Privy Council Appeal No. 68 of 1984

Syarikat Kewangan Melayu Raya Berhad *Appellant*

v.

Malayan Banking Berhad *Respondent*

FROM

THE FEDERAL COURT OF MALAYSIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND MAY 1986

Present at the Hearing:

LORD KEITH OF KINKEL
LORD BRIGHTMAN
LORD GRIFFITHS
LORD MACKAY OF CLASHFERN
LORD OLIVER OF AYLMERTON

*[Delivered by **Lord Oliver of Aylmerton**]*

This is an appeal from an order of the Federal Court of Malaysia (Salleh Abas C.J., Mohd. Azmi and Syed Agil F.JJ.) dismissing with costs an appeal from the dismissal by the High Court of Malaysia (Peh Swee Chin J.) on 12th November 1982 of the appellant's motion to set aside an order made by the Collector of Land Revenue, Kelang, for the sale of certain land charged by the appellant in favour of the respondent.

The relevant facts can be shortly stated and were not in dispute. At all material times the appellant (to whom it will be convenient to refer as "the mortgagor") was the registered proprietor of certain land held under EMR 7188, Lot 1800, Mukim and Daerah of Kelang. On 10th April 1965 the mortgagor charged the land by way of first charge in favour of the respondent (to whom it will be convenient to refer as "the Bank") to secure loan facilities by way of bank overdraft in the sum of $400,000 and interest. In 1967, the mortgagor required to increase its overdraft and on 21st September 1967, it executed a further charge to secure further loan facilities of $180,000 and interest. Both charges were duly registered. The amounts secured by the two charges
[26] were advanced to the mortgagor on a single account

with the Bank. By the autumn of 1980 the amount of the mortgagor's overdraft on the account exceeded $2,000,000 and, on 9th October 1980, the Bank's solicitors wrote a letter demanding repayment within seven days of the sum outstanding which then amounted to $2,374,382.24, together with interest thereon at the rate of 9% per annum with monthly rests. That demand was not complied with and on 13th November 1980 the Bank served on the mortgagor a statutory notice in Form 16D pursuant to section 254 of the National Land Code. A second undated notice in identical form was subsequently served under cover of a letter from the Bank's solicitors dated 28th November 1980.

The relevant provisions of the National Land Code are to be found in sections 253 and 254 which are, respectively, in the following terms (so far as material):-

Section 253

"(1) The provisions of this Chapter shall have effect for the purpose of enabling any chargee to obtain the sale of the land or lease to which his charge relates in the event of a breach by the chargor of any of the agreements on his part expressed or implied therein."

Section 254:-

"(1) Where, in the case of any charge, any such breach of agreement as is mentioned in sub-section (1) of section 253 has been continued for a period of at least one month or such alternative 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 it to be remedied within one month of the date on which the notice is served, or such alternative period as may be specified in the charge; and

(c) warning the chargor that, if the notice is not complied with, he will take proceedings to obtain an order for sale.

(2) ...

(3) If at the expiry of the period specified in any such notice the breach in question has not been remedied -

(a) the whole sum secured by the charge shall (if it has not already done so)

become due and payable to the chargee; and

(b) the chargee may apply for an order for sale in accordance with the following provisions of this hapter."

No point now arises on the form (as opposed to the content) of the notices served by, or on behalf of, the Bank. Each was addressed to the mortgagor described as "chargor under the charges described in the schedule below of the land so described". It went on to recite a breach of the provisions of the charges "by failing to make payment on demand of the sum of Ringgit 2,374,382.24 being the whole outstanding balance on your account as at September 10th 1980 with interest thereon at the rate of 9% p.a. with monthly rests from September 11th 1980 to the date of payment or any part thereof pursuant to a notice in writing dated October 9th 1980 and received by you on or about October 9th 1980". It continued by specifying that the breach had continued for a period of one month prior to the date of this notice and required the breach to be remedied within one month from service. It concluded with the statutory warning that, on non-compliance, application would be made for an order for sale.

Neither notice having been complied with, application was made in accordance with the provisions of the Code to the Collector of Land Revenue Kelang for an order for sale. After holding an inquiry the Collector on 3rd June 1982 ordered that the land be sold by public auction under a reserve of $1,000,000 and certified the amount due at that date to be $2,840,826.94. On 30th July 1982 the mortgagor issued an Originating Motion in the High Court to set aside the order. That was supported by an affidavit specifying that the ground of the application was that Form 16D is headed "Notice of Default with respect to a charge" and that it was inappropriate to issue a single notice in respect of the whole sum of $2,374,382.24 which was in fact, as the notice itself indicated, secured not by "a charge" but by two separate charges. There should, it was said, have been two notices specifying how much was claimed under each charge.

The point raised, which is not one of obvious appeal either as a matter of merit or of common sense, had, it appears, been taken before the Collector but with no success. It met with no better fate in the High Court. A valiant attempt to persuade the Federal Court likewise failed. In each court, the argument was based on two propositions, namely, first, that as a matter of construction Form 16D was appropriate only for a single charge and that there should therefore have been a separate notice

for each charge and secondly, that in any event each notice should have specified a separate breach for each charge, viz. the failure to pay a specific sum secured by each. The notice was, it was argued, insufficiently specific and thus prejudicial to the mortgagor in some way which their Lordships have been entirely unable to discern. Thus, it was said that the notice was invalid and since a valid notice is a condition precedent to an application for sale under the Code, the order made by the Collector must be set aside.

Their Lordships are not surprised that the first of these grounds received short shrift in the courts below. They can only express their surprise that it was raised at all and, happily and wisely, it was abandoned in the appellant's case before this Board. It is thus no longer contended that two separate notices are required, but it is now argued that the single notice is invalid, not because it is a single notice referring to two charges but on the ground that it fails to specify in relation to each charge the separate specific sum which is secured by that charge the failure to pay which constitutes the breach relied on. This ground is, in their Lordships' view, equally bereft of any merit.

One of the curious features of the case is that from first to last no reference appears to have been made at any stage to the actual contents or terms of the charges and they have not been produced in evidence. The overwhelming likelihood is that, although specifying the sums for which the land charged was to stand as security, they contained also covenants on the part of the mortgagor to pay all amounts outstanding on the mortgagor's account with the Bank whether secured or not. But assuming for a moment the absence of such a covenant, their Lordships are entirely unable to see why it should be contended that the breach relied on by the Bank has been insufficiently specified. Mr. Stewart, who has said everything that could be said in support of the appeal, was compelled to concede that a notice, particularly one following a letter of demand such as the one written by the Bank's solicitors on 9th October 1980, which referred to the breach simply as a failure to repay the principal and interest secured by the charge, would be a sufficient specification. That is exactly what, effectively, the notice did and the perfectly accurate specification of the global amount due on the single account secured by both charges cannot, in their Lordships' opinion, possibly have the effect of rendering insufficiently specific that which would have been sufficiently specific without any reference at all to the actual amount. The mortgagor knew perfectly well that it had one account and one account only with the Bank and, indeed, the second charge was raised specifically for

the purpose of securing an additional facility on that very account. It is quite inconceivable that the mortgagor could have been in any way misled or prejudiced simply because the aggregate amount due was not apportioned between the two charges. There is not, indeed, any hint or suggestion that it ever sought such an apportionment and the amount specified as due on both charges is conceded to be due in fact.

The decisions of the Collector, Peh Swee Chin J. and the Federal Court were plainly right and their Lordships will, accordingly, advise His Majesty the Yang di-Pertuan Agong that this appeal should be dismissed with costs.