

No. 3 of 1974

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA (APPELLATE
JURISDICTION)B E T W E E N :-

MALAYAN BANKING BERHAD

Appellants
(Applicants)

- and -

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1. TAN FONG GUAN
2. TAN AY LIN (f)
3. LIM TAN TEE (f)

Respondents
(Respondents)C A S E FOR THE APPELLANTSRecordp.106
pp.90-91
pp.101-105
pp.92-100

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1. This is an appeal from a judgment of the Federal Court of Malaysia (Appellate Jurisdiction) (Suffian, C.J. and Ong Hock Sim, F.J., Gill, F.J. dissenting) dated 20th November 1973 allowing with costs the Respondents' appeal from a judgment of Azmi, J. in the High Court in Malaya at Kuala Lumpur dated 18th December 1972 whereby it was ordered (on the Appellants' application by originating summons) that certain land charged to the Appellants under two Registered Charges be sold under the directions of the Court to satisfy the sum of \$128,034.49 due to the Appellant as at 18th December 1972 and further interest thereon at the rate of 6% per annum from the 19th December 1972 to the date of payment, and that the Respondents should pay the costs of the application. This appeal is made pursuant to an order of the said Federal Court of Malaysia dated 7th March 1974 granting final leave to appeal to his Majesty the Yang Dipertuan Agung.

p.62

pp.58-61
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2. On 4th May 1962 one Lim Meng See executed a Charge (hereinafter called "the First Charge") over his land held under Grant No. 7072 for Lot No. 1599 in the Mukim of Labis, District of

p.107

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Record

- p.13 Segamat, State of Johore, in favour of the Appellants as security for the repayment of sums advanced to him by the Appellants. On 11th June 1963 the said Lim Meng See executed a second Charge (hereinafter called "the Second Charge") over the same land as security for the repayment of sums advanced to him by the Appellants. Both Charges were duly registered.
3. The two Charges were in identical terms except for the limit on the amount secured by the Charge and the rate of interest. The relevant parts of the recital and the operative clause of the First Charge are as follows :- 10
- p.6 1.5-
p.7 1.10 "I Lim Meng See ... desiring to render the said land available for the purpose of securing to and for the benefit of Malayan Banking Limited ... (hereinafter called "the Bank") the repayment on demand of all sums advanced to me by the Bank in manner hereinafter appearing (with interest thereon at the rate of 12 per cent per annum) up to the limit of Dollars Thirty five thousand only (₹35,000/-) 20
- p.7 11.11-
38 Do Hereby Charge the said land for the benefit of the Bank with the repayment on demand of the balance which on the account between me and the Bank shall for the time being be owing ... up to the limit of Dollars Thirty five thousand only (₹35,000/-) for principal and for interest at the rate of 12 per cent per annum with monthly rests, commission and other usual bankers' charges" 30
- p.13 11.
24-26 4. In the Second Charge the limit was expressed as Dollars Thirty thousand only (₹30,000-00) and the rate of interest was 9.6 per cent per annum.
- p.4 1.16 5. On or about 1st December 1963 the said land was subdivided and separate titles were issued in respect of each of the sub-divided lots. On or p.4 1.23 about 6th December 1963 the said Lim Meng See transferred, subject to the First and Second Charges, all but one of the sub-divided lots either in whole or in part to the Respondents. 40
- p.5 1.6 6. On 13th March 1965 the said Lim Meng See was adjudicated bankrupt. On that date the amount due to the Appellants in respect of advances made was ₹73,173.79.
- pp.18,20,
21,23 7. By letters dated 8th June 1971 (and received on 10th June 1971) the Appellants through their

solicitors demanded of the said Lim Meng See and the Respondents payment within 7 days of the sum of \$116,826.53 (being the outstanding balance as at 15th May 1971 on the overdraft account of the said Lim Meng See with the Appellants) together with interest thereon at the rate of 9.6% per annum calculable as from May 16th 1971. Neither the said Lim Meng See nor the Respondents (or any of them) paid the said sum of \$116,826.53 or any part thereof, or the interest thereon or any part thereof, and on 28th August 1971 the Appellants served on the said Lim Meng See and the Respondents statutory notices of demand as prescribed by section 254 of the National Land Code. The said Lim Meng See and the Respondents failed to comply with these notices.

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pp.29-35

8. On 19th January 1972 the Appellants took out an originating summons in the High Court in Malaya at Kuala Lumpur for an order for the sale of the land comprised in the two Charges to satisfy the said sum of \$116,826.53 (due to the Appellants as at 16th May 1971) with interest thereon at the rate of 9.6% per annum as from 16th May 1971 to the date of the Order and further interest on the decretal at the rate of 6% per annum to the date of payment or realisation.

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9. Neither the said Lim Meng See nor the Official Assignee on his behalf have taken any steps in these proceedings to oppose the order sought by the Appellants.

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10. The said originating summons was heard by Mohd. Azmi, J. on 18th December 1972, when the learned judge made an order as sought by the Appellants. On 20th November 1973 the Federal Court of Malaysia allowed the Respondents' appeal from that order, and ordered instead that the Respondents should pay to the Appellants the sum of \$65,000 with interest at 9.6% per annum with effect from 10th June 1971 to 18th December 1972 and thereafter on such sum with interest at 6% per annum till satisfaction and that upon receipt of payment of such sum the Appellants should at the Respondents' costs discharge the said land from liability under the said two Charges. It is from that judgment of the Federal Court that this appeal is made.

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p.62

p.106

11. The only issue between the parties is whether the limits of \$35,000 (in the First Charge) and \$30,000 (in the Second Charge) refer to

principal alone (as the Appellants contend) or to principal and interest accrued up to 10th June 1971 (the effective date of demand) (as the Respondents contend).

12. The Appellants respectfully submit that on the true construction of the operative words in the First Charge the words "and for interest ... and other usual charges" refer back to the words "the balance which ... shall for the time being be owing" and not to the words "up to the limit of Dollars Thirty five thousand only (₹35,000/-)". It is only by adopting the construction for which the Appellants contend that the First Charge expressly charges the land with the payment of interest, commission and other usual bankers' charges, which was clearly the intention of the parties to the First Charge. On the construction of the First Charge preferred by the majority of the Federal Court, a charge for payment of interest, etc. has to be inferred from the fact that interest, etc., is included in the limit of ₹35,000. 10 20

13. The Appellants further respectfully submit that the words "and for" before "interest" are not apt to support the construction of the First Charge adopted by the majority of the Federal Court. To support that construction a more natural wording would have been "up to the limit of ₹35,000 for principal, interest, commission and other usual bankers' charges". 30

p.60 ll.
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14. The Appellants further respectfully submit that the construction of the First Charge for which they contend is supported by the fact that in the recitals the words "with interest thereon at the rate of 12 per cent per annum" appear in parentheses: they respectfully adopt that part of the judgment of Mohd. Azmi, J. where he says: "The fact that these words are put within brackets is very significant, because if it is intended that interest should be included within the limitation clause there seems to be no necessity for putting those words within brackets". 40

15. The Appellants further respectfully submit that the construction of the First Charge for which they contend is supported by the approach of the Court of Appeal in White v. City of London Brewery Company (1889) 42 Ch.D. 237.

16. Identical considerations apply to the construction of the Second Charge.

17. The Appellants humbly submit that the judgment of Mohd. Azmi, J. in the High Court and the dissenting judgment of Gill, F.J. in the Federal Court were right and that the judgment of Kohd. Azmi, J. should be restored and that the judgment of the Federal Court was wrong and should be reversed and that the Appellants should receive such further and other relief in the premises as may seem just for the following among other

pp.58-61
pp.92-100

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R E A S O N S

- (1) BECAUSE on the true construction of the First Charge the limit of \$35,000 applies only to the principal sum advanced by the Appellants thereunder and does not limit the amount of interest thereby secured.
- (2) BECAUSE on the true construction of the Second Charge the limit of \$30,000 applies only to the principal sum advanced by the Appellants thereunder and does not limit the amount of interest thereby secured.

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A.J. BALCOMBE

J.M. CHADWICK

