasarkan fakta semasa, surat tuntutan bukan prasyarat atau mandatori kepada tuntutan. Oleh kerana surat tuntutan bukan prasyarat atau mandatori, kegagalan untuk membuktikannya tidak memudaratkan tuntutan perayu (lihat perenggan 29).

(4) Bagi tujuan perintah jualan, butiran-butiran sebagaimana dikehendaki oleh A 83 k 3 Kaedah-Kaedah Mahkamah Tinggi 1980 telah diperuntukkan, dan oleh kerana ketiga-tiga kategori sebab sebaliknya tidak dibuktikan oleh responden-responden, perintah jualan hendaklah, menurut s 256(3) Kanun Tanah Negara, diberikan walaupun tuntutan untuk bayaran wang yang dicagarkan telah ditolak (lihat perenggan 41).

(5) Pengiktirafan kehakiman boleh dibuat bahawa kadar faedah jarang menetapkan kadar faedah tetap tetapi boleh berubah-ubah. Di mana kadar faedah ke atas suatu kemudahan adalah berdasarkaan kadar pinjaman asas, perubahan dalam kadar faedah telah dipersetujui pada asasnya (lihat perenggan 42).

(6) Kegagalan untuk mengekshibitkan surat tuntutan dalam konteks

perjanjian antara pihak-pihak di sini tidak memudaratkan tuntutan. Perayu telah memenuhi keperluan A 83 k 3 berkenaan wang sebagaimana dituntut (lihat perenggan 50).]

Notes

For a case on order for sale, see 8 *Mallal's Digest* (5th Ed, 2015) para 4230. For cases on record of appeal, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1664–1730.

Cases referred to

Bachan Singh v Mahinder Kaur [1956] 1 MLJ 97; [1956] 1 LNS 14, HC (refd)
Danaharta Urus Sdn Bhd v Kam Tick Beng & Anor [2014] 2 MiLJcon 22; [2009] 5 AMR 682; [2009] 1 LNS 538, HC (refd)
Low Cheng Soon v TA Securities Sdn Bhd [2003] 1 MLJ 389; [2003] 1 CLJ 309, CA (refd)
Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77, SC (refd)
Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719; [1995] 3 CLJ 520, CA (refd)
Lum Choon Realty Sdn Bhd v Perwira Habib Bank Malaysia Berhad [2003] 4 MLJ 409; [2003] 5 AMR 577; [2003] 3 CLJ 791, CA (refd)
Lum Choon Realty Sdn Bhd v Perwira Habib Bank Malaysia Berhad [2003] 5 AMR 577; [2003] 3 CLJ 791 (refd)
United Merchant Finance Berhad v Chang Miau Sin [2001] 5 MLJ 494; [2001] 1 CLJ 660, HC (refd)

Legislation referred to

National Land Code ss 256(2), (3), 340, Form 16D
Rules of the Court of Appeal 1994 r 18(4)(c)
Rules of the High Court 1980 O 83 r 3

Appeal from: Originating Summons No MT6(1)–24–1241 of 2006 (High Court, Shah Alam)

Ashmadi bin Othman (Muhammad Akram bin Abdul Aziz with him) (Amin, Yap & Co) for the appellant.
K Periasamy (P Selvaraj with him) (Raj & Co) for the respondent.

Abdul Wahab Patail JCA:

[1] The appellant Bumiputra-Commerce Bank Bhd appealed against the dismissal on 8 July 2010 of the appellant's application dated 4 July 2006 for an order for sale of the property charged by the respondents Abu Kassim bin Saidin and Norbayah bt Baba.

THE RESPONDENTS' NOTICE OF MOTION AT ENCL 6a

[2] The appeal before this court was heard on 4 October 2012 together with the respondents' notice of motion at encl 6a filed on 10 September 2012 ('the notice of motion'), to strike out the appeal on the grounds that:

a Perayu telah sengaja menukar dokumen dalam eksibit yang ditandakan sebagai 'WAT7' dalam rekod rayuan malahan di peringkat Mahkamah Tinggi, dokumen lain dirujuk;

b Isu mengenai eksibit 'WAT7' dan 'WAT8' telah dibangkitkan dalam hujahan responden di peringkat Mahkamah Tinggi; dan

c Penukaran dokumen dalam eksibit tersebut adalah suatu perbuatan mala fide dan/atau penipuan di pihak Perayu.

[3] The affidavit in support of the notice of motion is deposed by P Selvaraj a/l SKP Palani, the solicitor for the respondents. It is strongly worded. He averred that:

11. Penukaran dokumen dalam eksibit 'WATT' adalah suatu perbuatan 'mala fide' di pihak perayu dan dianggap sebagai suatu penipuan yang dilakukan di pihak perayu.

...

14. Perayu cuba menukar dokumen berkenaan secara sengaja dengan niat untuk memperdaya Mahkamah serta responden.

...

16. Oleh kerana penukaran eksibit di dalam rekod rayuan, rekod rayuan yang difailkan itu menjadi tidak sah dan harus diketepikan.

17. Memandangkan rekod rayuan dianggap tidak sah, keseluruhan rayuan perayu sepatutnya hendaklah dibatalkan dengan kos.

[4] In short, the complaint is that the letter of demand dated 10 March 2000 as now appears as exh WAT7 in the record of appeal at RR(C):183-188 is not the document produced as exh WAT7 in the High Court.

[5] Counsel for the appellant admitted the error complained of. He informed this court that they had taken over the case two weeks earlier and had then been served with encl 6a. They had filed their notice of change of solicitors on 2 October 2012.

[6] Since the issue of failure to produce the letter of demand dated 10 March 2000 at exh WAT7 in the High Court was raised during submissions in the High Court, we decided that we would decide on encl 6a at the end of the hearing of the appeal.

[7] The facts were summarised for the appellant as follows:

(a) The respondents had accepted a term loan facility as well as an overdraft facility from the appellant;

(b) As security, the respondents had charged their property known as Lot No 9 Jalan 22/44, Section 22, Bandar Petaling Jaya, Selangor Darul Ehsan;

(c) The respondents had never disputed at all material times that they had conducted the term loan and overdraft facility in an unsatisfactory manner and defaulted in the repayment of the outstanding amount of the said facility;

(d) Due to the default, the appellant had instructed its previous solicitors, Messrs Abdullah A Rahman & Co to issue a letter of recall dated 10 March 2000 as well as a Form 16D dated 26 June 2000 demanding payment of the total outstanding sum due and owing of RM209,690.22 on the term loan and RM53,665.84 on the overdraft facility together with interests by the respondents to the appellant; to which there was neither payment made nor reply or response by the respondents to challenge the appellant's demand or the amount demanded; and

(e) The appellant thereafter had instructed its previous solicitors, Messrs Amin Yap & Co to issue a Form 16D Notice dated 22 December 2005 to claim the outstanding sum due and owing of RM316,230.45 on the term loan and RM96,275.70 on the overdraft facility together with interests by the respondents, to which again there was neither payment made nor reply or response by the respondents to challenge the appellant's demand or the amount demanded.

[8] The submissions for the respondents, both written and orally before us are similar, that:

(a) before the High Court, exh WAT7 was the notice of default dated 26 June 2000 as now produced at p 126 of the respondents' notice of motion at encl 6a, and not the notice of demand dated 10 March 2000 as now appears at *RR Jld* 2/3: 184 as exh WAT7 before this court; and

(b) they had objected on 29 August 2012 to the inclusion of the document at *RR Jld* 2/3: 184 to the respondents' previous solicitors.

FINDINGS OF THIS COURT ON ENCL 6a

[9] The respondents' notice of motion at encl 6a had produced a copy of the appellant's originating summons before the High Court. It is clear that exh WAT7 and exh WAT8 in the affidavit in support of the originating summons had exhibited the same documents. It is also clear that the said affidavit intended to produce the letter of demand dated 10 March 2000, as the following averments show:

> 11. Saya sesungguhnya percaya melalui rekod plaintif yang telah saya teliti, plaintiff telah mengarah peguamcara plaintif terdahulu, Tetuan Abdullah A Rahman & Co (selepas ini dirujuk sebagai 'peguamcara plaintif terdahulu'), mengeluarkan satu notis tuntutan bertarikh 10 Mac 2000 bagi menuntut balik jumlah-jumlah yang tertunggak dan terhutang dl bawah kemudahan pinjaman dan kemudahan overdraf yang telah diberikan kepada defendan-defendan.
>
> Sesalinan notis bertarikh 10 Mac 2000 tersebut dikemukakan dan dilampirkan dl sini serta di tanda sebagai eksibit 'WAT7'.
>
> 12. Saya sesungguhnya percaya melalui rekod plaintif yang telah saya teliti bahawa peguamcara plaintif terdahulu seterusnya telah menghantar satu notis tuntutan berkenaan gadaian ('Form 16D') menurut Kanun Tanah Negara 1965 bertarikh 26 June 2000 kepada Defendan-defendan setelah Defendan-defendan gagal untuk meremedi kemungkiran yang telah dilakukan.
>
> Sesalinan notis tuntutan berkenaan gadaian bertarikh 26 June 2000 tersebut dikemukakan dan dilampirkan dl sini serta dl tanda sebagai eksibit 'WAT-8'.

[10] Since paragraph 11 of the appellant's affidavit in support of the originating summons clearly intended to produce the letter of demand dated 10 March 2000 as exh WAT7, the error was the failure to exh the said letter of demand in exh WAT7, and instead had exhibited at exh WAT7 the same documents that were exhibited at exh WAT8 as per paragraph 12.

[11] The first respondent's affidavit in reply in the High Court made no mention that exh WAT7 did not produce the letter of demand dated 10 March 2000. Instead it was averred:

> 12. Sebagai jawapan kepada perenggan 11 affidavit sokongan plaintif, saya dan defendan kedua mencabar plaintif untuk membuktikan bahawa saya dan defendan kedua telah menerima notis tuntutan bertarikh 10 Mac 2000 dengan sempurna dan penyampaian notis tersebut adalah mematuhi kehendak undang-undang yang sedia ada. Lebih-lebih lagi notis yang dikeluarkan itu adalah terikat dibawah Akta Had Masa 1953.

[12] It was nevertheless submitted before the High Court for the respondents herein that:

> Notis Tuntutan Tidak Sah

A Plaintif dalam perenggan 11 affidavit sokongan (Lampiran 2) merujuk kepada suatu notis tuntutan bertarikh 10 Mac 2000 dan merujuknya sebagai eksibit 'WAT7'. TETAPI notis ini bukanlah notis tuntutan yang dilampirkan dalam eksibit 'WAT7' tetapi notis dalam Borang 16D telah dilampirkan dan eksibit yang dilampirkan semula dan adalah sama dengan eksibit 'WAT8'. Maka tiada notis
B tuntutan dikenakan untuk menyokong permohonan plaintif.

[13] It was submitted in the High Court that:

(a) the failure to produce a notice of demand means no notice of demand
C had been served;

(b) and since cl 3(b) of the charge provides that any demand for payment of the money intended to be served may be made by a notice in writing requiring payment within seven days; and

D (c) relying upon *Danaharta Urus Sdn Bhd v Kam Tick Beng & Anor* [2014] 2 MLJcon 22; [2009] 5 AMR 682; [2009] 1 LNS 538 as authority,

the originating summons was invalid and ought to be struck out:

Maka adalah hujah bahawa plaintif gagal mengemukakan notis tuntutan dan kegagalan memberi notis tuntutan dianggap sebagai tiada notis tuntutan diberikan
E dan oleh kerana gadaian (eksibit 'WAT3') memperuntukkan suatu peruntukkan yang mandatori untuk memberi notis, Saman Pemula harus dianggap tidak sah dan hendaklah dibatalkan. Menurut kes *Danaharta* yang tersebut yang dirujuk diatas, notis tuntutan adalah 'pre-requisite to the claim'. dan kegagalan memberi notis tuntutan menjadi tuntutan tidak sah.

F

[14] In the appellant's appeal to this court, the letter of demand dated 10 March 2000 was included in the record of appeal by the appellant as 'WAT7'.

[15] It was submitted for the respondents that:

G

...

In this instance, the appellant *deliberately changed* the exh marked as 'WAT7' in the affidavit in support while filing the record of appeal.

The respondent refers to pages 11 to 141 of the notice of motion filed herein. This
H is the affidavit in support filed in the High Court Shah Alam by the appellant in support of their originating summons.

The respondent refers to pp 125 - 136 of the notice of motion which enclosed exhs 'WAT7 and 'WAT8'. If My Lady/Lords refer to both the exhibits, they are identical and there is no difference in them.

I ...

However, when the appellant filed the record of appeal, they have *deliberately changed the exh 'WAT7'* in the record of appeal. I refer my Lady/Lords to pages 168 to 288 of the Notice of Motion wherein the *Jld* 2/3 of the Record of Appeal is reproduced. The appellant refers in particular to pages 269 to 283 of the notice of

motion. Exhibit 'WAT7' in the record of appeal is totally different from the actual exhibit referred and marked and produced as 'WAT7' in the supporting affidavit filed in the High Court.

This change of exhibit in the record of appeal is a *deliberate attempt* done by the appellant herein and such an attempt should be taken seriously.

Further, by changing such and exhibit put in evidence in the High Court has *caused the record of appeal defective* and the Record of Appeal filed herein is *in breach of* Rule 18 (4)(c) Rules of The Court of Appeal 1994. The word 'shall' is used in the said Rules which reflects measure of mandatoriness in it.

...

The appellant by using the different exhibit in the Appeal Record is a *blatant disregard* of the Rules which is an *abuse of the said rules* and is *intended to misled (sic)* this honourable court *(sic)*.

...

It is crystal clear that the record of appeal in this matter is a defective record of appeal as it does not contain all documents put in evidence in High Court.

...

... in this instance (*sic*) appeal whereby (*sic*) the material facts raised in the affidavit in support has not been replied or rebutted by the appellant. Therefore, (for) the reasons stated in this notice of motion (there is) deemed admission by the appellant. Therefore ~~no~~ (there) is no proper appeal before this court.

[16] The two issues that arise for consideration are therefore whether:

(a) the inclusion in the record of appeal of the letter of demand dated 10 March 2000 as exhibited as exh WAT7 in the High Court when in fact it was not exhibited, is fatal to the appeal; and

(b) if not, whether there is merit in the appeal.

RE RECORD OF APPEAL, EXH WAT-7 AND STRIKING OUT

[17] Rule 18(4)(c) of the Rules of the Court of Appeal 1994, provides:

(4) The appellant shall attach to such memorandum copies of the proceedings in the High Court, including:

...

(c) copies of all affidavits read and of all documents put in evidence in the High Court *so far as they are material for the purposes of the appeal*, and subject to rule 101 if such documents are not in the national language, copies of certified translations thereof';

[18] In *Low Cheng Soon v TA Securities Sdn Bhd* [2003] 1 MLJ 389; [2003] 1 CLJ 309 (CA), it was held that r 18(4)(c) is mandatory. However, addressing the qualification so far as they are material for the purposes of the appeal, it was

held:

> Next, the said rule says 'so far as they are material for the purposes of the appeal'. Now, who is to decide which exhibits are material for the purpose of this appeal? We must say with the greatest of respect to learned counsel for the appellant that it is not a matter for him to decide or say that only two exhibits are material. It is for the court to decide which exhibits are material and relevant to this appeal.

[19] In that case, there were 80 exhibits produced and the appellant had included in the record of appeal only six. There were exhibits referred to in the grounds of judgement of the High Court which were the subject of the appeal, that were not included in the record of appeal. The Court of Appeal was clearly not impressed with the response to the respondents' objection:

> Before us, in response to learned counsel for the respondent learned counsel for the appellant took a simplistic approach to the objection by informing us that in this appeal they were concerned with only two exhs i.e., P1 (application to operate a trading account with the respondent) and P2 (the margin agreement) and these exhs were included in the appeal record.

[20] Rule 18(4)(c) requires copies of all affidavits and documents read and put in evidence in High Court so far as they are material for the purposes of the appeal. It is insufficient to include only affidavits and documents that benefits the appellant's appeal, but must include those documents that the respondent requires. For the latter reason, the appellant must serve for the respondent's approval a draft copy of the index to the record of appeal. But r 18(4)(c) does not make it mandatory that every affidavit and document put in evidence before the High Court must be included in the record of appeal.

[21] The respondents' defence that the appellant herein had failed to put into evidence in the High Court in exh WAT7 the letter of demand dated 10 March 2000 does not become impossible to pursue before this court because the appellant's counsel candidly admitted the error, and the documents missing in exh WAT7 are the same documents as in and produced in exh WAT8.

[22] Therefore, taking into consideration that:

(a) the non production of the letter of demand of 10 March 2000 in exh WAT7 in the High Court was clearly an unintended error;

(b) the index of documents shows clearly exh WAT7 as Item No 9, the date 10 March 2000 and 'Sesalinan Notis' and exh WAT8 as Item 9, the date 26 June 2000 and 'Sesalinan Notis Tuntutan berkenaan Gadaian bertarikh 26 June 2000';

(c) it is not the case for the respondents that the index of documents had not been submitted for their approval;

(d) there is no evidence that the placing in the record of appeal of the letter of demand dated 10 March 2000 as exh WAT7 instead of the documents in fact produced as exh WAT7 in the High Court, was deliberate, with actual intention, mala fide or fraudulent intent on the part of the appellant;

(e) the resultant defect is not that this court is unable to scrutinise because the documents that ought to have been in exh WAT7 are the same documents in exh WAT8, and this is a fact not disputed by the parties; and

(f) the resultant defect in the record is obvious and would not have misled vigilant counsel and thus the court,

we ordered that the letter of demand dated 10 March 2000 be expunged and struck out as exh WAT7.

[23] For the above reasons also, we concluded that to strike out the appeal in the circumstances set out above, without considering the appellant's appeal on its merits is as much an injustice as taking the letter of demand dated 10 March 2000 as exh WAT7 when it should not have been. We recall the words in *Low Cheng Soon v TA Securities Sdn Bhd* that strict and slavish adherence to forms and rules can sometimes hinder the administration of justice. Since in this appeal there is no dispute the documents at exh WAT7 and at exh WAT8 in the High Court were the same, the court is not unable to consider the appeal on its merits as before the High Court.

[24] We, therefore, proceeded to consider the appeal on its merits. The following were our findings.

RE APPEAL AND THE LETTER OF DEMAND

[25] The starting point is that its failure to exhibit the letter of demand dated 10 March 2000, the appellant had failed to prove its averment at para 11 of its affidavit in support of its originating summons that a demand had been made. This would have defeated the case for the appellant if the letter of demand is a pre-requisite or is mandatory.

[26] The respondents did not choose to answer the submissions for the appellant, confining their submissions to the question relating to the failure to produce the letter of demand dated 10 March 2000 in the proceedings before the High Court, and the inclusion of the said letter in the record of appeal as exh WAT7 without leave.

[27] The finding of facts at para 6.6 *Danaharta Urus Sdn Bhd v Kam Tick Beng & Anor* shows that the case concerned liability of a guarantor and that the

use of the phrase 'as principal debtors' did not have the effect of negating the requirement for a demand in that case.

[28] In the instant appeal, we observe that cl 3(b) of the charge provides:

> Any demand for payment of the money intended to be hereby served may be made by a notice in writing requiring payment within seven (7) days from the date thereof ...

[29] The use of the term '... may be made ...' in cl 3 does not make the letter of demand dated 10 March 2000 mandatory or a pre-requisite to the claim. In the circumstances, the delivery of the document at para 12 of the affidavit serves also as a demand for immediate payment within the meaning of cl 3.

[30] Since the letter of demand dated 10 March 2000 is neither mandatory nor a prerequisite, the failure to prove it is not fatal to the appellant's claim.

RE APPEAL AND ORDER FOR SALE

[31] The appeal relied upon s 256(2) and (3) of the National Land Code ('s 256(2) and (3)') for the submission that an order for sale ought to have been granted:

> (2) Any application for an order for sale under this Chapter by a chargee of any such land or lease shall be made to the Court in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure ...
>
> (3) On any such application, the court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of 'cause to the contrary'.

[32] We note firstly that the order shall be issued 'on any such application' and not only if the application succeeds.

[33] Secondly, what amounts to cause to the contrary has been explained in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 (FC) where the Federal Court set out the three categories of 'cause to the contrary':

(a) a chargor who is able to bring his case within any of the exceptions to the indefeasibility doctrine housed in s 340 of the National Land Code;

(b) a chargor demonstrates that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale; or

(c) a chargor demonstrates that its grant would be contrary to some rule of law or equity.

[34] The reason for the limitation was explained upon the basis that a charge gives the chargee a right ad rem. The distinction between ad rem and in personam rights was explained in *Bachan Singh v Mahinder Kaur & Ors* [1956] 1 MLJ 97; [1956] 1 LNS 14 and in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719; [1995] 3 CLJ 520 (CA).

[35] The High Court relied upon *United Merchant Finance Berhad v Chang Miau Sin* [2001] 5 MLJ 494; [2001] 1 CLJ 660, and *Lum Choon Realty Sdn Bhd v Perwira Habib Bank Malaysia Bhd* [2003] 4 MLJ 409; [2003] 5 AMR 577; [2003] 3 CLJ 791 (CA) to hold that the differences in interest rates in the letters of offer, the charges and the Form 16D notices showed variations in the interest rates, and in the absence of evidence that the changes in interest rates had been given notice of to the borrower, there was failure to comply with the requirements of O 83 r 3 of the Rules of the High Court 1980 ('O 83 r 3'). But in both these cases the decision in *Low Lee Lian v Ban Hin Lee Bank Bhd* in 1997 were not referred to.

[36] In *United Merchant Finance Berhad v Chang Miau Sin* [2001] 5 MLJ 494; [2001] 1 CLJ 660 the plaintiff's claim was dismissed by the High Court, and in *Lum Choon Realty Sdn Bhd v Perwira Habib Bank Malaysia Berhad* [2003] 4 MLJ 409; [2003] 5 AMR 577; [2003] 3 CLJ 791 (CA) the Court of Appeal allowed the appeal by the borrower on the grounds that O 83 r 3 had not been complied with.

APPEAL AND O 83 R 3

[37] O 83 r 3 provides:

Rule 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;

A

(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.

B

(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

C

was determined 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).

D

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

[38] In simple language, the rule requires that where the plaintiff seeks

E

delivery of possession of the security, his affidavit in support of the originating summons must show the circumstances by which the right to possession arises, and the state of the account with particulars of:

(a) the principal amount borrowed;

F

(b) the total of repayments made;

(c) the amount, of interest or instalments in arrears claimed at the date of the affidavit as well as at the date of the issue of the originating summons; and

(d) the amount remaining due under the charge.

G

[39] He is not required to prove the particulars of the accounts if he merely seeks delivery of possession. Only if he claims payment of the moneys secured by the property for which he seeks delivery of possession is he required to *prove the money is due and payable and give the same particulars as above for seeking*

H

delivery of possession, and *if he claims interest from to the date of judgement he must show the amount of the daily interest amount, not the daily interest rate.*

[40] Nothing in O 83 r 3 requires that the plaintiff proves what was the interest rate at any given point of time as would necessitate proving service of

I

notices of variations of interest rate.

[41] Examination of the record of appeal shows that for the purposes of an order for sale, the particulars as required by O 83 r 3 had been provided, and since the three categories of cause to the contrary were not established by the

respondents herein, the order for sale must, in accordance with s 256(3), be granted even if the claim for payment of moneys secured is dismissed.

[42] Judicial notice may be taken that interest rates are rarely fixed interest rates but are variable. We make the observation that:

(a) Firstly, it is obvious that even though a letter of offer makes an offer at one interest rate but the loan agreement and the charge states another, the later interest rates supersedes the interest rate on the letter;

(b) Secondly, not only can interest rates vary between the date of the letter of offer and the execution of the loan agreement and the charge; and

(c) Thirdly, a borrower is never obliged to sign a loan agreement or the charge unless he agrees to its terms.

[43] Further, the interest rate is comprised of two parts, being:

(a) the base lending rate which is inherently agreed to be variable; and

(b) the interest rate component over and above the base lending rate.

[44] Where the interest rate upon a facility is based upon a base lending rate, changes in the interest rate is inherently agreed to. Therefore, only the interest rate for which variation is allowed only upon notice in writing is the interest rate over and above the base lending rate. The latter is not expected to be inherently variable like the base lending rate.

[45] Be that as it may, the affidavit in support of the originating summons had deposed in respect of each of the loan facility the particulars of:

(a) principal amount;

(b) amount of repayments;

(c) accrued interest as at filing of originating summons and supporting affidavit;

(d) accrued principal as at date of supporting affidavit;

(e) total amount accrued and due as at date of supporting affidavit; and

(f) daily interest RM42.77.

[46] In respect of the overdraft facility:

(a) principal amount;

(b) accrued interest as at filing of originating summons and supporting affidavit;

(c) total amount accrued and due as at date of supporting affidavit; and

(d) daily interest RM28.67.

[47] The affidavit dated 17 June 2010 deposed, as on 8 July 2010 the amount due on the loan to be RM390,237.18 and on the overdraft as RM152,683.10 per the respective statement of accounts exhibited as exh LHM1. The total amount added up to RM542,875.28.

[48] The submissions for the appellant closed with the prayer that the appeal be allowed with costs and order for sale to be recorded against the respondents' charged property with costs.

[49] As observed earlier, in respect of the appeal, the respondents submitted on the issue of letter of demand dated 10 March 2000 not having been exhibited as exh WAT7 in the affidavit in support before the High Court.

[50] We have held earlier above that the failure to exhibit the letter of demand dated 10 March 2000 in the context of the agreement between the parties in cl 3 is not fatal to the claim. We hold that the appellant had satisfied the requirements of O 83 r 3 in respect of the moneys as claimed.

[51] Accordingly, we allowed the appeal, set aside the order of dismissal and costs, and substituted it with an order for sale and judgement in terms of prayers 1, 2, 3, 4, 5 and 6 of the originating summons. We further ordered the deposit be refunded. We left the date of public auction to be fixed by the registrar as prayed in the alternative at prayer 2.

Appeal allowed.

Reported by Kanesh Sundrum