

LEONG MOH SAWMILL CO. SDN. BHD.

a

v.

STANDARD CHARTERED BANK & ORS.

COURT OF APPEAL, KUALA LUMPUR

SITI NORMA YAAKOB JCA

ABDUL MALEK AHMAD JCA

MOKHTAR SIDIN JCA

[CIVIL APPEAL NO: W-02-598-1995]

18 JULY 1996

b

c

LAND LAW: *Sale of land - Sale by order of Court - Procedure to be followed after obtaining order for sale - Section 258(1)(b) and (2)(a) National Land Code 1965*

AUCTIONS AND AUCTIONEERS: *Sale of land - Procedure for advertising a judicial sale by public auction - Whether there are specific rules regulating the same - Contents of public notice or proclamation of sale - Section 4 of the Auction Sales Enactment FMS Cap.81*

d

BANKING & FINANCE: *Banks and banking business - Vesting order made pursuant to section 50(1) of the Banking and Financial Institutions Act 1989 - Effect of this order - Section 50(3) of the Banking and Financial Institutions Act 1989 - Meaning of "notwithstanding anything in any law or in any rule of law"*

e

CIVIL PROCEDURE: *Parties - Substitution of parties - Transmission of interests from one entity to another - Whether substitution of successor bank as plaintiff necessary pursuant to O. 15 r. 7(2) of the Rules of the High Court 1980 - Whether the necessity to substitute is circumvented by s. 50(3) of the Banking and Financial Institutions Act 1989*

f

LAND LAW: *Sale of land - Sale by order of Court - Failure to substitute the successor bank on the proclamation of sale - Whether this amounts to an impropriety in the conduct of the sale.*

g

LAND LAW: *Sale of land - Sale by order of Court - Right to redeem land - Whether right to redeem prejudiced by breach of s. 258(1)(b) and (2)(a) National Land Code 1965*

h

This was an appeal against the decision of the trial Judge allowing Standard Chartered Bank (the predecessor bank), which was the respondent, to continue proceedings in its name after having sold and vested all its banking business in Malaysia to Standard Chartered Bank Malaysia Berhad (the successor bank) which is a separate legal entity.

i

- a* The appellant was the registered proprietor of two lands which were charged to the predecessor bank to secure loans. The appellant defaulted in the repayment and consequently, foreclosure proceedings were instituted. An order of Court to sell the lands by way of public auction was obtained and after several attempts to abort or postpone the auction were made, the auction date
- b* was finally fixed. However, before this date, an agreement to adjourn the auction indefinitely to allow for an out of Court settlement was reached but this proved unsuccessful. In the meantime, the appellant had been compulsorily wound up pursuant to a winding-up petition instituted by the Inland Revenue Department.
- c* Subsequently, the predecessor bank filed for a fresh auction date and directions for sale. Unfortunately, however, the hearing of the summons for directions was delayed due to the Court file having gone missing. Before this summons for directions was heard, the predecessor bank, upon obtaining the approval of the Minister of Finance pursuant to s. 49(7) of the Banking And Financial
- d* Institutions Act 1989 ('the Act') and by way of a sale and purchase agreement, transferred and vested all its banking business in Malaysia to the successor bank. Despite this change, all proceedings continued in the name of the predecessor bank. A vesting order was granted by the Court under s. 50(1) of the Act and this included a few provisions which effectively provided for
- e* the automatic transferring of rights, liabilities and assets. In particular, paragraph 2(1) of the vesting order states that any judgment or award obtained by or against the predecessor bank and which was not complied with or yet to be satisfied shall, without any further act of the predecessor bank, be enforceable by or against the successor bank as if the latter had become a party to the
- f* judgment or award.
- Eventually, a date was fixed for the auction and at the auction, the second and third respondents were the successful bidders for the two parcels of land and further to this, a 10% deposit was paid.
- g* The appellant then filed an application for the following: to set aside the auction, annulling the sale of the lands; to set aside the proclamation of sale issued pursuant to the directions for sale; a fresh auction sale and fresh directions; and all further proceedings arising from the auction to be stayed pending the disposal of this application. The second and third respondents were allowed to
- h* intervene in the proceedings since their rights would be affected. The trial Judge dismissed the appellant's application with costs and this is the resultant appeal.
- The appellant is not challenging the order of sale. The complaint is that the proclamation of sale describes the wrong party as the chargee. It is claimed
- i* that there is a need for the title of the action to be substituted to reflect the identity of the true chargee before the auction can be enforced. In support of this, the appellant submitted that there was more than a mere name change.

The successor bank was a new legal entity which took over the rights and liabilities of the predecessor bank in Malaysia whilst the latter continues to operate as a separate legal entity internationally. Further, it was contended that as the successor bank was not cited as the plaintiff in the proclamation of sale, s. 258(1)(b) and (2)(a) of the National Land Code 1965 ('the NLC') had been breached and as this amounts to an impropriety in the subsequent conduct of the sale within the meaning enunciated in *M&J Frozen Food Bhd v. Siland Sdn. Bhd.*, the appellant chargor may nullify the sale. The trial Judge, however, found that there was no breach of the said section. He also held that the maintaining of the predecessor bank as the plaintiff in the proclamation of sale cannot amount to improper conduct as envisaged in *Siland*.

The appellant also contends that since the sale was conducted in breach of the procedures laid down by the said sections, the illegal sale had prejudiced the appellant's right to redeem the lands.

The main issue for the Court's determination was whether the trial Judge was correct in disallowing the appellant's application to set aside the auction on the grounds that the proclamation of sale wrongly declares the predecessor bank as the chargee.

Held:

Per Siti Norma Yaakob JCA

[1] Section 258(1)(b) and (2)(a) of the National Land Code 1965 sets out the procedure to be followed after an order of sale has been obtained and prior to the execution of the sale itself. By s. 258(1)(b), the Registrar is to see that the sale is advertised publicly in accordance with any rules of Court or, in the absence of such rules, the customary practice in the state.

[2] There are no specific rules regulating the procedure for advertising a judicial sale by public auction. Section 4 of the Auction Sales Enactment FMS Cap.81, however, prescribes what a public notice or a proclamation of sale should contain. The onus is on the auctioneer to prepare and advertise the sale. In practice, the auctioneer draws up the proclamation of sale according to s. 4 of the Auction Sales Enactment before submitting the same to the SAR for approval. Once approved, the proclamation of sale will be advertised by the auctioneer. Following this practice, the SAR would have seen that the sale has been publicly advertised, as is required of him under s. 258(1)(b) and (2)(a) of the NLC. In the present case the accepted practice has been observed and thus the Court finds that there has been no breach of the provisions in the NLC.

[3] Section 50(3) of the Banking and Financial Institutions Act 1989 provides *inter alia* that the transfer of any property or business pursuant to an order of the High Court under sub-section (1) shall, from the transfer date, be vested in or held by the transferee and that the order shall have effect

a according to its terms notwithstanding anything in any law or in any rule of law.

b [4] By virtue of the vesting order, there has been a transmission of interests from one legal entity to another and where this is the case, following O. 15 r. 7(2) of the Rules of the High Court 1980, the Court may order the party upon whom the interests vest to substitute the other party in order for the proceedings to be continued. However, considering the qualifying words used in s. 50(3) of the Act i.e. “notwithstanding anything in law or in any rule in law”, the need for a formal order under O. 15 r. 7(2) of the RHC has been circumvented.

c [5] Moreover, the provisions in the vesting order, in particular paragraph 2(1), effectively deems the successor bank as a party in all the proceedings that were initiated by or commenced against the predecessor bank. Thus, the successor bank is a party to the order of sale.

d [6] *Siland* was a case where there was a reckless disregard to the interests of an interested party. In the present case, there merely is a wrong use of a name which, by reason of the provisions of the vesting order and s. 50(3) of the Act, cannot render the proclamation of sale improper nor annul the subsequent sale.

e [7] The decision in *Standard Chartered Bank v. Asia Transport Services Sdn. Bhd. & 3 Ors* which was cited by the appellant, being a decision of a lower Court, is not binding on the Court of Appeal particularly where the decision is an *obiter dicta* and where the learned Judge was doubtful as to whether an application under O. 15 r. 7(2) of the RHC was necessary.

f [8] The contention of the appellant that his right to redeem the lands were prejudiced by the breach of s. 258(1)(b) and (2)(a) of the NLC cannot stand in the light of this Court’s finding that there has been no such breach. In any case, the right to redeem was always with the appellant from the time the land was charged to the predecessor bank but he had not exercised his right. In fact it would have been cheaper to redeem the land earlier on in the proceedings as interest would accumulate with time.

g [8] The contention of the appellant that his right to redeem the lands were prejudiced by the breach of s. 258(1)(b) and (2)(a) of the NLC cannot stand in the light of this Court’s finding that there has been no such breach. In any case, the right to redeem was always with the appellant from the time the land was charged to the predecessor bank but he had not exercised his right. In fact it would have been cheaper to redeem the land earlier on in the proceedings as interest would accumulate with time.

h [Appeal dismissed with costs; findings of trial Judge affirmed.]

i

[Bahasa Malaysia Translation of Headnotes]

UNDANG-UNDANG TANAH: *Penjualan tanah - Penjualan melalui perintah Mahkamah - Prosedur yang harus dipatuhi selepas mendapatkan perintah jualan - Seksyen 258(1)(b) dan (2)(a) Kanun Tanah Negara 1965*

PELELONGAN & PELELONG: *Penjualan tanah - Prosedur bagi mengiklankan suatu penjualan kehakiman melalui perlelongan awam - Samada terdapat kaedah-kaedah spesifik yang menyelaraskan perkara yang sama - Kandungan notis awam atau pengisytiharan jualan - Seksyen 4 Enakmen Jualan Perlelongan FMS Cap. 81*

PERBANKAN & KEWANGAN: *Bank dan perniagaan perbankan - Perintah perletakhakan dibuat selaras dengan seksyen 50(1) Akta Institusi Kewangan & Perbankan 1989 - Kesan perintah - Seksyen 50(3) Akta Institusi Kewangan & Perbankan 1989 - Maksud "notwithstanding anything in any law or in any rule of law"*

PROSEDUR SIVIL: *Pihak-pihak - Penggantian pihak-pihak - Pemindahan kepentingan daripada satu entiti kepada entiti yang lain - Samada penggantian bank pengganti sebagai plaintif perlu selaras dengan A. 15 k. 7(2) Kaedah-kaedah Mahkamah Tinggi 1980 - Samada keperluan untuk mengganti dipintas oleh s. 50(3) Akta Institusi Kewangan dan Perbankan 1989*

UNDANG-UNDANG TANAH: *Penjualan tanah - Penjualan melalui perintah Mahkamah - Kegagalan untuk menggantikan pengganti bank pada pengisytiharan jualan - Samada membawa kepada suatu kesalahan dalam pengendalian jualan*

UNDANG-UNDANG TANAH: *Penjualan tanah - Penjualan melalui perintah Mahkamah - Hak untuk menebus tanah - Samada hak untuk menebus di mudaratkan oleh kemungkiran s. 258 (1) (b) dan (2)(a) Kanun Tanah Negara*

Ini adalah suatu rayuan terhadap keputusan Hakim perbicaraan yang membenarkan Standard Chartered Bank (bank pendulu), yang mana adalah responden, untuk meneruskan prosiding atas namanya selepas menjual dan meletak hak kesemua perniagaan perbankannya di Malaysia kepada Standard Chartered Bank Malaysia Berhad (bank pengganti) yang mana adalah sebuah entiti sah yang berasingan.

Perayu adalah tuan punya berdaftar dua bidang tanah yang telah digadaikan kepada bank pendulu bagi menjamin pinjaman-pinjaman. Perayu telah memungkiri pembayaran balik dan akibatnya, prosiding halang tebus telah dimulakan. Satu perintah Mahkamah untuk menjual tanah-tanah tersebut melalui perlelongan awam telah diperolehi dan selepas beberapa percubaan atau

- a* penangguhan perlelongan itu dibuat, tarikh perlelongan tersebut akhirnya telah ditetapkan. Walaubagaimanapun, sebelum tarikh ini, satu perjanjian untuk menangguhkan perlelongan itu kepada tarikh yang tidak ditetapkan bagi membolehkan satu penyelesaian di luar Mahkamah telah tercapai tetapi perkara ini telah tidak berjaya dilakukan. Sementara itu, perayu telah digulung secara wajibnya selaras dengan satu petisyen penggulungan yang telah dimulakan oleh Jabatan Hasil Dalam Negeri.

- Kemudiannya, bank pendulu telah memohon untuk mendapatkan satu tarikh perlelongan yang baru dan arahan untuk jualan. Malangnya, perbicaraan saman untuk arahan telah lewat disebabkan fail Mahkamah telah kehilangan.
- c* Sebelum Saman untuk arahan ini didengar, bank pendulu, setelah mendapat kelulusan daripada Menteri Kewangan selaras dengan s. 49(7) Akta Institusi Kewangan 1989 (“Akta”) dan melalui satu perjanjian jualbeli, telah memindahkan dan meletak hak perniagaan perbankannya di Malaysia kepada bank pengganti. Sungguhpun terdapat penukaran ini, kesemua prosiding telah berterusan atas nama bank pendulu Perintah letakhak telah diberikan oleh Mahkamah di bawah s. 50(1) Akta dan ini termasuk beberapa peruntukan yang secara berkesannya telah memperuntukkan bagi pemindahan secara automatik segala hak, tanggungan dan aset-aset. Secara khususnya, perenggan 2(i) perintah perletakan hak tersebut menyatakan bahawa mana-mana penghakiman atau award yang
- d* diperolehi oleh atau terhadap bank pendulu dan yang mana telah tidak dipatuhi atau masih belum dipenuhi hendaklah, tanpa sebarang tindakan yang selanjutnya oleh bank pendulu, dikuatkuasakan oleh atau terhadap bank pengganti seolah-olah pihak yang terkemudian itu telah menjadi satu pihak kepada penghakiman atau award itu.

- f* Akhirnya, satu tarikh telah ditetapkan untuk perlelongan dan di perlelongan itu, responden kedua dan ketiga merupakan penawar yang telah berjaya bagi mendapatkan kedua-dua bidang tanah tersebut dan lanjutan kepada hal ini, wang pendahuluan sebanyak 10% telah dibayar.

- g* Perayu kemudiannya telah memfailkan satu permohonan bagi mendapatkan yang berikut: untuk mengenenpikan perlelongan tersebut, membatalkan penjualan tanah tersebut; untuk mengenenpikan pengisytiharan jualan yang telah dikeluarkan selaras dengan arahan untuk jualan; satu jualan perlelongan dan arahan yang baru; dan kesemua prosiding yang seterusnya berbangkit daripada perlelongan itu hendaklah ditangguhkan sementara menantikan penyelesaian permohonan ini.
- h* Responden-responden kedua dan ketiga telah dibenarkan untuk mencelah dalam prosiding-prosiding tersebut oleh kerana hak mereka akan terjejas. Hakim perbicaraan telah menolak permohonan perayu dengan kos dan hasilnya adalah rayuan ini.

- i*

Perayu bukannya mencabar perintah jualan. Bantahannya adalah bahawa pengisytiharan tersebut telah menyebut pihak yang salah sebagai pemegang gadaian. Adalah dituntut bahawa ianya perlu bagi tajuk tindakan tersebut digantikan bagi membayangkan identiti pemegang gadaian yang sebenarnya sebelum perlelongan itu boleh dikuatkuasakan. Bagi menyokong perkara ini, perayu telah berhujah bahawa terdapat perkara yang lebih daripada hanya menukarkan nama sahaja. Bank pengganti adalah sebuah entiti sah yang baru yang telah mengambilalih hak serta tanggungan bank pendulu di Malaysia sementara pihak yang terkemudian terus beroperasi sebagai entiti sah berasingan di bidang antarabangsa. Selanjutnya, telah ditegaskan bahawa oleh kerana bank pengganti telah tidak disebut sebagai plaintif dalam pengisytiharan jualan, s.258 (1)(b) dan (2)(a) Kanun Tanah Negara 1965 (“KTN”) telah dimungkirkan, dan oleh kerana ini telah membawa kepada suatu kesalahan dalam pengendalian jualan yang berikutnya mengikut makna yang disebut dalam *M&J Frozen Food Bhd v. Siland Sdn. Bhd.* perayu yang merupakan penggadai boleh membatalkan jualan itu. Hakim perbicaraan, walaubagaimanapun, mendapati bahawa tidak terdapat kemungkiran akan seksyen tersebut. Beliau juga memutuskan bahawa pengekalan bank pendulu sebagai plaintif dalam pengisytiharan jualan tersebut tidak membawa kepada pengendalian yang tidak wajar sepertimana yang dibayangkan dalam *Siland*.

Perayu juga menegaskan bahawa oleh kerana jualan itu telah di kendalikan dalam kemungkiran akan prosedur-prosedur yang dibentangkan oleh seksyen-seksyen tersebut, penjualan yang tidak sah itu telah menjejaskan hak perayu untuk menebus tanah-tanah tersebut.

Isu utama untuk penentuan Mahkamah adalah sama ada Hakim perbicaraan betul dalam tidak membenarkan permohonan perayu untuk mengenyepikan perlelongan tersebut atas alasan bahawa pengisytiharan jualan tersebut telah secara salah mengisytiharkan bank pendulu sebagai pemegang gadaian.

Diputuskan:

Oleh Siti Norma Yaakob HMR

[1] Seksyen 258(1)(b) dan (2)(a) Kanun Tanah Negara 1965 membentangkan prosedur yang harus dipatuhi selepas satu perintah jualan telah diperolehi dan sebelum penyempurnaan jualan itu sendiri. Melalui s. 258 (1)(b), pendaftar haruslah memastikan bahawa penjualan itu diiklankan secara umum menurut mana-mana kaedah Mahkamah atau dalam ketiadaan kaedah-kaedah yang sedemikian, amalan yang menjadi kelaziman dalam negeri tersebut.

[2] Tidak terdapat kaedah-kaedah spesifik yang mengawal prosedur bagi mengiklankan sesuatu jualan kehakiman melalui perlelongan awam. Seksyen 4 daripada Enakmen Penjualan Perlelongan FMS Cap. 81,

- a* walaubagaimanapun, menetapkan apakah yang harus terkandung dalam sesuatu notis awam atau suatu pengisytiharan jualan. Tanggungjawab adalah terletak pada peulong untuk menyediakan dan mengiklankan jualan. Menurut amalan, peulong akan menyediakan pengisytiharan jualan menurut s. 4 Enakmen Jualan Perlelongan sebelum mengemukakannya kepada Penolong
- b* Kanan Pendaftar (PKP) untuk kelulusan. Sebaik sahaja diluluskan, pengisytiharan jualan itu akan diiklankan oleh peulong. Berikutan dengan amalan ini, PKP tentunya akan dapat melihat bahawa penjualan tersebut telah secara umumnya diiklankan, sepertimana yang perlu beliau lakukan di bawah s. 258(1)(b) dan (2)(a) KTN. Dalam kes semasa ini, amalan
- c* yang diterima itu telah pun dipatuhi dan dengan itu Mahkamah mendapati bahawa tidak berlaku kemungkiran akan peruntukan-peruntukan dalam KTN.
- [3] Seksyen 50(3) Akta Institusi Kewangan dan Perbankan 1989 memperuntukkan antara lainnya bahawa pemindahan mana-mana harta atau
- d* perniagaan selaras dengan satu perintah Mahkamah Tinggi di bawah seksyen kecil (1) akan, daripada tarikh pemindahan, diletakkan dalam atau dipegang oleh penerima pindahan dan bahawa perintah itu akan berkuatkuasa menurut terma-termannya walau apa pun yang diperuntukkan dalam mana-mana undang-undang atau dalam mana-mana kaedah undang-
- e* undang.
- [4] Menurut perintah perletakhakan, telah berlaku pemindahan kepentingan daripada satu entiti sah kepada yang lain dan di mana keadaannya sebegini, berikutan dengan A. 15 k. 7(2) Kaedah-kaedah Mahkamah Tinggi 1980, Mahkamah boleh memerintahkan pihak ke atas siapa kepentingan itu telah
- f* diletakkan bagi menggantikan pihak yang lain agar prosiding tersebut dapat diteruskan. Walaubagaimanapun, memandangkan perkataan-perkataan sekatan yang digunakan dalam s. 50(3) Akta tersebut iaitu “notwith standing anything in law or in any rule in law”, keperluan untuk mendapatkan satu perintah yang formal di bawah A. 15 k. 7(2) KMT telah
- g* dipintas.
- [5] Lagipun, peruntukan-peruntukan dalam perintah perletakhakan, khususnya perenggan 2(1), secara berkesannya menganggapkan bank pengganti sebagai satu pihak dalam kesemua prosiding yang telah dimulakan oleh atau dimulakan terhadap bank pendulu. Dengan itu, bank pengganti merupakan
- h* satu pihak kepada perintah jualan.
- [6] *Siland* merupakan kes di mana telah berlaku secara melulu keadaan tidak menghiraukan kepentingan pihak yang berkepentingan. Dalam kes semasa ini, hanya berlaku salah penggunaan nama, yang mana, disebabkan oleh
- i* peruntukan-peruntukan perintah perletakhakan dan s. 50(3) Akta, tidak boleh menjadikan pengisytiharan jualan itu tidak wajar mahupun membatalkan penjualan yang berikutan.

[7] Keputusan dalam *Standard Chartered Bank v. Asia Transport Services Sdn Bhd. & 3 Ors.* yang telah disebut oleh perayu, sebagai suatu keputusan Mahkamah rendah, tidak mengikat Mahkamah Rayuan khususnya di mana keputusan tersebut adalah suatu *obiter dicta* dan di mana Hakim yang bijaksana berasa ragu-ragu samada suatu permohonan di bawah A. 15 k. 7(2) KMT adalah perlu. a
b

[8] Penegasan perayu bahawa haknya untuk menebus tanah-tanah telah dimudartakan oleh kemungkiran s. 258(i)(b) dan (2)(a) Kanun Tanah Negara tidak berasas memandangkan keputusan Mahkamah ini bahawa tidak berlaku kemungkiran yang sedemikian. Dalam apa-apa keadaanpun, hak untuk menebus adalah sentiasa dengan perayu daripada masa tanah itu digadaikan kepada bank pendulu itu tetapi beliau telah tidak melaksanakan haknya. Malahan ianya lebih murah untuk menebus tanah itu lebih awal dalam prosiding tersebut kerana faedah akan bertambah mengikut masa. c
d

[Rayuan ditolak dengan kos; keputusan Hakim perbicaraan diikrarkan.]

Cases referred to:

M & J Frozen Food Bhd v. Siland Sdn. Bhd. [1994] 1 MLJ 294 (*dist*)
Standard Chartered Bank v. Asian Transport Service (M) Sdn. Bhd. & 3 Ors. [1995] 4 CLJ 652 (*not foll*) e

Legislation referred to:

Auction Sales Enactment FMS Cap 81, s. 4
Banking and Financial Institutions Act 1989, ss. 49(7), 50(1) and (3)
National Land Code 1965, ss. 258(1)(b), (2)(a)
Rules of the High Court 1980, O. 15 rr. 6(2)(b)(ii), 7(2), O. 31, O. 83 f

For the appellant - K.S. Narayanan (Saranjit Singh with him); M/s. K.S. Narayanan Associates

For the 1st respondent - Tang Woh Heng (Steven Wong with him); M/s. Ariffin & Partners

For the 2nd respondent - Cecil Abraham (R S Nathan with him); M/s. Shearn Delamore & Co g

For the 3 respondent - Manjit Singh Sachdev (Edward Chan & Rajesh Kumar with him); M/s. Manjit Singh Sachdev, Mohammad Radzi & Partners

JUDGMENT

Siti Norma Yaakob JCA: h

The axis of the dispute in these proceedings is whether Standard Chartered Bank, a foreign bank and the 1st respondent before us can, after 1st July 1994, continue to pursue matters relating to these proceedings in its name as after that date it had already sold and vested all its banking business in i

- a* Malaysia to Standard Chartered Bank Malaysia Berhad, a separate legal entity incorporated locally and who we refer to as the successor bank. The 1st respondent as the predecessor bank, states it can, a contention that was upheld by the trial Judge whilst Leong Moh Sawmill Co Sdn Bhd, the appellant before us, states otherwise and to appreciate the many issues raised by them, we begin by setting out the factual background of the case.

b

At all material times, the appellant was the registered proprietor of two separate parcels of land held under HS(D) 17288 PT 253, Mukim Batu, Wilayah Persekutuan and HS(D) 14833 PT 9497 also in the Mukim of Batu, Wilayah Persekutuan (collectively referred to as “the lands”). It charged the lands to the predecessor bank, then known as Chartered Bank to secure loans granted to it by the predecessor bank in 1979. The appellant defaulted in the repayment of the loans and the predecessor bank as the chargee instituted foreclosure proceedings against the appellant in Kuala Lumpur Originating Summons No F 981/84.

c

d On 4 October 1985, the predecessor bank obtained an order of Court to sell the lands by way of public auction. Since that date various attempts at auctioning the lands were either aborted or postponed on various grounds and finally fixed for 2 June 1993. However, on the eve of the auction date, the parties agreed to adjourn the auction indefinitely to enable a contributory to the appellant to settle the matter out of Court. In the meantime on 25 March 1988, by an order of Court, the appellant was compulsorily wound up under the provisions of the Companies Act 1965 in winding-up petition No: 42-22-86 instituted by the Inland Revenue Department against the appellant.

e

f When the appellant’s attempts at settlement failed in 1993, the predecessor bank filed a summons in chambers on 2 November 1993 for a fresh auction date and further directions for sale. This summons for directions was not heard until a year later as the Court file had gone missing and whilst waiting for the file to be reconstructed a number of events occurred that affected the status and business of the predecessor bank.

g

On 12 April 1994, after having obtained the approval of the Minister of Finance under s. 49(7) of the Banking and Financial Institutions Act 1989 (the Act) and by way of a sale and purchase agreement, the predecessor bank transferred and vested all its banking business in Malaysia to the successor bank. In Kuala Lumpur originating summons No: D3-24-88-94, both the predecessor bank and the successor bank jointly applied to give effect to the sale and purchase agreement under s. 50(1) of the Act. On 28 April 1994, the Court granted a vesting order and, *inter alia*, fixed 1 July 1994 as the effective date for the transfer of the business of the predecessor bank to the successor bank.

h

i

By November 1994, the Court's missing file was reconstructed and on 1 December 1994, the summons for directions filed by the predecessor bank to fix a new date of auction and further directions for sale was heard. 13 March 1995 was identified as the new auction date together with other terms and conditions of sale. It must be noted here that despite the change in the status of the predecessor bank after the transfer date, all proceedings in this matter continued in the name of the predecessor bank as the plaintiff. Thus the summons in chambers carried no change in the heading and citation and the proclamation of sale upon which the auction was conducted on 13 March 1995 still had the predecessor bank as the plaintiff.

At the auction on 13 March 1995, the 2nd and 3rd respondents had bid successfully for one parcel of each of the lands with the 2nd respondent agreeing to pay RM11,955,000 for its bid and the 3rd respondent RM4,675,000. Each paid 10% of the respective purchase price at the date of the auction with the balance to be paid within 90 days of sale ie on or before 13 June 1995.

However, upon being made aware by a contributory of the existence of the vesting order, the appellant with the sanction of the official receiver, filed an application on 3 April 1995 seeking:

- (1) to set aside the auction held on 13 March 1995 and that the sale of the lands to the 2nd and 3rd respondents be annulled and that the deposits made by them be refunded to them;
- (2) to set aside the proclamation of sale issued pursuant to the directions for sale;
- (3) a fresh auction sale and fresh directions be given in respect of the same lands;
- (4) all further proceedings arising from the auction held on 13 March 1995 be stayed pending disposal of the application.

As this application would definitely affect the rights of the 2nd and 3rd respondents as the *bona fide* purchasers for value of the lands, they were allowed to intervene in the proceedings. On 15 July 1995, Abdul Aziz Mohammed J, dismissed the appellant's application with costs, stayed the issuance of Form 16F in favour of the 2nd and 3rd respondents and extended time to them to settle the balance of the purchase price for the lands. It is to appeal against this decision that the appellant, who was the defendant below, is now before us.

The following question was raised by the appellant before us. Since there has been a change in the identity of the chargee, is there a need for the title of the action to be substituted to reflect the identity of the true chargee before

- a* the auction can be enforced? The appellant answers it positively as the change is not a mere change in name (as was the case when the predecessor bank initiated the foreclosure proceedings in the name of Chartered Bank) but that a new legal entity has been created with the incorporation of the successor bank who has been granted a valid banking licence to operate in Malaysia. It
- b* was under these circumstances that the localised successor bank took over the rights and liabilities of the predecessor bank in Malaysia whilst the latter continues to operate as a separate legal entity elsewhere internationally. It is for this very reason that the appellant contends that the failure by the predecessor bank to cite the successor bank as the plaintiff in the proclamation
- c* of sale issued pursuant to the directions for sale ordered on 1 December 1994, constitutes a breach of section 258(1)(b) and (2)(a) of the National Land Code 1965 (NLC) and that breach amounts to an impropriety in the subsequent conduct of the sale within the meaning enunciated in the case of *M & J Frozen Food Bhd. v. Siland Sdn. Bhd.* [1994] 1 MLJ 294 (the *Siland* case) so as to entitle the appellant, as the chargor to nullify the sale.
- d*

Section 258(1)(b) and (2)(a) of the NLC is worded as follows:

Procedure prior to sale.

- e* 258 (1) Where any such order has been made, it shall be the duty of the Registrar of the Court:

(a) ...

(b) to see that the sale is publicly advertised in accordance with rules of Court or, in the absence of any rule in that behalf, the practice customarily adopted in the State.

f

(2) The chargee on whose application the order was made shall:

(a) prepare the conditions of sale, in accordance with the terms of the order and any determination thereunder by the Registrar of the Court;

- g* In the *Siland* case which also concerns the public auction of a charged property, one of the issues raised before the Supreme Court was whether a successful bidder can apply to vary the terms and conditions of the order of sale without giving due notice of such application to the chargor. In that case the successful bidder after defaulting in its obligations to settle the balance of the purchase price within the time limited by the conditions of sale, had applied
- h* to the Senior Assistant Registrar (SAR) to extend the completion date and without service of such application to the chargor, obtained such an order. On appeal, the trial Judge held that the SAR had no right to make such an order without giving the chargor the right to be heard, a decision that was confirmed
- i* by the Supreme Court, on the grounds that any variation in the order of sale or the terms or conditions made in the absence of or without service of the required notice to the chargor is *ultra vires* the authority to sell under the

NLC. The conduct of the successful bidder in obtaining the extension of time to complete the sale, to the exclusion of the chargor, was held to be improper by the Supreme Court, and this entitles the chargor to have the order for extension set aside and the sale annulled.

a

Abdul Aziz Mohamed J, in the circumstances of this instant case, held that the provisions of s. 258(1)(b) and (2)(a) of the NLC have not been breached by the predecessor bank and the fact that the proclamation of sale maintained the predecessor bank as the plaintiff cannot amount to conduct being improper as was envisaged by the *Siland* case. We now have to consider whether that finding has been correctly made.

b

It must be remembered that the appellant is not impugning the order of sale but that its only complaint is that the proclamation of sale describes the wrong party as the chargee. This is so as after 1 July 1994, all matters pertaining to the sale of the lands should be conducted by the successor bank and for this reason the appellant contends that there is a need to substitute the successor bank as the plaintiff in the proceedings and described as such in the proclamation of sale as was done in the case of *Standard Chartered Bank v. Asian Transport Service (M) Sdn. Bhd. & 3 Ors.* [1995] 4 CLJ 652, a decision that was handed down a few days after the decision, which is now being impugned, was made.

c

d

We will start by considering whether the provisions of s. 258(1)(b) and (2)(a) of the NLC have been breached by the predecessor bank. These two subsections set out the procedure to be followed after an order of sale has been obtained and prior to the execution of the sale itself. Section 258(1)(b) is directed to the Registrar of the High Court and it empowers such Registrar to see that the sale is advertised publicly in accordance with any rules of Court or in the absence of such rules the customary practice in the State. There are no specific rules regulating the procedure for advertising a judicial sale by public auction. The Rules of the High Court 1980, where one expects such procedure to be set out, is silent on this although there is a chapter on charge actions in O. 83 and another chapter, O. 31, that makes provisions as to the directions to be given when carrying out such sale.

e

f

g

However there are provisions in s. 4 of the Auction Sales Enactment FMS Cap. 81 regulating what particulars a public notice or proclamation of sale should contain and the onus is on the auctioneer, conducting the sale, to prepare and advertise such sale. What happens in practice is that the auctioneer named by the Court to conduct the sale, working together with the chargee, draws up the proclamation of sale containing all particulars as required by s. 4 and submits the proclamation of sale for approval to the SAR. Once approved, the auctioneer will take all the necessary steps to have the proclamation of

h

i

a sale advertised. In this way the SAR would have seen that the sale has been publicly advertised as is required of him under s. 258(1)(b) and (2)(a) of the NLC.

b In this instance, a perusal of the reconstructed file shows that the SAR had, on 9 December 1994 informed the auctioneer of his appointment to sell the lands by public auction on 13 March 1995 at 9.00 am and the auctioneer was also directed to prepare the proclamation of sale to contain all necessary particulars and submit the same for approval by the SAR. A draft of the proclamation of sale was submitted by the Auctioneer to the SAR on 19 December 1994 for approval and the approved proclamation of sale was
c advertised by the auctioneer 7 days before the sale as is required by s. 4(2) of the Enactment.

Clearly, we do not see how the provisions of s. 258(1)(a) and (2)(b) of the NLC have been breached by the predecessor bank as all procedural steps laid down by the two sub-sections have been adhered to by the predecessor
d Bank through the Court appointed auctioneer and the SAR. However, what remains to be determined is whether the alleged impropriety of not amending the heading of the proceedings to disclose the name of the successor bank as the chargee in the proclamation of sale is the sort of impropriety envisaged by the *Siland* case.
e

We say 'no' for the following reasons.

f The vesting order of 28 April 1994 was such that there is no requirement in law to effect a substitution of the plaintiff. Paragraph 2(d) of the order states that any reference to the predecessor bank in any existing instrument of any nature vesting any title, assets or liability on the predecessor bank shall, without any further act by the predecessor bank, be construed as if the reference has been substituted with a reference to the successor bank with effect from 1 July 1994. Paragraph 2(k) of the vesting order also states that where any right or liability of the predecessor bank is to be transferred to the successor bank,
g then the latter shall, without any further act of the former, have the same rights, powers and remedies like commencing or defending any legal proceedings including rights and liabilities in respect of any legal proceedings pending before 1 July 1994 by or against the predecessor bank.

h Likewise, para 2(1) of the vesting order which states that any judgment or award obtained by or against the predecessor bank and which was not complied with or yet to be satisfied shall, with effect from 1 July 1994, and without any further act of the predecessor bank, be enforceable by or against the successor bank as if the latter had become a party to the judgment or award.

i We consider that the effect of this particular order is that the successor bank

is deemed to be a party in all proceedings that were initiated by or commenced against the predecessor bank and, for practical purposes, this means that the successor bank is very much a party to the order of sale obtained on 4 October 1985.

a

It was pursuant to the various paragraphs in the vesting order that we have singled out that the trial Judge likened the situation of the predecessor bank leaving its shell and the successor bank filling in the space left vacant by the predecessor bank. Thus the transfer of business was to take place without any further administrative acts to be done by either the predecessor bank or the successor bank.

b

The vesting order was made under s. 50(1) of the Act and sub-section (3) of the same section states as follows:

c

(3) Where the order of the High Court under sub-section (1) provides for the transfer of any property or business vested in or held by the transferor, either alone or jointly with any other person, then, by virtue of the order, that property or business shall, on and from the transfer date, become vested in or held by the transferee either alone or, as the case may be, jointly with such other person, and the order shall have effect according to its terms notwithstanding anything in any law or in any rule of law, and shall be binding on any person thereby affected, regardless that the person so affected is not a party to the proceedings under this section or any other related proceedings, or had no notice of the proceedings under this section or of other related proceedings.

d

e

The only written law dealing with parties to an action is found in the Rules of the High Court 1980 and O. 15 r. 7(2) specifically deals with the change of parties under certain circumstances. For ease of reference we reproduce that particular order and rule:

f

(2) Where at any stage of the proceedings in any cause or matter the interest or liability of any party is assigned or transmitted to or devolves upon some other person, the Court may, if it thinks it necessary in order to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, order that other person to be made a party to the cause or matter and the proceedings to be carried on as if he had been substituted for the first mentioned party.

g

Thus by virtue of the vesting order, there has been a transmission of interest from one legal entity to another and under the provisions of O. 15 r. 7(2), there may be a substitution of the proper party to continue with the proceedings. However by virtue of the qualifying words “not withstanding anything in law or in any rule of law” appearing in s. 50(3) of the Act, we consider that there is no necessity for a formal order under O. 15 r. 7(2) to regularise the position of the successor bank. If indeed there was any irregularity committed by the predecessor bank, it was merely its failure to withdraw and allow the sale to be conducted by the successor bank. That

h

i

a can be achieved by the mere production of the vesting order. In any event that omission, we consider, is not the sort of impropriety envisaged by the *Siland* case, where the conduct sought to be impugned amounts to a reckless disregard to the interests of an interested party. That cannot be the case here as what is being challenged is not the interest of any party but the wrong

b use of a name which by virtue of the particular provisions of the vesting order, which we have already averred to, and the provisions of s. 50(3) of the Act, cannot have the effect of rendering the proclamation of sale improper and the subsequent sale annulled.

c Since our attention was drawn to the case of *Standard Chartered Bank v. Asia Transport Services Sdn. Bhd. & 3 Ors.*, we need to say a few words about the decision in that case. It concerns the status of the same predecessor bank and the successor bank and the effect the same vesting order had on them. A joint application was made by both banks to have the successor bank substituted as plaintiff in place of the predecessor bank pursuant to O. 15 r.

d 7(2). The Deputy Registrar who heard the application dismissed it with costs on the grounds that both banks had no *locus standi* to bring the application as the predecessor bank had divested all its rights to the successor bank who in turn is not a party to the action. The Registrar held that the successor bank should have applied for leave to intervene under O. 15 r. 6(2)(b)(ii) of the

e Rules before applying to have itself substituted under r. 7 (2) of the same order. On appeal, Richard Tallala J had this to say at page 656 of the report.

f As to the submission of Counsel for the defendant that a stranger to the proceedings seeking to get in should first obtain leave to intervene therein, I could find nothing in the Rules to support such a proposition. It is true that subrule (2) does not stipulate who is entitled to make the application. However, by reference to subrule (3) it is envisaged that any person is entitled to make it, and that will include a stranger to the proceedings whom the subrules by necessary implication embrace any way. In this instance the Malaysian bank was not a person seeking relief in respect of a right independent of the English bank but rather relief in respect of the same right against the same party namely the

g defendant. In short, the Malaysian Bank was seeking to step into the shoes of the English bank. The Malaysian bank whom the right of action of the English bank had been assigned or on whom it has devolved was seeking not merely to be added as a party, or to intercede so to speak, but to be plaintiff in the action. Accordingly the Malaysian bank had to do no more than make an application

h under O. 15 r. 7(2) (again there is no restriction in the subrule as to who is entitled to make the application) for an order that the proceedings be carried on as if the Malaysian bank had been substituted for the English bank which it is believed is what it actually did but the application was dismissed and against the dismissal there was no appeal.

i On that premise, the learned Judge confirmed the dismissal of the application insofar as it was brought by the successor bank but set aside the Registrar's order on the application of the predecessor bank by substituting the successor bank as plaintiff.

With respect, we are not bound by the decision of a lower tribunal particularly when the decision is *orbiter dicta* and where the learned Judge himself entertained doubts as to whether an application under O. 15 r. 7(2) was necessary to substitute the successor bank as the plaintiff in view of the vesting order. a

Lastly, we come to the appellant's submission that since the sale was conducted in breach of the procedures laid down by s. 258(1)(b) and (2)(a) of the NLC, the illegal sale had prejudiced the appellant's right to redeem the lands. b

To begin with, we have already concluded that there has been no breach of the statutory requirements of s. 258(1)(b) and (2)(a) of the NLC and as such the question of prejudice does not arise. c

In any event, the right to redeem has always been with the appellant all along, from the time it charged the lands to the predecessor bank up to the time the order of sale was made on 4 October 1985 and extended further right up to the eve of the auction. Yet the appellant did not exercise that right during those intervening years although attempts at getting its contributory to do so failed in 1993. For the appellant to complain that its right to redeem the lands has been thwarted by the sale does not stand to reason as it would have been cheaper for it to redeem the lands earlier on in the proceedings than to wait until the auction to do so as it would have to meet not only the balance of the outstanding loans but also the interest accumulated with the passage of time. Thus it is only reasonable to expect the appellant to have exercised its right of redemption earlier on in the proceedings and the very fact it did not can only mean that it was not in a position financially to do so. That may well explain the reason it was placed under liquidation in 1988. d
e
f

If anybody at all who would complain of being prejudiced by the auction it must be the 2nd and 3rd respondents, the *bona fide* purchasers for value, who had bid successfully for the lands and are willing and capable to pay the balance of the purchase price but whose rights of ownership have been stayed following the present proceedings. In the case of the 2nd respondent, it is purchasing one of the lands at double the reserved price, a plus factor for which the appellant should have no cause to complain at all. g

For the reasons that we have given, we dismiss this appeal with costs, the findings of the trial Judge are affirmed and we order that the deposit be paid proportionately to the three respondents to account for their taxed costs. h

Reported by S. Puvan

i