

47/84

No. 18 of 1983

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

LIM YOKE FOO @ LIM YAP KWEE Appellant

- and -

EU FINANCE BERHAD Respondent

CASE FOR THE RESPONDENT

Record

10 1. This is an appeal from an Order of the Federal Court of Malaysia holden at Kuala Lumpur (Lee Hun Hoe, C.J. Borneo, Hashim Yeop Abdullah Sani and Abdoolcader JJ.) dated the 25th March 1982 p.26 allowing an appeal against an Order of the High Court in Malaya (Razak J.) dated the 10th December 1980. p.19

Background Facts

20 2. The Appellant as the registered owner of lands situated in Pahang and comprised in 20 separate titles executed a charge ("the Charge") thereof in favour of the Respondent to secure repayment of a loan of 350,000 ringgit together with interest thereon at the rate of 1.25 per cent. per month. Such charge was registered pursuant to the National Land Code 1965 ("the Code") on the 8th November 1974. p.37

30 3. The Appellant defaulted in making payment due under the Charge and the Respondent sought an order for sale of the charged land under Section 260(2) of the Code, pursuant to which the Collector of Land Revenue Kuantan ("the Collector") held an enquiry pursuant to the provisions of Sections 261 and 262 of the Code. This enquiry was concluded on the 29th May 1976 and on the 15th June 1976 the Collector made an Order ("the 1976 Order") pursuant to Section 263 of the Code. p.46

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4. The 1976 Order ordered the sale of the charged land and further ordered:-

- (a) that the sale should be by public auction on the 5th August 1976; and
- (b) that the reserve price be 507,000 ringgit.

The 1976 Order further declared that the amount due to the Respondent as chargee at the date of the 1976 Order was 443,694.52 ringgit. In error the Schedule to the 1976 Order, which purported to specify the land subject to the Charge, included only 12 of the 20 titles which comprised such land. The Respondent complained to the Collector of this error by a letter dated the 22nd June 1976 and by a letter dated the 30th June 1976 the Collector confirmed that the 1976 Order in fact comprised all 20 titles.

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5. On the 18th June 1976 the Appellant filed a notice of appeal against the 1976 Order. The Collector subsequently notified the Respondent that the sale on the 5th August 1976 had been cancelled. The appeal, however, was withdrawn by the Appellant on the 8th June 1978. By a letter dated the 20th December 1978 the Respondent requested the Collector to proceed with the sale pursuant to the 1976 Order as soon as possible, as the total debt of the Appellant had increased day by day by accrual of interest. On the 21st February 1979 the Respondent wrote again to the Collector asking for the date of sale by public auction to be fixed and mentioning that the debt due to the Respondent was 590,939.04 ringgit as at the 30th September 1978, and that interest would be added after that date at the rate of 175 ringgit per day.

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6. On the 26th December 1979 the Collector purported to make another order of sale pursuant to Section 263 of the Code ("the 1979 Order") ordering the sale of the charged land and further ordering:-

- (a) that the sale be by public auction on the 31st January 1980; and
- (b) that the reserve price be 562,000 ringgit.

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The 1979 Order further purported to declare that the amount due to the Respondent at the date of the 1979 Order was 443,694.52 ringgit. This figure was plainly wrong, as it took no account of interest accrued since the date of the 1976 Order. The

amount due as at the date of the 1979 Order was
in fact 673,569.11 ringgit.

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7. On the 28th January 1980 the Collector informed the Respondent's solicitors by telephone that he was cancelling the sale as the Appellant had tendered to him under Section 266 of the Code the amount stated in the 1979 Order.

10 8. By a letter dated the 31st January 1980 the Respondent's solicitors drew the Collector's attention to the fact that the sum due as at the 15th January 1980 was in fact 679,581.44 ringgit not including costs. p.66

9. By a letter dated the 6th February 1980 the Collector told the Respondent's solicitors that the sale fixed for the 31st January 1980 had been cancelled pursuant to Section 266 of the Code because the Appellant had "settled the final balance of the loan amounting to 443,695.52 ringgit as per order made on 9/5/1976 (sic)". p.67

20 10. By a letter of the 1st March 1980 the Respondent's solicitors told the Collector that the amount due from the Appellant as at the 25th February 1980 was 683,956.44 ringgit with daily interest thereafter of 175 ringgit, apart from legal fees amounting to 6,526.80 ringgit.

30 11. By Writ issued in this action on the 26th April 1980 the Appellant claimed against the Respondent in effect a discharge of the Charge by reason of the amount specified in the 1979 Order having been tendered. p.1

12. As appears above the amount at issue between the parties is interest on the debt of 350,000 ringgit for the period between the dates of the 1976 Order and the 1979 Order, amounting to 229,874.50 ringgit.

The Trial

40 13. The action was tried by Razak J. and on the 10th December 1980 the learned Judge delivered judgment for the Appellant on the ground that by reason of the 1979 Order it was res judicata between the parties that the amount due at the date of the 1979 Order was 443,695.52 ringgit (although it was not disputed that this figure failed to take account of interest accrued since the date of the 1976 Order) and that if dissatisfied with the 1979 Order the Respondent should have appealed against it under Section 418 of the Code. The learned p.14

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p.17 Judge also said that he assumed the Collector had not charged the Appellant with interest between the dates of the 1976 Order and the 1979 Order because so to do would have been unfair, since the sale should have taken place on the 5th August 1976 had it not been for the Collector's intervention. It is respectfully submitted that such was a quite unjustified assumption having regard to the facts set out above. The learned Judge further suggested that if it felt the Collector had erred the Respondent should have made the Collector a party to this action. 10

Judgment of the Federal Court

p.28 14. The Respondent appealed to the Federal Court, and that Court (Lee Hun Hoe, C.J., Borneo, and Hashim Yeop Abdullah Sani and Abdoolcader JJ.) gave judgment on the 31st March 1982.

15. By a single judgment of the Court the Federal Court allowed the appeal. They recorded, as is the fact, that on an application for a stay of execution pending the appeal to the Federal Court the parties had agreed, and an order was made accordingly, that the Charge would be discharged on payment of the amount not in dispute, but that the sum in dispute was to be lodged on fixed deposit in the name of the Appellant's solicitors pending the result of the appeal. Consequently the only decision required of the Federal Court was in regard to the validity of the 1979 Order and a consequential order for the disposal of the amount so lodged as aforesaid. 20 30

p.31 16. The Federal Court then held that there was no power in the Collector to cancel an order of sale made under Section 263 of the Code, and that when he purported to cancel the 1976 Order he was in fact merely postponing the holding of the sale pursuant to Section 264(3) of the Code. Subject to such postponement an order of sale once made has to be implemented in accordance with Section 265 of the Code unless it ceases to have effect under the provisions of Section 266(1) on tender by the Chargor of the amounts specified in Section 266(2), which include the amount shown in the order of sale as due to the chargee at the date on which the Order was made and such further amounts (if any) as have fallen due under the Charge between the date of the Order of sale and the date of the tender. 40

17. The Federal Court further held that once the Collector had made the 1976 Order he was functus officio save for his power under Section 264(3) of 50

the Code to postpone the date of sale and his power under Section 33 of the Code to rectify the error in the Schedule to the 1976 Order. In particular he had no power to make another order for sale under Section 263 of the Code. Accordingly the Federal Court held that the 1979 Order was a nullity and of no effect.

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10 18. The Federal Court then considered the Appellant's argument (which was accepted by the trial judge) that the 1979 Order stood until set aside and that the Respondent should have appealed against the 1979 Order under Section 418 of the Code. The Federal Court rejected this argument in accordance with the principle that an order made without jurisdiction and therefore a nullity does not cease to be ineffective merely because steps are not taken to appeal against it. The authorities establishing this principle include:-

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- 20 (1) Birmingham (Churchwardens and Overseers) v. Shaw (1849) 10 Q.B. 868.
- (2) Barnard v. National Dock Labour Board [1953] 2 Q.B.18.
- (3) Director of Public Prosecutions v. Head [1959] A.C. 83.
- (4) Ridge v. Baldwin [1964] A.C. 40.
- (5) R. v. Paddington Valuation Officer, Ex parte Peachey Property Corporation Ltd. (No. 2) [1966] 1 Q.B. 380.
- 30 (6) Harkness v. Bell's Asbestos and Engineering Ltd. [1967] 2 Q.B. 729.
- (7) London & Clydeside Estates Ltd. v. Aberdeen District Council [1980] 1 W.L.R. 182.
- (8) Pow Hing v. Registrar of Titles, Malacca [1981] 1 M.L.J. 155.

40 19. Accordingly the Federal Court allowed the Respondent's appeal, and granted the Respondent a declaration that the 1976 Order was still subsisting and of full legal effect. The Federal Court further ordered the moneys lodged on fixed deposit in the name of the Appellant's solicitors to be paid, together with accrued interest thereon, to the Respondent and ordered the Appellant to pay the costs in the Federal Court and in the Court below.

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20. It is respectfully submitted that the decision of the Federal Court was right for the reasons given in that Court's judgment, in essence because the Collector had no power to cancel the 1976 Order or to make the 1979 Order, so that the 1976 Order remained in force save only for the adjournment of the holding of the sale. The Collector had no power by the 1979 Order to determine the amount due under the Charge and accordingly the purported determination of such amount by the 1979 Order did not give rise to any estoppel per rem judicatam as against the Respondent (see Halsbury's Laws of England 4th Edition Volume 16 paragraph 1554 and the authorities there cited).

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21. Alternatively it is submitted that the said purported determination of the amount due at the date of the 1979 Order was ineffective to give rise to any estoppel per rem judicatam because the Collector did not (and had no power to) carry out any fresh enquiry before making the 1979 Order, so that the said purported determination was in truth no determination of any matter in issue between the parties such as could amount to res judicata.

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22. Therefore the Respondent submits that the appeal should be dismissed with costs for the following (amongst other)

R E A S O N S

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- (A) BECAUSE the purported determination by the 1979 Order of the amount due to the Respondent at the date thereof was made without jurisdiction and gave rise to no estoppel per rem judicatam.
- (B) BECAUSE the 1976 Order remained in force (subject only to the adjournment of the date of sale) unaffected by the 1979 Order.
- (C) BECAUSE the Federal Court was correct.

DONALD RATTEE

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