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LAW OF CHARGES RAHN

A COMPARATIVE STUDY

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LAW OF CHARGES AND RAHN:
A COMPARATIVE STUDY

PART I. LAW OF CHARGES.

UNDER THE NATIONAL LAND CODE

Chapter One

DEFINITION OF "CHARGE"

1. A "charge" is a transaction (or a dealing for the purposes of the Code) whereby the registered proprietor of an alienated land or a lease conveys it as a security for the repayment of a loan, an annuity or any other periodical payment, to another. The proprietor of the land or the lease (as the case may be) is known as the "chargor" and the person to whom the property is conveyed or in whose favour the charge has been effected is called the "chargee".

2. A charge under the Torrens system differs from a common law mortgage in that a person in whose favour the Torrens charge is created only acquires an interest in the land, with a statutory right to enforce his security by way of a sale of the land or to take possession thereof in the event of the chargor's default. Under the charge, legal title or ownership still vests with the chargor or registered proprietor.

3. A common law mortgage, on the other hand, the legal title or legal ownership passes on or vests with the mortgagee. On the part of the mortgagor, what he retains is the equity of redemption, i.e. the right in equity to redeem the land from the mortgagee upon payment of the debt (loan) due to the mortgagee.¹

4. Under the Torrens system, the legal charge comes into existence only upon registration.² Where a lender holds an instrument of charge in statutory form and the document of title has been deposited by the borrower with him, but he has not or he failed, for one reason or another, to register the charge, the law regards him as an equitable chargee. In order to protect his interest in the land, he should lodge a lien-holder's caveat in respect of the land.^{2a}

1. See Teo Keang Sood, Land Law in Malaysia: Cases and Commentary, 1987, Butterworths, p. 225.

2. Section 5 of the Code defines a charge as "a registered charge".

2a. But see inexplicable judgment of Raja Azlan Shah J (as he then was) in Mercantile Bank v. The Official Assignee [1969] 2 MLJ 196.

5. If the equitable charge is not supported by an instrument in statutory form, the remedies of the lender does not rest in equity but in contract, and he will have to rely on the provisions of section 206 (3) of the Code. Owing to the rigid application of the Torrens rule regarding compliance with the prescribed form and the act of registration also, the customary transaction known as jual janji has been regarded as being purely contractual.^{2b}

6. In Datuk Jagindar Singh & Ors v. Tara Rajaratnam [1983] 2 MLJ 196, the respondent (the registered proprietor of a piece of land) alleged that she was induced by the fraud and undue influence of the first and second appellants to transfer her land to the second appellant. The respondent claimed that when the land was transferred, it was done by way of a security and that there were collateral undertakings - first, that the land would not be sold to anyone for one year without the consent of the respondent, and second, that the land would be retransferred back to the respondent on her repaying \$220,000 within one year.

2b. See Salleh Buang, Malaysian Torrens System, Dewan Bahasa & Pustaka, 1989, p. 87.

7. Contrary to these undertakings, the second appellant some eighteen days later transferred the land to the third appellant. The land was then again transferred to a land development company, which was virtually wholly owned by the first appellant. The land was subsequently subdivided and sold to the public. In an action by the respondent against the appellants (who were in fact solicitors) the learned trial judge found that the appellants were guilty of fraud, breach of agreement and undue influence. The appellants appeal to the Federal Court was dismissed.

8. What is relevant at this juncture is the decision of the Federal Court when it affirmed the trial judge's decision that the transfer of the land was in reality a security agreement and did not constitute an outright transfer of land as envisaged under the Torrens system. Delivering the judgment of the Federal Court, Lee Hun Hoe CJ (Borneo) said that there was ample evidence that the transaction between the respondent and the appellants "was meant to be a security agreement rather than an outright sale." The learned Chief Justice continued:

" It is not unlike the Malay customary transaction known as jual janji. In such a transaction the borrower transfers his land to the lender on payment who takes possession of the land and may make any profit out of the land as a sort of interest payment. The borrower is entitled to have the land transferred back to him on paying the debt. However, when a period for repayment of the loan is fixed then the default to pay will convert the original arrangement into an absolute sale, jual putus...^{2c}

©. Whilst it is clear that under the Torrens system, a duly registered charge creates an interest in land, there also exists conflicting judicial opinions as to whether a charge constitutes an interest in land for the purposes of section 7(1) of the Kelantan Malay Reserve Enactment (No. 18 of 1939).^{2d}

2c. [1983] 2 MLJ 196, at p. 204.

2d. See Teo Keang Sood, Land Law in Malaysia: Cases and Commentary, 1987, Butterworths, p. 226.

7. In Ho Giok Chay v. Nik Aishah [1961] 1 MLJ 49, the issue was whether a charge constitutes an interest in land for the purposes of the Kelantan Malay Reservation Enactment. Hepworth J held that it was an interest in land especially in view of the fact that it rendered the land liable as security under the then Kelantan Land Enactment 1938 (now repealed by the National Land Code 1965) and that the chargee could, in the event of default by the chargor, obtain an order for sale in respect of the encumbered land.

8. However, in the subsequent case of T Bariam Singh v. Pegawai Pentadbir Pesaka Malaysia [1983] 1 MLJ 232, Mohamed Zahir J held that a charge did not create an interest in land for the purposes of the Kelantan Malay Reservation Enactment 1930 on the ground that a chargee is not given any interest in the land as to the enjoyment and use of it.

Chapter Two

EFFECT OF REGISTRATION

1. Upon registration of the legal charge, title or ownership of the property does not vest in the chargee. The chargee merely acquires an interest in the land or over the lease. If the charge is the first registered charge, the chargee will have priority over all later registered charges, subject only to a voluntary postponement of priority.

2. Since a charge does not involve the transfer of title or ownership in the property, it is possible to create any number of legal charges as long as there is nothing in the first or subsequent charges which prohibit the borrower from effecting further charges in respect of his land. In such cases where two or more charges are effected in respect of the same land, these take priority in accordance with the date of their registration, unless there has been a change in priority due to mutual agreement either through consolidation,³ tacking⁴ or postponement.⁵

3. Section 245

4. Section 246

5. Section 247; See also Judith Sihombing, National Land Code - A Commentary, 1981, MLJ, pages 474-479.

Chapter Three

FAILURE TO REGISTER A CHARGE

1. In Mahadevan s/o Mahalingam v. Manilal & Sons (M) Sdn Bhd⁶ the Federal Court held that there is no provision in the National Land Code which prohibits the creation of an equitable charge. Salleh Abas CJ (as he then was) held:

" ... Our land law does not recognise a mortgage if it means a mortgage in the sense of the English land law whereby a legal estate ... is transferred to the mortgagee and what is left with the mortgagor is only an equitable right to redeem, known as the equity of redemption. But our land law certainly recognises a mortgage in the sense of the Torrens system. For the purpose of avoiding confusion, our National Land Code drops the word 'mortgage' and uses the word 'charge'....

The decision of the Privy Council in Haji Abdul Rahman v. Mohamed Hassan⁷ certainly does not prevent the creation of an equitable charge. In

6. [1984] 1 MLJ 266

7. [1917] AC 209

that case agreement to secure a debt by which the debtor transferred his land to the creditor and upon repayment the land would be transferred back to the debtor was held to be valueless as a transfer or burdening instrument, but was good as a contract. The right so created was not a legal right in the land but only a contractual right....

On the other hand, if Haji Abdul Rahman's case is considered to have the effect of preventing the creation of an equitable right, the effect of the decision cannot be extended to other cases. In that case the agreement was held to be void as a transfer or as a burdening instrument because it contravened section 4 of the Selangor Registration of Titles Regulations 1891 ...

But the subsequent Land Code and the present National Land Code do not contain provisions similar to section 4 of the above-quoted Regulation, although the Codes make provisions as to how a charge or a lien could be created. Examination of court decisions clearly shows that the courts have resorted to equitable principles and consistently held that an agreement ...to

secure a debt in favour of the creditor in respect of the debtor's land creates an equitable charge giving rise to an equitable right in favour of the creditor, although no charge or lien within the provision of the National Land Code of the previous Code is executed or created... "

2. After reviewing several authorities, the learned Chief Justice concluded that there is no provision in the National Land Code prohibiting the creation of equitable charges and liens. He went on:

" The Code is silent as to the effect of securities which do not conform to the Code's charge or lien. Therefore, equitable charges and liens are permissible under our land law."⁸

8. [1984] 1 MLJ 266, 271

Chapter Four

WHAT CAN BE CHARGED

1. The following can be charged under the Code, namely -

- (a) the whole, but not a part only, of any alienated land;
- (b) the whole, but not part only, of any undivided share in alienated land; and
- (c) any lease of alienated land. ⁹

2. The powers of charging as given under section 241 of the Code are, however, subject to -

- (a) any prohibition or limitation imposed by the Code or any written law for the time being in force;
- (b) any restriction in interest to which the land in question is for the time being subject; and

(c) in relation to leases, the provisions thereof, whether express or implied. ¹⁰

3. In addition, the Code also provides that no charge may be effected in favour of two or more persons or bodies otherwise than as trustees or representatives. ¹¹

9. Section 241 (1)

10. Section 241 (3)

11. Section 241 (4)

Chapter Five

RIGHTS OF THE CHARGOR AND CHARGEES

1. The rights of the parties are either implied by the Code¹² or by express agreement of the parties. According to section 249 of the Code, in every charge there shall be implied on the part of the chargor to do the following -

- (a) to pay the sums due to the chargees;
- (b) to pay rents, rates, taxes and other outgoings in respect of the land to the relevant authorities;
- (c) to comply with the conditions, express or implied, to which the land is subject; and
- (d) in the case of a lease, to observe and comply with the terms and conditions of the lease.

2. In addition to the above implied conditions, there shall also be implied, in the absence of any express provisions to the contrary, that the chargor will keep

12. Section 249

in repair all buildings on the land, insure the same to its full value against loss or damage in the joint names of the chargee and the chargor, permit the chargee or his agent at all convenient times to inspect the premises and to ascertain its state of repair. ¹³

3. Further, there shall also be implied in every charge, in the absence of any express provision to the contrary, that the chargee will not, without reasonable cause, withhold his consent to the granting by the chargor of any lease or tenancy. ¹⁴

4. The registered charge can be assigned by the lender (chargee) to another person. ¹⁵ The borrower (chargor) may also transfer the land subject to the charge to another person, but invariably the consent of the chargee is required. ¹⁶ The chargee (or in the case of several chargees, the first chargee) shall, as

13. Section 250

14. Section 251

15. Section 218(2)

16. Sections 215 and 216

between himself and the charger, be entitled to the custody of the issue document of title to the land or the duplicate lease, as the case may be, so long as the liability under the charge still subsists. 17

5. This right is subject to any agreement to the contrary as may be expressly stipulated by the parties. Section 244(2) of the Code provides for the contingency situation when the title to the land or the duplicate lease is required by the owner for any bona fide purpose to be produced at the Registry or the Land Office.

17. Section 244.

Chapter Six

CHARGEES' REMEDIES WHEN CHARGOR DEFAULTS

1. Where there is a breach by the chargor of any condition and the breach continues for one month or such other period as may be specified in the charge, the chargee may serve on the chargor a Notice in Form 16D -

- (a) specifying the breach in question;
- (b) requiring the chargee to remedy it within one month or such other alternative period as may be specified in the charge; and
- (c) warning the chargor that if the notice is not complied with, the chargee will take proceedings to obtain an order of sale.

2. If on the expiry of the period specified in the notice, the breach has not been remedied, the whole sum secured by the charge shall become due and payable to the chargee, and the chargee may apply for an order of sale. 18

3. In V.A.M. Hussain v. B.P. Malaysia¹⁹ the owner of a piece of land had entered into an agreement with the respondent to turn it into a petrol filling station. Monies were advanced by the respondent to the owner (appellant). It was mutually agreed by the parties that if the project could not materialise, such as where the necessary approvals from the relevant authorities could not be obtained, all monies advanced were to be refunded to the respondent forthwith. It later transpired that such approvals were in fact denied by the authorities, whereupon the respondent sought to recover the monies due by serving on the appellant a Notice in Form 16E. The appellant objected, maintaining that the correct procedure was for the respondent to serve a Notice in Form 16D. The Federal Court rejected this argument and held that Form 16E was properly used as the monies sought to be recovered by the respondent were monies "payable on demand".²⁰

4. It is to be noted that when it comes to the

19. [1970] 2 MLJ 69

20. See also Jacob v. OCBC [1974] 2 MLJ 161

chargee enforcing his remedy by way of sale because of the charger's default, the Code prescribes different procedures for Registry titles and Land Office titles. In the case of the former, the chargee must apply to the High Court for the order of sale, pursuant to section 256 of the Code. Upon receiving any such application, the court shall, where the default is proven, order the sale of the land or the lease unless it is satisfied of the existence of any cause to the contrary. ²¹ In the case of the latter, the chargee must apply to the Land Administrator of the District, pursuant to the provisions of section 260 of the Code. After due enquiry, where the default is proven, the Land Administrator shall order the sale of the land or the lease unless he is satisfied of the existence of any cause to the contrary. ²²

5. In Tan Teng Pan v. Wong Fook Shang ²³ it was held that in the case of land held under Land Office

21. Section 256(3), and see also Kheng Soon Finance Bhd v. MK Retnam Holdings [1983] 2 MLJ 384 for the Federal Court's interpretation of the words "cause to the contrary".

22. Section 263(1)

23. [1973] 1 MLJ 31

title, the court has no jurisdiction to order the sale of such land in foreclosure proceedings instituted at the instance of the chargee.

6. In Lim Beng Y. A.V.A. Palaniappa Chetty ²⁴ the plaintiff was the purchaser at an auction sale of land held at the instance of the defendant, the chargee. The certificate of transfer was issued by the Supreme Court on 31st December 1915. The plaintiff later discovered that about a month previously, on 21st November 1915, the same land had been sold for arrears of rent by the Collector of Land Revenue, Kajang. The defendant had been served with a notice of sale dated 24th August 1915 but he did not inform the court of the notice.

7. The plaintiff sued for the refund of his purchase money and damages for breach of contract. Sir T. Braddel, CJC held that :

" .. the defendant must be regarded as the vendor and .. was bound to make a title to the purchaser

24. [1916] 1 FMSLR 264