



الجامعة الإسلامية العالمية ماليزيا
INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA
وَتَشْرِيفَتِي إِسْلَامًا أَبَدًا رَجِيئًا مُلِيمًا

**CHARGE : ORDER FOR SALE
THE DISCRETION OF THE COURT
IN INTERPRETING
'CAUSE TO THE CONTRARY'
UNDER
SECTION 256(3) OF THE
NATIONAL LAND CODE**

By :

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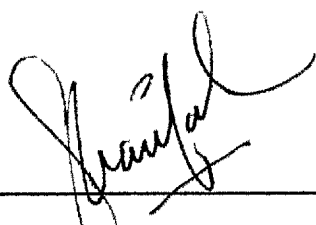
**A Dissertation Submitted In Partial Requirement
for the Master in Comparative Laws,
International Islamic University.**

1992/1993

DECLARATION

I HEREBY SWEAR THAT THIS DISSERTATION IS MY OWN ORIGINAL WORK, EXCEPT THE QUOTED REFERENCES, THE SOURCES OF WHICH, I HAVE CITED AND/OR ENUNCIATED.

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ACKNOWLEDGEMENTS

All gratitude belongs to Allah (s.b.t) who has provided me strength and piece of mind in completing this work.

Many thanks are also due to my husband, Kushairi and my little son, Amir Mukhlis, both of whom were always a source of comfort, Enche' and Abah : my supportive parents in law, and Mama and Babah, my parents whose constant attention to my work has spurred me on to complete this work.

I must not forget my supervisor, Assoc. Prof. Dato' Nik Abdul Rashid bin Nik Majid, who has sacrificed his precious time and contributed his valuable advise in guiding me throughout this dissertation.

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In the Name of God, Most Beneficent, Most Merciful

ABSTRACT

The registered charge in Malaysia has no equal parallel in other jurisdictions. Adopted from the Australian Torrens charge, it has been incorporated into the National Land Code, 1965 (hereinafter referred to as "the NLC") with an identity of its own, particularly with regard to the enforcement of the charge by power of sale. Under the Real Property Act, 1900 of New South Wales, Australia, where a chargee may exercise his power of sale after due notice of breach without the sanction of the court, the situation in Malaysia is different, where a chargee must apply to court for an order for sale. The court, after being satisfied that there is 'no cause to the contrary' will then grant an order for sale under Section 256 of the NLC. Section 256 (3) of the NLC reads as follows:-

"On any such application, the court shall order the sale of the land and to the whole of any undivided share in or any lease of any such land to which the charge relates unless it is satisfied of the existence of cause to the contrary"

(emphasis is mine.)

The main objective of this thesis shall be to examine the attitude of the Malaysian courts in interpreting the clause 'cause to the contrary' under the said Section 256(3) of the NLC and to identify the situations that will constitute such cause to the contrary. Consequently, the aim is to :-

- (1) provide some clarity on the right of chargors in a charge action under the National Land Code. Much emphasis has been given to the rights of chargees but not to the 'often oppressed' party, the chargor.
- (2) assist practising lawyers in Peninsular Malaysia who act for defendants in charge actions or 'foreclosure' proceedings, who often find it quite difficult to build up a good case for their clients. The discussion in this dissertation shall be confined to actions in respect of Registry Titles and not Land Office Titles.

PRELUDE

Chapter One will be a general discussion of the authorities who may grant the order for sale in a charge action under the former FMS Land Code 1928 (Cap. 138), the NLC and also under the Australian Torrens System.

In Chapter Two, the writer will introduce the topic by discussing the Torrens mortgage and how it was imported into the Malaysian conveyancing system as a 'charge'. The writer will in the course of this chapter, identify the salient differences arising between the enforcement of the original Torrens mortgage and enforcement of a charge under Malaysian National Land Code, 1965.

Chapter Three shall discuss the general background of charge actions under the former FMS Land Code, 1928 and shall discuss the position before the introduction of the National Land Code in 1965.

In Chapter Four, the writer shall discuss the first case in Malaysia where the court had to interpret the phrase 'cause to the contrary' under Section 256(3) of the National Land Code, 1965 in the case of Kheng Soon Finance Bhd. v MK Retnam Holding Sdn. Bhd. & Ors., at both the Federal Court and the Privy Council.

Chapter Five shall discuss cases coming under the NLC where 'cause to the contrary' was interpreted to mean challenging the indefeasibility of the charge under Section 340 (2) of the NLC.

In Chapter Six, it is proposed to discuss the position of 'bona fide' purchasers and to examine whether the right of this purchasers can have priority over a registered charge.

Chapter Seven shall deal with technical irregularities as coming within the scope of 'cause to the contrary'. Technical irregularities shall include, inter alia, the service of the incorrect statutory notice, defects in the notice and defects in the originating summons.

Chapter Eight shall discuss whether the unconscionable conduct of the chargee may come within the purview of 'cause to the contrary' under Section 256 (3) of the NLC.

In Chapter Nine, the writer will seek to determine, from the decided cases whether or not the existence of the Registrar's Caveat will constitute 'cause to the contrary' to justify the court in withholding the order for sale. This chapter will also discuss the mean by which a chargee may overcome the problem of having a Registrar's caveat encumbering the charged land.

Chapter 10 shall be a discussion of a variety of others situation which may possibly constitute 'cause to the contrary' under Section 256 (3) of the NLC. Over eight different situations have been enumerated in this chapter.

The conclusion of this dissertation will be in Chapter 11.

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CHAPTER 1

THE AUTHORITIES WHO GRANT THE ORDER FOR SALE IN A CHARGE ACTION

It is pertinent to understand generally, the officers in charge of land administration in Malaysia and Australia before proceeding to discuss the nature of a Torrens mortgage.

Under the former FMS Land Code, 1928 (Cap. 138) (hereinafter referred to as the FMS Land Code), in each state, the Resident may appoint Registrars of Title, Deputy Registrars of Titles, Collectors of Land Revenue, Assistant Collectors of Land Revenue and other officers to carry out the provisions of the FMS Land Code.¹ The Resident will also define the areas within which these officers will perform their duties.²

The Registrar is in charge of the Registry in respect of Registry Titles whilst the Collector of Land Revenue heads the local land office in respect of land office titles.³ In line with this, Part x of the F.M.S Land Code provided different sections for

¹ Section 3 (ii), F.M.S Land Code.

² Ibid.

³ See Wong S.Y. David, TENURE AND LAND DEALINGS IN THE MALAY STATES, 306 (1977).

the exercise of powers to order the sale of the land in respect of 'land held under the mukim register'⁴ (land office) and 'land held under the grant, lease of state land or Certificate of Title'⁵ (Registry). In the former, it is the Collector of Land Revenue that exercises the power to grant the order for sale, whilst in the latter, it is the court. 'Court' under the F.M.S Land Code means the Supreme Court.⁶

Under the National Land Code, 1965 (hereinafter referred to as "the NLC")⁷ the State Authority⁸ may appoint for the State, inter-alia, a Registrar of Titles, his deputy, District Land Administrators and Assistant District Land Administrators.⁹ The State Authority may define the districts, sub-districts and other areas for the officers to perform their duties.¹⁰

4 Sections 141 to 148.

5 Sections 149 to 154.

6 Section 2.

7 Act 56 of 1965.

8 Which means 'the Ruler or Governor of the State, as the case may be', See section 5, NLC.

9 Section 12(1)(a) and (b).

10 Section 12(2).

It is noted that the term 'Collector of Land Revenue' under the F.M.S Land Code has been changed to 'Land Administrator' under the NLC.

Under the NLC, the remedies of chargees are provided under Chapter 3 and under this Chapter different procedures are provided for :

- (i) Registry title, qualified title corresponding thereto, and subsidiary title; and ¹¹
- (ii) Land Office title, qualified title corresponding thereto, and subsidiary title.

Like the F.M.S Land Code, the power of granting the order for sale is exercised by the court in the former and by the Land Administrator, in the latter. 'Court' under the NLC means the High Court in Malaya.¹²

At the enquiry under Section 261 of the NLC, the Land Administrator's powers are quite limited, if compared to the court. Unlike the court, the Land Administrator has no power to consider

¹¹ Sections 256 to 259.

¹² Section 4.

or hear pleadings and defences raised on behalf of the chargor.¹³ Hence, the Land Administrator does not¹⁴ exercise judicial or quasi-judicial powers at the enquiry.¹⁵

In Australia, the Department of the Registrar-General was established under Section 3 of the Registration of Deeds Act, 1843.¹⁶ Before 1843, it was the Land Titles Commissioners who dealt with judicial matters.¹⁷ Until then, the Registrar-General was conceived of as a ministerial functionary.¹⁸ These judicial powers were transferred to the Registrar-General who, consequently, exercises both functions. The Registrar-General's powers and duties arise from a variety of statutes.¹⁹ It is the Registrar-General's duty to ensure the correct, uncluttered and plain operation of the Real Property Act.²⁰ Though most of the powers

¹³ Gurpal Singh v Kananayer [1976] 2 MLJ 34.

¹⁴ My emphasis.

¹⁵ Teo Keang Sood and Khaw Lake Tee, LAND LAW IN MALAYSIA, Cases and Commentary, 228 (1987).

¹⁶ Baalman, THE TORRENS SYSTEM IN NEW SOUTH WALES, 16 (1974).

¹⁷ R.T.J Stein, M.A. Stone, TORRENS TITLE, 360 (1991)

¹⁸ Ibid.

¹⁹ i.e. The Real Property Act, 1900 (New South Wales), Conveyancing Act 1919, Trustee Act 1925.

²⁰ Section 4, Real Property Act, 1900.

of the Registrar-General²¹ are discretionary, it has been held in numerous decisions that, they must be exercised in a judicial manner and that the Registrar-General must decide matters on merits without any preconception and without arbitrary rules to bind him.²²

Therefore, it is clear that the office of the Registrar-General in Australia is not similar to the office of the Land Administrator in Malaysia. To be appointed as Registrar-General, one has to be legally qualified but to be appointed as a Land Administrator in Malaysia, this is not necessary. The Director-General of Land is also known as the Federal Lands Commissioner²³ and he is a 'public officer'. He is also the Registrar of Titles in the Federal Territories of Kuala Lumpur²⁴ and Labuan²⁵. It should be noted that the federal and state officers in the Registry and land offices are drawn from the Malaysian Administrative and Diplomatic Services (or Pegawai Tadbir dan Diplomatik, in Bahasa

²¹ Section 12, Real Property Act, 1900.

²² See Gibb v Registrar of Titles (1940) 63 CLR 503 at 522, per Evatt J; also Coronet Homes Pty Ltd. v Banks'own Finance and Investment Co Pty Ltd. [1966] 2 NSW 351 at 376; cited at footnote 183, RTJ Stein, M.A Stone, TORRENS TITLE, op. cit., n. 17 at 361.

²³ Section 3(1) of the Federal Land Commissioner Ordinance, 1957.

²⁴ Since the Constitutional (Amendment) Act No. 2 of 1973.

²⁵ Since the Constitutional (Amendment) Act No. 2 of 1984.

Malaysia) under Article 132 (1) (c) of the Federal Constitution. Since, these are not drawn from the Judicial and legal service, they are therefore, not necessarily legally qualified²⁶. Doubts have been expressed as to whether the functions of the Registrar-General in Australia is judicial, quasi-judicial or administrative because the court may 'find a way to upset a procedure with which it disagrees'²⁷. In this aspect, therefore, we may identify a similarity with the Land Administrator's powers which may also, upon application of an aggrieved party, be looked into by the courts.²⁸

²⁶ Idea from discussion with supervisor.

²⁷ RTJ Stein, MA Stone, TORRENS TITLE, op. cit., n. 17 at 361.

²⁸ See Section 418, NLC.

CHAPTER 2THE TORRENS MORTGAGE

"When the legislature introduced the statutory mortgage (under the Torens System) it took the final step in the movement towards hypotheca that the Court of Chancery was unable, by reason of its limited jurisdiction, to take and introduced what was practically the Roman hypotheca with the addition of registration. For it introduced a registered charge to take effect as a security, which conferred on the creditor merely a group of powers to secure the money lent, such as to sell, to take possession, etc. whilst leaving the owner subject to fulfilling his obligations. The group of powers thus conferred included the power of sale ... and the powers and right, which a mortgagee, in such a mortgage usually acquired by reason of the conveyance of the mortgagor's land to him."²⁹

²⁹ per Herring, C.J. in Re Forrest Trust Trustees, Executors And Agency Co. Ltd., v Anson (1953) V.L.R. 246 at 256.

In substance, the Torrens mortgage is a common-law mortgage but it has been given a realistic form in conformity with its actual effect as a HYPOTHECARY CHARGE in equity.³⁰ Hence, a Torrens mortgage operates only as a security and not a transfer of the land charged.³¹

This is the essential difference between a Torrens mortgage and an English 'mortgage'. Unlike a mortgage, a charge gives no ancillary rights over the property until there is a default in payments.³²

In Malaysia, the word charge is used in place of the word 'mortgage' and the difference between the Malaysian 'charge' and English mortgage is best described by Salleh Abbas, C.J. when he said :³³

³⁰ op. cit., n.3 at 174.

Note : A hypothecary charge was evolved in the English courts of equity which adopted the Roman Law concept of hypothec. 'Hypothec' under Roman law, is a kind of security for debt in which the creditor had neither ownership nor possession of the security and possession could only be taken if the debt were not paid. See David M. Walker, THE OXFORD COMPANION TO LAW, 597 (1980).

³¹ See Section 57 of the Real Property Act, 1900 (NSW).

³² op. cit. n.17.

³³ Mahadevan s/o Mahalingam v. Manilal and Sons (M) Sdn. Bhd. (1984) MLJ 266 at 270.

"Our land law does not recognise a mortgage if it means a mortgage in the sense of English land law whereby the legal estate, i.e. ownership of the land is transferred to the mortgagee and what is left with the mortgagor is only an equitable right to redeem, known as equity of redemption. But our land law certainly recognises a mortgage in the sense of Torrens system, referred to by text written as Torrens Mortgage, in which the mortgagor retains the legal ownership whilst the mortgagee acquires a statutory right to enforce his security. For the purpose of avoiding confusion, our National Land Code drops the word "mortgage" and uses the word "charge" in place of Torrens mortgage."

In the middle of the nineteenth century, when the Malay States began looking at the Torrens system, they were looking for a simple system of land dealings that would be suitable for the local inhabitants and conditions.³⁴ English mortgages and even Torrens mortgages with complex incidents seemed undesirable.³⁵

³⁴ Wong, op. cit. n.3. at 177.

³⁵ Ibid.