

THE UPDATE



The Quarterly Law Bulletin of TAY & HELEN WONG Law Practice

Special Issue 1-2009

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We are bringing to you this Special Issue to highlight the two recently reported Federal Court and Court of Appeal decisions which, in our view, are important landmark rulings that will have significant impact on the banking industry.

We also take this opportunity to wish all our readers a Merry Christmas and Have a Happy New Year 2010 !

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**CONCURRENT REMEDIES IN CHARGE
ACTION AND CIVIL SUIT**

In issue 2 of 2005 of the Law Update, we expressed our reservation on the part of the Federal Court's decision in *Tan Kong Min v Malaysian National Insurance Sdn Bhd* which appeared to hold that 'a civil suit to recover the debt brought against the chargor personally (an action in *personam* by way of a civil suit) prior to the completion of the charge action to realize the security is premature' (the Proposition in Question)ⁱⁱ.

We are glad to note that recently, the Federal Court in *Chan Boi Loi v Public Bank Bhd & Anor Application*ⁱⁱⁱ clarified its own decision in *Tan Kong Min* and stated that the observation made in *Tan Kong Min*, namely "where the respondent is also a chargee of the property and the only terms that bind the parties are terms set out in the annexure to the charge, the respondent is not entitled at law and equity to proceed by way of a civil suit before first realizing the security under the charge" was not part of the *ratio decidendi*^{iv} but was only pure *obiter dicta*^v. The issues that called for decision in *Tan Kong Min* were when the insurance company's cause of action to recover the shortfall arose and which period of limitation was to be applied, *ie* whether the 6 years under s.6 or the 12 years under s.21 of the Limitation Act 1953.

In other words, the Proposition in Question was just an observation which was not necessary for the purpose of arriving at the decision of the issues and thus, is not to be regarded as a binding authority.

The Federal Court in *Chan Boi Loi* in no uncertain terms confirmed that a lender was entitled to pursue all remedies available against

a borrower simultaneously, contemporaneously or successively to recover the moneys lent unless there is an agreement to the contrary. Such an agreement was not to be implied from clauses which contain the following words or words to that effect:

"If the amount realized by the Bank on a sale of the said Land under the provisions of the National Land Code after deduction and payment from the proceeds of such sale of all fees dues costs rents rates taxes and other outgoing on the said Land is less than the amount due to the Bank and whether at such sale the Bank is the purchaser or otherwise the Chargor(s) shall pay to the Bank the difference between the amount due and the amount so realized and until payment will also pay interest on such balance at the Prescribed Rate as aforesaid with monthly rests."

All that a clause in the above terms did was to create a right to the lender to recover the balance outstanding in the event a sale of the charged property produced a shortfall. Such a clause did not amount to an agreement by the chargee to postpone its right to bring an action *in personam* (by way of a civil suit) for the recovery of the debt until after the charged land had been sold.

The fallacy of the contrary argument was revealed by posing the question: what if the land could never be sold despite all attempts to do so? It would mean that the borrower would get away scot-free from making any payment because his answer to any action by the lender would be that it was a condition precedent that the land be sold and a shortfall produced before any suit might be instituted.

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The want of logic in that proposition was sufficient to demonstrate that it was insensible.

The applicants' further argument that the annexure to each charge was the only contract between the parties and the respondent had no alternative but to follow its terms before suing on the debt was shot down by the court. There were two contracts of loan as evidenced by two letters of offer which stood independently as separate contracts of debt, the breach of which entitled the respondent to bring the action.

It would appear to us that the Federal Court decision in *Chan Boi Loi* was not dependent upon the existence of any concurrent remedies clause^{vi} in the charge annexure or the contract of loan. In that respect, *Chan Boi Loi* has expanded the chargee/lender's rights on concurrent recovery of debt owing under a charge to be wider than that laid down in previous authorities such as *Bank Bumiputra Malaysia Berhad v Esah binti*

BANKING LAW

UPDATE ON THE GROUNDS OF JUDGEMENT WHICH VALIDATES 'BAI BITHAMAN AJIL CONTRACTS

In Issue Q1 of 2009 of The Update, we highlighted the landmark decision made by the Court of Appeal in *Bank Islam Malaysia Berhad v Ghazali Shamsuddin & 2 Ors* which overturned the High Court decision in *Arab-Malaysia Finance Berhad v Taman Ihsan Jaya Sdn Bhd & 2 Ors and a Third Party* (heard together with 11 other cases) and ruled that the Islamic financing contract Al-Bai Bithaman Ajil (BBA) as practiced in Malaysia as valid and

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Abdul Ghani^{vii} or Co-operative Central Bank Bhd v Belaka Suria Sdn Bhd^{viii}.

ⁱ [2005] 3 CLJ 825, [2005] 4 AMR 745

ⁱⁱ The relevant part of the Federal Court's decision reads: '...if a suit is brought against the chargor before the completion of the foreclosure action and the determination that there is a balance still owing, such a suit could be struck off as being premature.'

ⁱⁱⁱ [2009] 6 CLJ 81

^{iv} The reason or ground of a judicial decision. It is a precedent for the future.

^v A saying by the way. It is not binding as a precedent.

^{vi} A typical concurrent remedies clause entitles the chargee to concurrently recover the outstanding loan by a civil suit against the chargor personally (an action *in personam*) and a charge action to enforce the charge of the property (an action *in rem*).

^{vii} [1986] 1 MLJ 16

^{viii} [1991] 3 MLJ 43

binding. The detailed grounds of judgment of the Court of Appeal are now available under the reported case of *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and Other Appealsⁱ*

Briefly, the Court of Appeal held that it was not appropriate for the learned High Court judge to make a comparison between a BBA contract and a conventional loan agreement as the two instruments of financing were not alike and had different characteristics, the former being a sale agreement whilst the latter a money-lending transaction. The learned High Court judge was wrong when he equated the profit earned by BIMB as being similar to 'riba' or interest.

The learned High Court judge had misconstrued the meaning of the phrase 'do not involve any element which is not approved by the Religion of Islam' in the definition of 'Islamic Banking Business' under s.2 of the Islamic Banking Act 1983. In any event, it is not for the

judges in civil courts to take upon themselves to declare whether a matter was in accordance with the Religion of Islam or otherwise. Whether the bank business was in accordance with the Religion of Islam required consideration by eminent jurists who were properly qualified in the field of Islamic jurisprudence. Under the law, it was a requirement of any Islamic bank to establish a Syariah Advisory body to advise the bank and to ensure the operations of its banking business did not involve any element not approved by the religion of Islam. Thus, the learned High Court judge should not have taken upon himself to rule that the BBA contracts were contrary to the Religion of Islam without having any regard to the resolutions of the Syariah Advisory Council of the Central Bank

Malaysia and the Syariah Advisory Body of BIMB on the validity of the BBA contracts.

The Court of Appeal also highlighted the fact that the validity and enforceability of the BBA contracts had been ruled upon by the superior courts (the Supreme Court and the Court of Appeal) on many occasions prior to the *Taman Ihsan Jaya's* decision. Therefore, on the doctrine of *stare decisis*, the learned High Court judge ought to have held himself bound by those decisions.

¹ [2009] 6 CLJ 22, [2009] 6 MLJ 839.

THE UPDATE is a quarterly law bulletin of TAY & HELEN WONG Law Practice which aims to highlight to the firm's clientele, business partners and friends contemporaneous development in law (particularly in principal areas of the firm's law practice) which might have an impact on their business dealings, operations or trade. The bulletin focuses primarily on case law development in the jurisdiction of Malaysia.

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