



TAY & HELEN WONG
LAW PRACTICE • AMALAN GUAMAN

LAW UPDATE

SPECIAL ISSUE 1 OF 2008 (AUGUST)

We are bringing you this Special Issue 1 of 2008 (August) to feature two recent High Court decisions that raise, in our view, legitimate concern on the rights of a creditor (particularly lender/chargee bank) in seeking remedies under the security created in respect of a loan or debt. The first case [***Don't Jump the Gun !***] is about the rights of a creditor to proceed against a third party chargor and a guarantor simultaneously with a charge action to sell the charged land without waiting for the completion of the charge action ; the second case [***Stay of Auction Proceedings Pending Appeal***] is about the continuation of the legal proceedings to auction a charged land when an appeal against the order for sale of the land is still pending. We have reservation on the correctness of these two decisions which, if followed or subsequently upheld on appeal, will be serious ramifications on creditors' recovery action.

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IMPORTANT

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DON'T JUMP THE GUN!

That was the headline in the Star newspaper on 20.7.2008 in reporting the Deputy Prime Minister's call to banks not to withdraw loan and overdraft facilities from businesses during these tough times. Banks were urged not to over-react with drastic measures with the slow-down in the country's economy which would affect businesses.

The same headline could also be applied on the recently reported decision of the High Court in *Ammerchant Bank Bhd v Totalhill Sdn Bhd & Another Case*ⁱ. In that case, the plaintiff bank had granted loans to Totalhill Sdn Bhd (borrower) which were secured by a 3rd party charge given by the 2nd defendant over a piece of land and a guarantee executed by 1st defendant. Upon default, the plaintiff filed a civil suit against the borrower and both defendants. The plaintiff also instituted foreclosure action against the 2nd defendant/chargor and succeeded in obtaining an order for sale of the land at public auction at reserved price of RM17.96 million. It was not disputed that if the charged land was auctioned off as scheduled, the sums realized would more than repay the amount close to RM7 million owing to the plaintiff.

The plaintiff however did not pursue the foreclosure action to its ultimate end and the charged land remained unsold. Both defendants applied for a stay of proceedings in the civil suit pending the auction sale of the charged land. The 1st defendant contended that as a guarantor, his obligation was contingent upon the primary liability of the borrower and that he would be discharged from such obligation should the borrower be exonerated from liability following the sale. Thus, it was submitted that the plaintiff ought to first realize the sale of charged land to satisfy the outstanding sums under the charge. The 2nd defendant argued that his liability (as a chargor) would only crystallize if there was a shortfall after the charged land had been auctioned. The plaintiff's reply was that contractually, it was entitled to exercise all remedies concurrently against the parties in view of express contractual provisions in the charge agreements, facility agreements and guarantee and indemnity and established case lawⁱⁱ.

Whilst the learned Judicial Commissioner (JC) accepted the long established proposition that the plaintiff may, in order to recover monies lent by it, pursue any or all remedies available either concurrently, simultaneously, contemporaneously or successively through enforcement of its statutory charge against the 2nd defendant/chargor by way of foreclosure action and civil suit *in personam* against the 1st defendant/guarantor and the 2nd defendant/chargor, he relied on a passage in the Supreme Court case of *Low Lee Lian v Ban Hin Lee Bank Berhad*ⁱⁱⁱ to ascertain whether there were special circumstances to justify a stay. The relevant passage reads:

"Thus, **absent any special circumstances**, a chargee who has obtained an order for sale is not barred by *res judicata* or any other form of estoppel from pursuing actions *in personam* against the chargor or the surety."

The learned JC took into account the following facts:-

- (i) order for sale had been obtained to auction the charged land at the reserve price of RM17.96 million;
- (ii) no affidavit evidence was adduced as to the present status of the auction process and it was not shown why the auction could not be proceeded on promptly;

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- (iii) prima facie, the realization of the charge would more than repay the amounts owing to the plaintiff;
- (iv) the plaintiff failed to show that it would stand prejudiced if the application for stay was allowed, and even if it would, there was nothing to show that it could not be compensated by costs;
- (v) there was great force in the Federal Court's decision in *Ng Yik Seng & Anor v Perwira Habib Bank Malaysia Bhd*^{iv} (*Ng Yik Seng*) that in circumstances such as these, a stay (or even dismissal) of proceedings ought to be granted.

He held that all these constituted 'special circumstances' which justified a stay of proceedings (in the civil suit) against the 1st and 2nd defendants.

With due respect, it is opined that the High Court has erroneously relied on *Ng Yik Seng* because subsequently, the Supreme Court (the successor of the Federal Court at the relevant time) declined to follow *Ng Yik Seng*. In *Bank Bumiputra (M) Bhd v Esah bte Abdul Ghani*^v (*Esah*), the Supreme Court restored the long-established common law position that a creditor who has taken various forms of security was entitled to pursue against such security concurrently and unless required by express agreement or statute, it could not be compelled to realize its security and/or go against the principal debtor first before proceeding against the guarantor. Thus, in *Esah*, although there was a pending foreclosure action and a pending creditor's petition against the principal debtor, the Supreme Court refused to stay the creditor's petition against the guarantor. We therefore find it rather curious that the learned JC who was aware of the Supreme Court's decision in *Esah* still preferred to follow *Ng Yik Seng*^{vi}.

On the 2nd defendant (chargor)'s contention, much emphasis was laid on the following provision in the charge on Deficiency in Monies Realised:-

"If the amount realized pursuant to the exercise of the remedies conferred by the Facility Agreement, this Charge, the other Security Documents or by statute or otherwise on the Lender, after deduction and payment of all costs charges and expenses, is less than the amount due to the Lender; and whether at such realization the Lender is the purchaser of the assets or otherwise the Chargor shall pay to the Lender the difference between the amount due and the amount so realized and until payment shall be entitled to recover the same with interest thereon at the Prescribed Rate of Interest or any other rates determined by the Lender."

The learned JC followed the earlier decision of the High Court in *Hongkong & Shanghai Banking Corp Ltd v Wan Mohd bin Wan Ngah*^{vii} (*Wan Mohd bin Wan Ngah*) which contained provision similar to the above provision in its charge annexure and held that the cause of action against the 2nd defendant/chargor as regards his personal liability would only accrue after the differential amount (ie.shortfall) has been ascertained, ie. after the charged land has been sold.

However, we wish to point out that in *Wan Mohd bin Wan Ngah*, it does not appear that Concurrent Remedies clause was present in the charge, whereas in *Totalhill Sdn Bhd*, the charge annexure has such clause as follows:-

"Upon the occurrence of any default, the Lender shall be entitled to exercise all or any of the remedies provided in the Facility Agreement, this Charge, the other Security Documents or by statute or otherwise and shall be entitled to

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exercise such remedies concurrently against the Borrower and/or the Chargor to recover all monies dues and owing to the Lender.” (shortfall clause)

The presence of such clause could have been seized upon by the learned JC to depart from *Wan Mohd bin Wan Ngah*. It must be noted that there were other cases that had decided differently from *Wan Mohd bin Wan Ngah* on similar shortfall clause.^{viii}

Having said that, the learned JC also relied upon the more recent Federal Court decision in *Tan Kong Min v Malaysian National Insurance Sdn Bhd*^x (*Tan Kong Min*) which ruled that the cause of action against the chargor as regards his personal liability would only accrue after the differential amount had been ascertained, ie. after the land had been sold and if there was still a shortfall owing. Thus, the cause of action *in personam* against both the 1st and 2nd defendant in *Totalhill Sdn Bhd* has not arisen as the foreclosure proceedings have yet been completed and the civil suit was premature.

We have in our previous Law Update Issue 1 of 2006 brought to our readers' attention that around the same time *Tan Kong Min* was decided by our Federal Court, the House of Lords in United Kingdom decided differently in *West Bromwich Building Society v Wilkinson & Anor*^x when it held that for the purpose of the cause of action to recover a principal sum secured by a mortgage, it accrued upon the occurrence of an event of default. The time continued to run regardless of whether the lender exercised the power of sale and whether the action was for shortfall or otherwise. Notwithstanding this, *Tan Kong Min* remains a judgment of the highest court and the learned JC's reliance upon it to arrive at its decision in *Totalhill Sdn Bhd* could not be faulted.

In a nutshell, by virtue of *Tan Kong Min* and *Totalhill Sdn Bhd*, a chargee is not entitled to proceed with action *in personam* (by way of civil suit) against the 3rd party chargor until the completion of foreclosure proceedings against the charged property and the presence of concurrent remedies clause does not make any difference. Similar principle appears to apply to an action against the guarantor, but such application will be contrary to the legal position laid down in *Esah* case and in our respectful view, is erroneous.

ⁱ [2008] 3 CLJ 845 ; [2008] 4 AMR 521

ⁱⁱ *Low Lee Lian v Ban Hin Lee Bank Berhad* [1997] 2 CLJ 36, *Bank Bumiputra (M) Bhd v Esah Abdul Ghani* [1986] 1 MLJ 16; *Kandiah Peter a/l Kandiah v Public Bank Bhd*. [1993] 4 CLJ 332.

ⁱⁱⁱ *supra*.

^{iv} [1980] 2 MLJ 83

^v [1986] 1 MLJ 16

^{vi} *Ng Yik Seng* has also been subjected to criticisms by writers, see 'Where Do We Go From Here?(Volatile State of the Law Concerning Concurrent Proceedings)' [1992] 2 MLJ cxlvi and 'Lesco Development Corp Sdn Bhd v Malaysia Building Society Bhd: A Case Note' [1989] 2 MLJ lxxxix.

^{vii} [1991] 3 MLJ 119

^{viii} Cases like *Malaysian International Merchant Bankers Bhd v G & C Securities Sdn Bhd & Anor* [1988] 2 MLJ 471, *Malaysia Building Society Bhd v Lim Kheng Kim & Ors* [1988] 3 MLJ 175, *Re Tosrin bin Jarvanthi, ex p Equity Finance Corp Bhd* [1989] 3 MLJ 428.

^{ix} [2005] 4 AMR 745

^x [2005] 4 All ER 97.

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STAY OF AUCTION PROCEEDINGS PENDING APPEAL

Pursuant to an action to enforce charge over three parcels of land, an order for sale was granted under ss 256 and 257 of the National Land Code (NLC) to recover sums due under a facilities agreement. The defendants filed an appeal to the Court of Appeal and pending disposal of such appeal, filed an application for a stay of all proceedings. The defendants argued that if stay was not granted and the plaintiff proceeded to auction off the said lands before the appeal was heard, then it would render the appeal nugatory and destroy the substratum of the appeal since the said lands which were the subject matter of the dispute between the parties would be irrecoverable. Damages were inadequate as there were big differences in the valuation of the lands by the parties. The plaintiff objected to the stay on the ground that no special circumstances had been shown to have existed to warrant a stay. Furthermore, even if the said lands were to be auctioned off to a third party, the damage were quantifiable and the plaintiff had the capacity to pay the defendants.

The above were the relevant facts in the High Court case of *AmBank (M) Bhd v Mujur Zaman Sdn Bhd*. The High Court granted the stay applied for. The learned Judge agreed with the plaintiff's contentions. She also took into account the value of the said lands and the fact that the plaintiff was merely concerned with the recovery of monies due to them. If a stay was granted and the appeal ultimately was unsuccessful, the plaintiff could still proceed with the sale of the said lands. In the interest of justice, the learned Judge granted the stay to preserve the status quo pending the outcome of the appeal.

With due respect, we beg to differ from the above decision. We do not think that on the facts, there are any special circumstances. If, as aptly submitted by the plaintiff's counsel, it was because the subject matter involved land which could possibly be perceived as having special value, loss of which might not be adequately compensated by damages, then it would defeat the purpose of an order for sale. Indeed, the defendants' concern that if stay was not granted then there was a risk of the land being auctioned, is ever present in all foreclosure proceedings. If such concern were to be upheld (which seemed to be the case in *Mujur Zaman* case), then all auction proceedings would have to be stayed so long as there is an appeal against the making of an order for sale of charged land. Surely, in our respectful opinion, that could not be a tenable legal position.

ⁱ [2008] 3 MLJ 608

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