BETWEEN

PG HJ ABDUL RAHMAN PG HJ ABAS **…. Appellant**

AND

BAIDURI BANK BERHAD **…. Respondents**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 7 of 2004)

(In the Matter of High Court of Brunei Darussalam)
(Originating Summons No. 46 of 2003)

In the matter of all that one (1) parcel of land together with the building erected thereon and the appurtenances thereto described as EDR No. BD68, Lot 73 situate at Jalan Sungai, Tanah Di-Pekan Belait, Mukim Belait, Daerah Belait, Belait Land District; and

In the matter of the Memorandum of Charge dated 25th May 1995 registration No. 65/2001 and created in favour of Baiduri Bank Berhad; and

In the matter of the Power of Attorney dated 25th May 1995 registration No. PA768/95 and created in favour of Baiduri Bank Berhad; and

In the matter of Memorandum of Deposit of Documents of Title dated 16th May 1995 created in favour of Baiduri Bank Berhad; and

In the matter of Order 31 and Order 79 of the Brunei High Court Rules 1990

BETWEEN

PG HJ ABDUL RAHMAN PG HJ ABAS …. Appellant

AND

BAIDURI BANK BERHAD …. Respondents

Cons, P.; Power, JJA and Hayati, J.
9th December, 2004.

Question to be determined was whether when a Memorandum of Charge is registered under s.23 of the Land Code a "statutory charge is created which ousts the equitable jurisdiction of the Supreme Court to order a sale of the land subject to a charge and wholly vests that power in the Land Officer."

Held –

That there is no question of a change in the nature of the charge or in the nature of the right and obligations created thereunder and that the Judge rightly held that the remedy under the Land Code is neither exhaustive nor exclusive and that the chargee was entitled to make an application to the Court.

Mr Rudi Lee and Mr Paul Foo of Fathan, Rudi Lee & Associates for Appellant.
Mr John Lee of Y.C. Lee & Lee for Respondents.

Cases cited in the judgment:

Kimlin Housing Development Sdn. Bhd. v Bank Bumiputra (M) Bhd & Ors. [1997] 2 MLJ 805
Noga v Abacha [2001] 3 A11 ER 513
Re Barrell Enetrprises [1972] 3 A11 ER 631

Power, J.A:

This is an appeal from a decision of Chong J. affirming a decision of a Registrar granting an application by the Baiduri Bank Berhad (the Respondent) for an order for sale of the property of the Appellant over which a charge had been given to the Respondent.

The Appellant contends that the Judge:

(a) Given the existence of a registered Memorandum of Charge under s.23 of the Land Code Cap 40, erred in law in finding that the court has inherent jurisdiction

to entertain an application to the court by a party who seeks to enforce rights under the charge the subject of registration.

(b) Erred in fact in finding that there was no question of the Land Officer having delegated his power to the court.

(c) Erred in fact and law in finding that impliedly the procedure for sale of a charged property under s.25 of the Land Code Cap 40 is not as comprehensive as the Malaysian Land Code.

(d) Erred in fact in finding that there was no circumstance of a wholly exceptional character which would have given him a discretion to hear further argument after the making of an order which had not been perfected.

When dealing with the facts relating to Grounds (a) and (b) we can do no better than set out the relevant passage from the decision of the Judge which reads as follows:

"*Background*

On 10 September 2003 summary judgment was entered in favour of Baiduri Bank against the defendant for the sum of B$4,867,489.55 owed by the defendant to the bank for banking facilities granted to him.

I dismissed the defendant's appeal against the summary judgment entered on 25 November 2002.

In Originating Summons No. 46 of 2003 Baiduri Bank is seeking for a declaration that:

"(1) The Memorandum of Charge ("the said Charge") created by the Defendant on 25 May 1995 in favour of the Plaintiffs, and registered with the Land Office under registration no. 65/2001, have created a legal charge in favour of the Plaintiffs on all that one (1) parcel of land together with the building thereon and the appurtenances thereof described as EDR No. BD 68 Lot No. 73 situate at Jalan Sungai, Tanah Di-Pekan Belait, Mukim Belait, Daerah Belait, Belait Land District ("the said property");

(2) The Power of Attorney dated 25 May 1995 having registration number 768/95 ("the said Power of Attorney") and the Memorandum of Deposit of Title Deeds dated 16 May 1995 granted in favour of BAIDURI BANK BERHAD, the Plaintiffs by the Defendant to deal with the said Property as being valid and binding and subsisting on the Defendant; and

(3) The said Charge, the said Power of Attorney and the said Memorandum of Deposit of Documents of the Title Deeds may be enforced by the sale or foreclosure of the said Property to satisfy fully the outstanding debt of

B$4,967,489.55 due and owing by the Defendant to the Plaintiffs plus interests at the prescribed rate and full indemnity of the Plaintiff's legal fees and costs to recover the sum owed by the Defendant for the banking facilities which the Plaintiffs had granted to him.

And order that:

(1) the Plaintiffs be at liberty to sell the said Property by public tender with vacant possession free from all encumbrances or claims of the Defendant and/or of all persons claiming through him;

(2) the said Property be sold by public tender under the direction of this Honourable Court for the realization of the outstanding debt of B$4,967.489.55 together with the agreed interest and full indemnity of the Plaintiff's legal fees and costs due and owing to the Plaintiffs under and by virtue of the said Charge, the said Power of Attorney and the said Memorandum of Deposit of Documents of Title;

(3) the said Property be sold by public tender on such date, time and place as this Honourable Court may fix or so soon thereafter;

(4) the condition of sale and the reserve price and all other matters necessary and proper for carrying out the Order for Sale be referred to the Chief Registrar or Registrar of this Honourable Court with all powers of the Court to fix and settle the same;

(5) the Plaintiffs be allowed to bid at the sale and in the event if they have been declared the purchasers, to set off the purchase price against the moneys due to them under the said Charge, the said Power of Attorney and the said Memorandum of Deposit of Documents of Title;

(6) an order that upon such foreclosure or sale, the Chief Registrar or any other duly authorized registrar of the Supreme Court be at liberty to execute the Memorandum of Transfer and other instruments or documents or transfer to facilitate and complete the transfer of the said Property to the purchaser of the same;

(7) an order that the relevant Land Office or Registry be directed to register the Memorandum of Transfer or such instrument or instruments of transfer into the name of the purchaser of the said Property subject to the approval of the Sultan-in-Council;

(8) an order for possession of the said Property;

(9) further or alternatively, an order that the Defendant and/or any person or persons deriving title through the Defendant give vacant possession of the said Property to the Plaintiffs;

(10) the costs of and incidental to this application and of the sale be paid by the Defendant to the Plaintiffs on a full indemnity basis; and

(11) such further or other relief as this Honourable Court deems fit."

The application by Baiduri Bank is made pursuant to the following documents: (a) the Memorandum of Charge dated 25 May 1995 whereby the defendant charged to the bank the property; (b) the Power of Attorney dated 25 May 1995 whereby the defendant appointed the bank to deal with the charged property; and (c) the Memorandum of Deposit of Documents of Title dated 16 May 1996 granted by the defendant in favour of the bank for the charged property.

For the purpose of this appeal the relevant clauses in the documents relied upon by Baiduri Bank are as follows:

(a) Memorandum of Charge (clause 15):

"Chargee's right of sale after expiration of notice

After an event of default, it shall be lawful for the said Chargee, after the expiration of two (2) months' notice served upon the Chargor at his usual or last known place of business within Brunei Darussalam, to obtain an order from the Land Officer for the sale of the said Property."

(b) Power of Attorney (clause 1):

"In default of payment of the said banking facilities of B$5,500,000.00 or any other facilities granted or any interest accrued thereon or any other monies due and at any time if in the opinion of the Bank the security created herein is in jeopardy my attorney may sell charge assign transfer grant lease sub-lease license or otherwise dispose of all or any part of the lease of the said Property for such consideration and rentals as my attorney shall deem fit at its discretion."

(c) Memorandum of Deposit of Documents of Title (clause 7):

"I/We hereby declare and agree that in addition to the powers expressly conferred hereunder the Bank shall enjoy all powers enjoyed by a Mortgage or Equitable Mortgage whether under any Ordinance, Common Law or Equity. The Bank's powers of sale and of entering into possession of the property charged and of executing a legal Charge over the property charged in favour of the Bank shall in relation to this security by exercisable without the necessity of giving any notice in that behalf in the event that I/We fail to repay all sums secured hereunder on demand or, although no part of the moneys hereby secured shall have become due, in any of the following cases:

(a) if I/we shall die or shall commit any act of bankruptcy;
(b) if I/we shall have any judgment or order of court executed against my/our property;
(c) if I/we shall commit any breach of any term, condition or stipulation herein contained on its part to be observed or performed."

The application of Baiduri Bank is supported by the affidavit of its Senior Corporate Manager Mr. Philipper Petitier (Mr. Petitier) of 19 April 2003. He deposed that by a letter dated 5 November 2002 the bank sent a notice to the defendant informing him that an application for an order of sale of the charged property would be made if the outstanding sum owed by the defendant to the bank was not settled within two months and that the sale proceeds would be utilized to pay the debt."

The Judge's ruling on Ground (a), the failure to comply with the Land Code, was as follows:

"At the outset I think it is useful to set out section 25 of the Land Code which states:

"(1) If any Land Officer is satisfied that default has been made in the payment of any sum whether principal or interest secured by any charge and that 2 months notice demanding payment has been given by the chargee, he may order the sale of the land charged, provided that no such sale shall be carried out until reasonable notice has been given to all persons who would be affected by such sale.

(2) Such sale shall take place either at the Land Office of the district in which the land to be sold is situated or at such place as may be notified either generally or specially by the Minister and the chargee may bid at such sale."

Now it is common ground, as Mr. Petitier had deposed in his supplementary affidavit, that in practice "officers of the Land Office have not exercised their powers under section 25(1) of the Land Code. Instead, they require a court order for the sale of a charged property by the chargor to a third party before they accept the application for transfer of the charged property to the third party……."

Nevertheless, Mr Rudi Lee submits, and this is the crux of the case for the defendant, that the bank is bound to apply to the Land Office for an order to sell the charged property both by express provision in accordance with clause 15 of the Memorandum of Charge and under section 25 of the Land Code. He argues that as the charge has been registered by the bank it can no longer rely on the rights conferred to it under the Power of Attorney or the Memorandum of Deposit of Documents of Title. The Land Officer cannot delegate his power to the court; if he refuses to exercise his statutory discretion one way or the other, the remedy lies in an application for an order of mandamus (Halsbury's Laws of England Vol.1 (1) Butterworths 4th Edition 1989 para 29).

> That is an attractive argument but I do not accept it. In my opinion neither the Memorandum of Charge nor section 25 of the Land Code precludes an application by the bank to the court for an order to sell the charged property. The application may be made pursuant to the relevant provisions in the Memorandum of Charge or Power of Attorney or Memorandum of Deposit of Documents of Title. The remedy provided under section 25 of the Land Code is neither exhaustive nor exclusive.
>
> In my view an application to the Land Officer under section 25 of the Land Code would be a futile exercise in light of the practice mentioned earlier; and an application for an order of mandamus to compel the Land Officer to act would only incur additional costs and delay the inevitable. There is no question of the Land Officer delegating his power to the court. The court has inherent jurisdiction to entertain an application by a party who seeks only to enforce rights to which he is entitled by agreement with another."

The Judge with focus and brevity dealt with the submission, as it was put in the hearing before him, that once a charge is registered the only avenue open to a chargee seeking to enforce the charge is an application to the Land office. He rightly, in our view, dismissed the contention that after registration a chargee was precluded from relying on the instruments which created the charge. Before us, however, Mr Rudi Lee appears to have refined his argument in this regard. He contends that the equitable charge which came into existence on 25th May 1995, when the parties signed the Memorandum of Charge, the Power of Attorney and the Memorandum of Deposit of Title Deeds, was extinguished by the creation of a "Statutory Charge" (Mr Lee's term) when the charge was registered with the Land Office 3rd September 2001. It is inherent in his submission that the effect of registration is not simply to register the charge created by the parties but to extinguish it and to create a new "Statutory Charge." He submitted that upon registration the "jurisprudential nature" of the charge had changed. We cannot agree.

In our view it matters not whether the charge be enforceable, as it is before registration, only in accordance with the rules of equity or be given an additional dimension of enforcement by virtue of the Land Code. However that may be, we are satisfied, that it remains the charge created by the parties. There is, in our view, no question of a change in the nature of the charge or in the nature of the rights and obligations created thereunder. We are satisfied that the Judge rightly held that the remedy under the Land Code is neither exhaustive nor exclusive and that the Appellant was entitled to make application to the court.

As to Ground (b), which contends that the Land Officer wrongly delegated his power to the court, we find, as did the Judge, that on the facts, no question arose of any delegation of power by the Land officer.

The Judge set out the facts and his findings as to Grounds (c) and (d) as follows:

> "On 29 March 2004, in a letter addressed to the Chief Registrar, counsel for the defendant applied to me to reconsider my decision on the ground that he had an authority, *Kimlin Housing Development Sdn. Bhd. (Appointed receiver*

and manager) (In Liquidation) v Bank Bumiputra (M) Bhd & Ors. [1997] 2 MLJ 805, that he did not have when the appeal was heard, which supported his argument that upon registration of the charge in the Land Office an application for sale of the charged property must be made to the Land Officer and the Power of Attorney and Memorandum of Deposit of Documents of Title "would not have any effect". That application has now been heard.

Mr Rudi Lee argued that notwithstanding the repeal of Order 56 rule 2(2) of the Rules of the Supreme Court which gave the court a discretion to hear further argument after an order has been made and to then set aside that order if it deemed fit, I could still reconsider my decision as the order I made dismissing the appeal had yet to be perfected.

Reliance was placed on *Noga v Abacha* [2001] 3 A11 ER 513, in which Rix, LJ. Said at p.517:

> "It is common ground that until an order has been perfected, the court retains control over its judgment and its decision, and can permit argument to be reopened. As a result it may modify or even reverse a decision to which it has already come, and which it has communicated to the litigants. As Jenkins LJ said, giving the judgment of the court, in *Re Harrison's share* under a Settlement, *Harrison v Harrison, Re Ropner's Settlement Trusts, Ropner v Ropner* [1955] 1 A11 ER 185 at 188, [1955] Ch 260 at 276: 'We think that an order pronounced by the judge can always be withdrawn, or altered or modified, by him until it is drawn up, passed and entered. In the meantime it is provisionally effective……' "

As to the exercise of that jurisdiction Russel, LJ. giving the judgment of the Court of Appeal in *Re Barrell Enetrprises* [1972] 3 A11 ER 631 had this to say at p.636 to 637:

> "……When oral judgment have been given, either in a court of first instance or on appeal, the successful party ought save in most exceptional circumstances to be able to assume that the judgment is a valid and effective one. The cases to which we were referred in which judgment in civil courts have been varied after delivery (apart from the correction of slips) were all cases in which some most unusual element was present. *Re Samuel, James Lamont & Co Ltd v Hyland Ltd and National Benzole Co Ltd v Gooch* are not really in point because in none of them had there been a hearing. They were cases where there had been a request by the appellant for his appeal to be dismissed and this had been initially by the president of the court (which under a practice direction results in automatic dismissal of the appeal) and the appeal was afterwards allowed to be reinstated on the application of the appellant.

> In *Re Harrison' Share* under a Settlement a Chancery judge made an order in chambers and a few days later the House of Lords gave a decision showing that the order was wrongly made. It was held that the judge could withdraw the order before it was drawn up. In *Basrow v Bagley & Co Ltd* two decisions of the Court of Appeal had been given within a few days of each other giving markedly different decisions as to the appropriate damages for the loss of an eye. One division thereupon reconsidered its decision and varied it to correspond with the other so as to avoid the injustice as between the two sets of litigants of one award being out of all proportion to the other. In *Dietz v Lenning Chemicals Ltd* a master approved a settlement in a Fatal Accidents Acts case, the solicitors on both sides being unaware that the plaintiff widow had already remarried. Before the order was drawn up the true facts were discovered and brought to the notice of the master, who set his order aside. The judge in chambers held that he had been right to do so and this decision was affirmed by the Court of Appeal and the House of Lords. In all these cases there were circumstances of a wholly exceptional character.
>
> It is clearly not permissible for a party to ask for a further hearing merely because he has thought of a possible ground of appeal that he originally overlooked. The discovery of fresh evidence has never been suggested as a ground for reopening the argument before the Court of Appeal. If fresh evidence comes to light, of such a character as to call for further consideration of the issues, the right way to deal with the situation is by applying for leave to appeal to the House of Lords: see *Murphy v Stone Wallwork (Charlton) Ltd*; or if such appeal be not available in a contempt case, then by application for release."

On the authorities I am not persuaded that there are any circumstances of a wholly exceptional character which justify reopening the appeal in the case at hand. I do not think it is sufficient for counsel to ask for a further hearing merely because he has belatedly found an authority to support a point which he made in the appeal.

That said I have read the *Kimlin* case (supra) and in my opinion it does not advance the defendant's argument that as the charge has been registered the bank can only apply to the Land Officer for an order to sell the property. Unlike our Land Code, the Malaysian Land Code provides a comprehensive set of rules relating to the sale of charged property and the court in *Kimlin* was of the view that the rules which were meant for the protection of the charger could not be waived or contracted out by the charger himself and that it was necessary for the chargee to obtain a judicial sale to ensure compliance with the rules.

> There are only two conditions to be met before a sale can be ordered under section 25 of the Land Code: (1) the chargor has defaulted in payment of any sum whether principal or interest secured by the charge; and (2) notice of 2 months demanding payment has been given to the chargor by the chargee. Both requirements have been satisfied in the instant case."

Under Ground (c) Mr Rudi Lee relied before us upon *Kimlin Housing Development v Bank Bumiputra* [1997] 2 MLJ 805. In that case the court held that the provisions of the Malaysian National Land Code 1965 setting out the rights and remedies of parties under a statutory charge over land in Pt xvi are exhaustive and conclusive and any attempt at contracting out of those rights, unless expressly provided for in the code, would be void as being contrary to public policy.

It was the argument of Mr Lee that the approach of the Malaysian Court in the *Kimlin* Case was equally applicable to the Bruneian Land Code because both codes are Torrens Title Acts. It is true that each provides for a system of registration of title which is loosely referred to as the Torrens Title System but there the similarity ends. The Malaysian Code is a comprehensive code of considerable scope and length which bears no real comparison to the Bruneian Code which does no more than, with admirable brevity, provide for a relatively simple system of Land Registration.

The Judge was, we are satisfied, correct when he indicated his view that the approach of the court to the Malaysian Code in the *Kimlin* Case has no relevance to a consideration of the Bruneian Code. There is no merit in this Ground.

Ground (d) was not canvassed in argument before us. Suffice to say that we are satisfied that the Judge was correct in holding that there was no circumstance which would have justified him in reopening the appeal.

The appeal is dismissed.

We make an order nisi that the Appellant is to have his costs both here and below. That order will become absolute at 9 o'clock in the morning of Saturday 9 December 2004 unless application to very is made to this court at that time.

Appeal dismissed