

**A**                    **Dato' Hj Nik Mahmud bin Daud v Bank Islam  
Malaysia Bhd**

**B**                    HIGH COURT (KOTA BHARU) — ORIGINATING MOTION NO 25-26-  
1994  
IDRIS YUSOFF J  
27 SEPTEMBER 1995

**C**                    *Land Law — Malay reservations — Dealings in reservation land — Execution of property purchase agreement, property sale agreement and charge documents for loan granted under Al Bai Bithaman Ajil concept — Whether there was actual dealing or attempt to deal in the said lands — Whether the execution of the said agreements transgressed the provisions of the Kelantan Malay Reservations Enactment 1930 and were thus void — Kelantan Malay Reservations Enactment 1930 ss 7(i) & 12(i)*

**D**                    *Land Law — Indefeasibility of title and interests — Registered charge — Whether registration was obtained by an insufficient or void instrument — Whether there was anything in law or in fact that could deny indefeasibility — National Land Code 1965 s 340(2)(b)*

**E**                    The plaintiff, on 6 May 1984, had executed two agreements, namely the 'property purchase agreement' and the 'property sale agreement' with the defendant. There was a purchase by the defendant through the former agreement of properties ('the said lands') for a price of RM520,000 which were then resold through the latter agreement to the plaintiff for RM629,200. Both the agreements were signed contemporaneously. On 8 May 1984, the plaintiff's attorney executed two charges of the said lands in favour of the defendant as securities for a loan of RM629,200, which loan was purportedly granted under the Islamic banking concept of Al Bai Bithaman Ajil. In this action, the plaintiff applied for an order that the charges dated 8 May 1984, the property purchase agreement and the property sale agreement be declared null and void and of no effect. It was contended by the plaintiff that the execution of the property purchase agreement, the property sale agreement and the charge documents would clearly tantamount to an exercise to defeat the very purpose and intention of the Kelantan Malay Reservations Enactment 1930 ('the Enactment') and the National Land Code 1965 ('the Code'). Counsel for the defendant raised various issues to resist the motion, inter alia, the indefeasibility of the charges under s 340 of the Code and the interpretation of the Enactment, vis-a-vis Al Bai Bithaman Ajil transactions.

**H**                    **Held**, dismissing the application:

**I**                    (1) Section 7(i) of the Enactment prohibits any transfer or transmission or vesting of any right or interest of a Malay in reservation land to or in any person not being a Malay. However, when the property purchase agreement was signed the right that could be acquired by the defendant under the agreement at that

point of time, the agreement being still executory, was only a right to a registrable interest which right was yet to crystallize into a registrable interest. It was only upon registration that the title to the said lands would vest in the defendant and it was only when the defendant became the registered proprietor that its title would have the indefeasibility which the Code conferred. As there was no evidence to show a change in the registered proprietorship of the said lands pursuant to the execution of the property purchase agreement, the plaintiff was and is the registered proprietor of the said lands. That being the case, there was no transfer effected and the proprietorship still remained with the plaintiff. There was also no vesting of right or interest in the said lands in the defendant (see pp 302G-I, 304H-I, 305A-B; *Bachan Singh v Mahinder Kaur* [1956] MLJ 97, *Macon Engineers Sdn Bhd v Goh Hooi Yin* [1976] 2 MLJ 53 and *Wee Tiang Peck v Teoh Poh Tin* [1995] 1 MLJ 446 followed).

- (2) The contemporaneous execution of the property purchase agreement and the property sale agreement constituted part of the process required by the Islamic banking procedure before the plaintiff could avail himself of the financial facilities provided by the defendant under the Al Bai Bithaman Ajil concept. That was what both parties had bargained for. Therefore, the execution of the property purchase agreement had not transgressed the provisions of ss 7 and 12 of the Enactment since there was no dealing or attempt to deal in the said lands (see pp 305G-I, 306A-B; *Foo Say Lee v Ooi Heng Wai* [1969] 1 MLJ 47, *Tengku Mohamed Zairuddeen bin Tengku Mohamed Zaid v Wazuraiyah bte Mohamad* [1988] 1 MLJ 27, *Haji Hamid bin Ariffin & Anor v Ahmad bin Mahmud* [1976] 2 MLJ 79, *Manang Lim Native Sdn Bhd v Manang Selaman* [1986] 1 MLJ 379 and *Hussanjan v Haji Nik Yahya bin Nik Daud & Ors* [1973] 1 MLJ 9 distinguished).
- (3) In this case, indefeasibility could only be successfully attacked by evidence which manifested that registration was obtained by 'means of an insufficient or void instrument'. This meant the plaintiff could only successfully seek the aid of s 340(2)(b) of the Code if it could be shown that there existed a defect or illegality in the execution of the charge documents. A scrutiny of the charge documents here did not disclose any form of defect or illegality. The charge documents had been registered in accordance with the procedure laid down in the Code and such registration did not run counter to the Enactment either. Therefore, there was nothing in law and in fact that could deny the indefeasibility accorded by s 340 of the Code to the charges (see pp 307B-C, 308B-C).

**Per curiam:**

The failure to register the power of attorney, which was used to execute the charges, with the Director of Lands and Mines with whom the charges were registered would not give rise to any legal

A impediment to the registration process in view of certain directory measures that have to be taken pursuant to Ch 1 and 2 of Part 18 of the Code and the presumption in s 114(e) of the Evidence Act 1950 that judicial and official acts have been regularly performed (see pp 307H-I, 308A-B).

B **[Bahasa Malaysia summary**

C Plaintiff, pada 6 Mei 1984, telah melaksanakan dua perjanjian, iaitu 'perjanjian membeli hartanah' dan 'perjanjian menjual hartanah' dengan defendan. Terdapat pembelian hartanah ('tanah itu') oleh defendan melalui perjanjian pertama pada harga RM520,000 yang kemudiannya telah dijual semula melalui perjanjian kedua kepada D plaintiff untuk RM629,200. Kedua-dua perjanjian itu telah ditandatangani serentak. Pada 8 Mei 1984, peguam plaintiff telah melaksanakan dua gadaian ke atas tanah itu memihak kepada defendan sebagai jaminan untuk pinjaman sebanyak RM629,200, pinjaman yang mana telah dibuat di bawah konsep perbankan Islam Al Bai Bithaman Ajil. Di dalam tindakan ini, plaintiff memohon untuk suatu perintah bahawa gadaian yang bertarikh 8 Mei 1984 itu, perjanjian membeli hartanah dan perjanjian menjual hartanah itu diisytiharkan batal dan tidak sah dan tidak berkesan. Dihujah oleh plaintiff bahawa pelaksanaan perjanjian membeli hartanah, perjanjian menjual hartanah dan dokumen gadaian itu jelasnya sama dengan satu gerak kerja E untuk mengalahkan tujuan dan maksud Enakmen Tanah Rizab Melayu Kelantan 1930 ('Enakmen itu') dan Kanun Tanah Negara 1965 ('Kanun itu'). Peguam untuk defendan membangkitkan berbagai isu untuk menentang usul itu, antara lainnya, isu ketakbolehsangkalan F gadaian itu di bawah s 340 Kanun itu dan tafsiran Enakmen itu berkaitan dengan transaksi Al Bai Bithaman Ajil.

**Diputuskan**, menolak permohonan itu:

- (1) Seksyen 7(i) Enakmen itu melarang sebarang pemindahmilikan, pengantarserahan (transmission) atau perletakhakan apa-apa hak atau kepentingan seorang Melayu di dalam tanah rizab kepada atau dalam mana-mana orang yang bukan Melayu. Namun demikian, apabila perjanjian membeli hartanah itu ditandatangani hak yang boleh diperolehi oleh defendan di bawah perjanjian itu pada masa itu, memandangkan yang perjanjian itu masih kena dilaksanakan, hanyalah satu hak untuk mendapat satu kepentingan yang boleh didaftarkan yang belum berubah menjadi kepentingan yang boleh didaftarkan. Hanyalah pada masa pendaftaran yang hakmilik kepada tanah itu akan diletakhak pada defendan dan hanyalah pada masa defendan menjadi tuannya berdaftar yang hakmiliknya akan memperolehi ketakbolehsangkalan seperti yang diberi oleh Kanun itu. Oleh kerana tiada keterangan untuk menunjukkan pertukaran di dalam ketuannya berdaftar tanah itu berikutan pelaksanaan perjanjian membeli hartanah itu, plaintiff merupakan dan adalah tuannya berdaftar tanah itu. Dengan itu, ia bermakna bahawa pemindahmilikan tidak berlaku dan

- ketuannya masih kekal dengan plaintif. Tiada perletakhakan hak atau kepentingan dalam tanah itu pada defendan (lihat ms 302G-I, 304H-I, 305A-B; *Bachan Singh v Mahinder Kaur* [1956] MLJ 97, *Macon Engineers Sdn Bhd v Goh Hooi Yin* [1976] 2 MLJ 53 dan *Wee Tiang Peck v Teoh Poh Tin* [1995] 1 MLJ 446 dibeza).
- (2) Pelaksanaan serentak perjanjian membeli hartanah dan perjanjian menjual hartanah itu adalah sebahagian daripada proses yang perlu di bawah prosedur perbankan Islam sebelum plaintif boleh memperolehi kemudahan-kemudahan kewangan yang disediakan oleh defendan di bawah konsep Al Bai Bithaman Ajil. Itu adalah apa yang dipersetujui oleh kedua-dua pihak. Maka, pelaksanaan perjanjian membeli hartanah itu tidak melanggar peruntukan ss 7 dan 12 Enakmen itu kerana tiada sebarang urusan atau percubaan untuk mengurus dengan tanah itu (lihat ms 305G-I, 306A-B; *Foo Say Lee v Ooi Heng Wai* [1969] 1 MLJ 47, *Tengku Mohamed Zairuddeen bin Tengku Mohamed Zaid v Wazuraiyah bte Mohamad* [1988] 1 MLJ 27, *Haji Hamid bin Ariffin & Anor v Ahmad bin Mahmud* [1976] 2 MLJ 79, *Manang Lim Native Sdn Bhd v Manang Selaman* [1986] 1 MLJ 379 dan *Hussanjan v Haji Nik Yahya bin Nik Daud & Ors* [1973] 1 MLJ 9 dibeza).
- (3) Di dalam kes ini, ketakbolehsangkalan hanya boleh dinafikan dengan jayanya jika terdapat keterangan yang menunjukkan bahawa pendaftaran telah diperolehi dengan 'cara suratcara yang tidak lengkap atau tak sah'. Ini bermakna bahawa plaintif hanya boleh berjaya menggunakan s 340(2)(b) Kanun itu jika boleh ditunjukkan bahawa terdapat kecacatan atau kepenyalahan undang-undang dalam pelaksanaan dokumen gadaian itu. Satu penelitian dokumen gadaian itu di sini tidak menunjukkan apa-apa kecacatan atau kepenyalahan undang-undang. Dokumen gadaian itu telah didaftar mengikut prosedur seperti yang terdapat dalam Kanun itu dan pendaftaran sedemikian tidak bercanggah dengan Enakmen itu juga. Maka, tidak terdapat apa-apa dalam undang-undang dan fakta yang boleh menafikan ketakbolehsangkalan yang diberikan oleh s 340 Kanun itu kepada gadaian itu (lihat ms 307B-C, 308B-C).

### Per curiam:

Kegagalan untuk mendaftarkan surat kuasa wakil, yang digunakan untuk melaksanakan gadaian itu, dengan Pengarah Tanah dan Galian yang dengannya gadaian itu didaftarkan tidak akan menimbulkan halangan undang-undang terhadap proses pendaftaran itu memandangkan langkah direktori tertentu yang mesti diambil mengikut Bab 1 dan 2, Bahagian 18 Kanun itu dan anggapan di dalam s 114(e) Akta Keterangan 1950 bahawa tugas kehakiman dan rasmi telah dijalankan dengan sempurna (lihat ms 307H-I, 308A-B).]

- A [Editorial note: The plaintiff has appealed to the Court of Appeal vide Application No D-02-656-95.]

### Notes

- B For a case on dealings in Malay reservation land, see 8 *Mallal's Digest* (4th Ed) para 1533.
- For cases on indefeasibility of registered charges, see 8 *Mallal's Digest* (4th Ed) para 1407; [1992] *Mallal's Digest* 1229.

### Cases referred to

- C *Bachan Singh v Mahinder Kaur* [1956] MLJ 97  
*Foo Say Lee v Ooi Heng Wai* [1969] 1 MLJ 47  
*Frazer v Walker, Radomski and Radomski* [1967] 1 AC 569  
*Haji Hamid bin Ariffin & Anor v Ahmad bin Mahmud* [1976] 2 MLJ 79
- D *Hussanjan v Haji Nik Yahya bin Nik Daud & Ors* [1973] 1 MLJ 9  
*M & J Frozen Food Sdn Bhd v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294  
*Macon Engineers Sdn Bhd v Goh Hooi Yin* [1976] 2 MLJ 53  
*Manang Lim Native Sdn Bhd v Manang Selaman* [1986] 1 MLJ 379  
*Margaret Chua v Ho Swee Kiew & Ors* [1961] MLJ 173
- E *Mohamed Zairuddeen bin Tengku Mohamed Zaid, Tengku v Wazuraiyah bte Mohamad* [1988] 1 MLJ 27  
*Phuman Singh v Kho Kwang Choon* [1965] 2 MLJ 189  
*Tan Hee Juan v Teh Boon Keat & Anor* [1934] MLJ 96  
*Tengku Mohamed Zairuddeen bin Tengku Mohamed Zaid v Wazuraiyah bte Mohamad* [1988] 1 MLJ 27
- F *United Malayan Banking Corp Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352  
*Wee Tiang Peck v Teoh Poh Tin* [1995] 1 MLJ 446

### Legislation referred to

- G Evidence Act 1950 s 114(e)  
Islamic Banking Act 1983  
Kelantan Malay Reservations Enactment 1930 ss 2, 3, 4, 7, 9A, 12, 14, 104, Schedule D  
Land Enactment 1938 Schedule 26A  
Moneylenders Act 1951
- H National Land Code 1965 ss 5, 205(1), 206(1)(b), 215(1), (2), 242 340, Form 14, Form 16A

*MS Nagayam (Ahmad Rastom & Nagayam)* for the plaintiff.

*Mohamed Ismail bin Mohamed Shariff (K Thavakumar with him)*

- I (*Mohamed Ismail & Co*) for the defendant.

**Idris Yusoff J:** By an originating motion dated 5 October 1994, the plaintiff applies to the court for the following orders:

- 1 That the charges dated 8 May 1984 executed by the plaintiff's attorney in favour of the defendant in respect of 25 lots of land registered as PT 109 (HS(D) KB 645/83); PT 110 (HS(D) KB 646/83; and PT 113 (HS(D) KB 649/83 to PT 135 (HS(D) KB 671/83); all in section 12, Kota Bharu, Kelantan be declared null and void and of no effect and that the memorandum of charge registered under charge No jilid 39, folio 36, bil perserahan No 1091/84 and charge No jilid 39, folio 37, bil perserahan No 1092/84 with the Pengarah Tanah dan Galian, Kota Bharu, Kelantan be cancelled; A
- 2 that the property sale agreement and the property purchase agreement executed by the plaintiff and the defendant and dated 6 May 1984 be declared null and void and of no effect; and B
- 3 that consequent upon prayers (1) and (2) above, the defendant be ordered to return the plaintiff's titles, free of all encumbrances, forthwith. C

Attached to the application and in support thereof is an affidavit sworn by the plaintiff on 4 October 1994 setting out the relevant facts.

As can be gathered from the plaintiff's averments in the said affidavit and the exhibits annexed thereto, the plaintiff on 6 May 1984 executed two agreements, namely the 'property purchase agreement' and the 'property sale agreement' with the defendant. In respect of the former, it shows that there was a purchase by the defendant of the properties listed in prayer (1) of the motion for a price of RM520,000. Having so purchased, the defendant then resold to the plaintiff for a price of RM629,200 thereby making a profit of RM109,200. It is to be noted that both the agreements were signed contemporaneously. D

On 8 May 1984, the plaintiff's attorney executed a charge of the said lands in favour of the defendant as securities for the loan of RM629,200, which loan was purportedly granted under the Islamic banking concept of Al Bai Bithaman Ajil. E

It is also alleged by the plaintiff that the loan was never disbursed to him but as I see it on the strength of the financing facility agreement dated 6 May 1984 executed by the plaintiff, Mariza Sdn Bhd and the defendant and in particular to cl 1(a) and 2(a) thereof, such an allegation can be brushed aside as having no basis at all. Clauses 1(a) and 2(a) are set out below: F

- 1(a) At the request of the first-named customer ('the plaintiff') and the second-named customer ('Mariza Sdn Bhd'), the bank ('the defendant') hereby agrees to pay the purchase price payable by the bank to the first-named customer under the property purchase agreement to the second-named customer and upon the terms and conditions herein contained. G
- 2(a) In consideration of the bank agreeing to pay the purchase price mentioned in cl 1(a) hereof to the second-named customer with the concurrence of the first-named customer, the second-named customer hereby covenants, agrees and undertakes with the bank and the first-named customer that the second-named customer shall in place of the first-named customer pay to the bank the purchase price payable by the first-named customer under the property sale agreement ('the purchase price') in the amounts, at the times and in the manner specified in s 1 of the Second Schedule hereto or by instalments of such other amounts as shall be mutually agreed between the bank and the second-named customer. H

I

A As such and in the absence of any evidence to the contrary, it does not now lie in the plaintiff's mouth to deny the arrangements that have heretofore been agreed upon between the said parties, more so when the loan had already been disbursed to the 'second-named customer'.

The issues initially raised by the plaintiff to support his motion are:

- B (i) the defendant was at all material times prohibited from accepting charges in respect of usury transactions hence the acceptance of the charge by the defendant was ultra vires the defendant's Articles of Association; and
- C (ii) that the execution of the property purchase agreement, the property sale agreement and the charge documents would clearly tantamount to a colourable exercise to defeat the very purpose and intention of the Kelantan Malay Reservations Enactment 1930 ('the Enactment') and the National Land Code 1965 ('the Code').

D However, at the outset of the hearing the plaintiff abandoned the first issue and indicated that he would wish to go on with the second issue only, ie on the alleged infringement of the terms of the Enactment and the Code.

It is common ground that:

- E (i) the plaintiff is a Malay as defined under s 2 of the Enactment and also a native of Kelantan;
- (ii) the defendant is a bank licensed under the Islamic Banking Act 1983 to carry on Islamic banking business, which, inter alia, is to provide financing facilities under the concept of Al Bai Bithaman Ajil;
- (iii) that the lands in question are lands declared under s 4 of the Enactment to be included in a Malay Reservation;
- F (iv) 'Malay' as defined in s 3 of the Enactment means 'a person belonging to any Malayan race who speaks any Malayan language and professes the Mohammedan religion; and shall include
- (a) the Majlis Ugama Islam; and
- G (b) the Official Administrator when acting as administrator or trustee of the estate of a deceased Malay';
- (v) the defendant is neither a Malay nor a native of Kelantan;
- (vi) the defendant is a party included in Sch D to the Enactment and also in Sch 26A to the Land Enactment 1938;
- H (vii) a power of attorney was given by the plaintiff in favour of one Tengku Mahyiddin; and
- (viii) charges in Form 16A were signed by Tengku Mahyiddin on behalf of the plaintiff in the exercise of the said power and the said charges were presented and registered on 8 May 1984.

I It is strongly argued on behalf of the plaintiff that the execution of the property purchase agreement had somewhat contravened the provisions of ss 7 and 12 of the Enactment and relying on the authorities of *Tengku Mohamed Zairuddeen bin Tengku Mohamed Zaid v Wazurayah bte Mohamad* [1988] 1 MLJ 27; *Haji Hamid bin Ariffin & Anor v Ahmad bin Mahmud*

[1976] 2 MLJ 79; *Manang Lim Native Sdn Bhd v Manang Selaman* [1986] 1 MLJ 379; and *Hussanjan v Haji Nik Yahya bin Nik Daud & Ors* [1973] 1 MLJ 9, the court is urged to declare that such dealing is null and void and consequently, the creation of the charge by the plaintiff would be of no effect and ought to be set aside since its creation was dependent upon the said agreement.

Counsel for the defendant in his submissions raises various issues to resist the motion — amongst others, he raises the issue of indefeasibility under s 340 of the Code, the interpretation of Enactment vis-a-vis Al Bai Bithaman Ajil transactions and the applicability of equitable principles to the facts of the case. For convenience, I shall deal with the question of interpretation of the Enactment first.

The concept of Al Bai Bithaman Ajil involves, as prerequisites, the purchase of the said property by the defendant from the plaintiff and the immediate resale of same to the plaintiff. The question that requires to be determined, as a matter of obvious necessity, is the effect of such sale in the eyes of the law — such determination requires to be guided by the provisions of the Enactment and the Code.

Section 12(i) of the Enactment says:

All dealings or disposals whatsoever and all attempts to deal in or dispose of reservation land contrary to the provisions of this Enactment shall be null and void.

It appears to me that in the instant case dealings which are alleged to be 'contrary to the provisions of this Enactment' refer to such dealings which are contrary to s 7 of the Enactment. For easy reference, reproduced below is s 7(i) which is pertinent to the issue under consideration:

No right or interest of any Malay in reservation land and no right or interest in such land acquired by virtue of s 13A by any person not being a Malay shall be transferred to or transmitted to or vest in any person not being a Malay provided that leases of reservation land shall be valid to the extent specified in sub-ss (ii) to (v) below, save as provided in this Enactment.

From the above, it is manifestly clear that s 7(i) prohibits any transfer or transmission or vesting of any right or interest of a Malay in reservation land to or in any person not being a Malay. In the circumstances, what would be the effect of the property purchase agreement in terms of s 7(i) — does the said agreement per se confer on the defendant any registered title in the said lands? The crucial point is whether the execution of the property purchase agreement comes within the context of 'transfer' or 'a vesting' of right or interest; on the present facts suffice it to say that the question of 'transmission' is of no relevance.

To my mind when the property purchase agreement was signed the right that could be acquired under the agreement at that point of time, since the agreement being still executory, was only a right to a registrable interest which right is yet to crystallize into a registrable interest. The acquisition of such right, however, would confer on the defendant an in personam right against the plaintiff which would entitle the former to



A bring an action for specific performance in the event of the latter refusing to go along with the agreement. And assuming that a decree of specific performance would be granted by the court, such decree would be effective to achieve a statutory title only upon the appropriate instrument, ie the instrument of transfer, being registered as required under the Code as otherwise the decree would remain inefficacious.

B As was observed by Thomson J (as he then was) in *Bachan Singh v Mahinder Kaur* [1956] MLJ 97:

C To my mind, many of the difficulties which appear to arise in these cases would not arise if we were to bear in mind throughout the distinction between rights ad rem or personal rights and rights in rem or real rights. Where there is a valid binding contract for the sale of land, the purchaser, when he has performed his side of the contract, *acquires a right ad rem which is also a right in personam*. In other words, he acquires a right to the land as against the vendor personally but it is not good against the world as a whole and, in due course, that right can become a real right good against the world as a whole *on registration* in accordance with the National Land Code 1965. (Emphasis added.)

D In *Margaret Chua v Ho Swee Kiew & Ors* [1961] MLJ 173 (CA), Thomson CJ (as he then was) stressed that he saw no reason to depart from his observations above stated.

E The observations of Thomson J (as he then was) in *Bachan Singh* found favour with the Federal Court in *Macon Engineers Sdn Bhd v Goh Hooi Yin* [1976] 2 MLJ 53 where Gill CJ (Malaya) said at p 54:

F It would seem clear that the respondent cannot claim title to or any registrable interest in the property in question merely on the strength of the sale agreement which is a non-statutory and non-registrable instrument ...

and at p 56, Ali FJ said:

G A purchaser of land under an agreement cannot obviously have any registrable interest in land. But he has a right to the land or interest in land against the vendor personally which according to Thomson J (as he then was) in *Bachan Singh v Mahinder Kaur* is not good against the world as a whole.

Raja Azlan Shah FJ (as he then was) expressed his agreement when he said at p 57:

In my view, the respondent had a contractual right under a contract of dealing in land which is a right of action against the vendor personally.

H It is submitted by counsel for the defendant that in order to constitute a transfer of a right or interest in land within the meaning of s 7 of the Enactment, such transfer must be effected by a validly registered instrument, eg Form 14A. This, as further submitted, is in accord with s 14 of the Enactment which says:

I Except as otherwise in this Enactment provided the provisions of the Land Enactment in force in the state of Kelantan and all rules made thereunder shall apply to reservation land.

As provided in s 5 of the Code, 'dealing' means:

... any transaction with respect to alienated land effected under the powers ... conferred by Division IV, and any like transaction effected under the provisions of any previous land law, but does not include any caveat or prohibitory order.

while s 205(1) says:

The dealings capable of being effected under this Act with respect to alienated lands and interests therein shall be those specified in Parts 14 to 17, and no others.

Part 14 refers to transfers, Part 15 to leases and tenancies, Part 16 to charges and liens while Part 17 to easements. Further, s 206(1)(b) categorically states:

... no instrument effecting any such dealing shall operate to transfer the title to any alienated land or, as the case may be, to create, transfer or otherwise effect any interest therein, *until it has been registered under Part Eighteen.* (Emphasis added.)

While sub-s (1) of s 215 says:

The transfer under this Act of any alienated land shall be effected by an instrument in Form 14A.

And again sub-s (2) of the said section, and this is stressed, states:

The title of the transferor shall pass to and vest in the transferee upon the registration of any such transfer, together also with the benefit of any registered interests then enjoyed with the land.

The above provisions doubtlessly show that in terms of 'dealing', registration plays a pivotal role for it is in fact registration that 'vests' and 'divests' title. See *Frazer v Walker, Radomski and Radomski* [1967] 1 AC 569. David Wong in *Tenure and Land Dealings in the Malay States* says at p 164:

The transfer of land or an undivided share in land is by way of registration. Upon a transfer of land being duly effected, the title of the transferor passes to and vests in the transferee ... When land or an undivided share in land is transferred, it means the substitution of the transferee for the transferor as the new proprietor or co-proprietor who now holds the land from the state subject to the same terms of land holding.

In fact, it is invariably the practice that in a sale and purchase agreement it is provided that on the date of completion, the purchaser would be given by the vendor the transfer form together with the document of title and there only remains for the purchaser to effect the registration of the said instrument of transfer. It is upon registration that the title vests in the transferee and indeed it is only when the transferee becomes the registered proprietor that his title will have the indefeasibility which the Code confers. I must say that in this case there is no evidence to show that there was, at any time, a change in the registered proprietorship of the said lands pursuant to the execution of the property purchase agreement. All along the plaintiff was and is the registered proprietor of the said lands. That

A being the case I hold that there was no transfer being effected and the proprietorship still remains with the plaintiff. And I would add that neither was there any vesting of right or interest in the said lands in the defendant. To this end, I would reiterate what I said in *Wee Tiang Peck v Teoh Poh Tin* [1995] 1 MLJ 446 at p 455 that 'vesting', as appears in s 7(i), is intended to cover cases where right or interest is indefeasibly vested in a person to form part of his property, thereby enabling him to deal with and alienate such right and interest as his own ...'. The facts of this case, with respect, do not seem to come within the aforesaid ruling.

B  
C Having held that there was no dealing contrary to s 7, the next question that has to be addressed to is whether the execution of the property purchase agreement or the property sale agreement is in purport and effect an attempt to deal in reservation lands contrary to the provisions of s 12 of the Enactment.

D It is the defendant's contention that the circumstances of the instant case are such that they could not even be said to amount to an attempt to deal in reservation lands.

E  
F Judicial decisions have shown that intention is an essential element in construing 'attempt'. A party's conducts or acts may sometimes have gone to a certain extent that could amount to attempt — but on the contrary there may be cases where the circumstances would show that their conducts or acts have fallen very much short of attempt. It is settled law that quite apart from the element of intention, to constitute attempt, the act done must have reached a reasonably advanced stage, but for some interruptions falls short of achieving the result. A useful guidance is perhaps by analogy of criminal law wherein it is described as 'the acts that would be sufficient to constitute attempt must be proximate enough to the commission of the crime'.

G On a fair reading of the Enactment, one cannot help but conclude that the intention of the Legislature in the promulgation of the Enactment is 'to preclude Malays from parting with their rights and interests in reservation lands ...'. And to ensure achieving this very intention, certain forms of statutory prohibition have been incorporated in the Enactment in the form of s 7 with the consequences being highlighted in s 12 should there be any infringement thereof.

H  
I The case of *Foo Say Lee v Ooi Heng Wai* [1969] 1 MLJ 47 and the four cases relied upon by the plaintiff can be distinguished on facts. In all these cases, the court was asked to give effect to what have been allegedly agreed to by the parties which would consequently involve the transfer of proprietorship. Unlike in the instant case it was never the intention of the parties, in as much as it can ever be said to be within their contemplation, to involve any transfer of proprietorship. It so happened that the execution of the property purchase agreement and the property sale agreement constituted part of the process required by the Islamic banking procedure before a party can avail itself of the financial facilities provided by the defendant. Hence, that would account for the contemporaneous execution of the two agreements, and in fact, it would be observed that the property

purchase agreement would be rendered otiose and bereft of any consequential value the moment the property sale agreement was signed. For my part, I would say that that was what both parties had bargained for and they too had agreed that beyond this, to proceed no more. These prerequisites had been well understood by the plaintiff. **A**

Accordingly, it is my judgment that the execution of the property purchase agreement had not transgressed the provisions of ss 7 and 12 of the Enactment since there was no dealing or attempt to deal in the said lands contrary to the provisions thereof. **B**

Now to turn to the issue of indefeasibility under s 340 of the Code. The section reads: **C**

- (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
- (2) The title or interest of any such person or body shall not be indefeasible — **D**
  - (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
  - (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
  - (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law. **E**
- (3) Where the title or interest of any person or body is defeasible by reason of any circumstances specified in sub-s (2) — **F**
  - (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
  - (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser. **G**

- (4) Nothing in this section shall prejudice or prevent — **H**
  - (a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or
  - (b) the determination of any title or interest by operation of law.

It is submitted by counsel for the defendant that in light of the above section, it is incumbent upon the plaintiff to show which limb of the exceptions to indefeasibility applies before he can seek to impugn the validity of both the charges. Besides, as further submitted by him, the plaintiff also has to show due compliance with the set criteria as stipulated in that section. **I**

A In his submissions in reply, counsel for the plaintiff seems to allege that the registration of the charges was obtained by means of 'insufficient or void instrument', which is contrary to s 340(2)(b), hence the interest of the defendant as chargee is not indefeasible. Quite apart from that, counsel also seems to rely on para (c) of the said subsection though I am inclined to say, with respect, that that paragraph has no bearing on the instant case as there does not seem to be present any element of unlawful acquisition of title or interest 'by the person or body in the purported exercise of any power or authority conferred by any written law'. On the premise, I hold that in this case, indefeasibility can only be successfully attacked by evidence which manifests that registration was obtained by 'means of an insufficient or void instrument'. This means a party can successfully seek the aid of s 340(2)(b) if it can be shown that there exists a defect or illegality in the execution of the charge documents, eg if it can be shown that the signature of the chargor is not that of the registered proprietor of the lands or someone authorized by him or that the signature was not properly obtained in that there is present an element of forgery or duress.

D There are, however, instances whereby despite registration, the title or interest of any person or body in the land either as proprietor, chargee, lessee or owner of dominant land had been held to be not indefeasible. Such instances are where dealings are effected in favour of or by minors — *Tan Hee Juan v Teh Boon Keat & Anor* [1934] MLJ 96, or where dealings are in contravention of any restriction in interest to which the land is subject — *United Malayan Banking Corp Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352, or where dealings are not in compliance with the Code — *M & J Frozen Food Sdn Bhd v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294, or where the charge is purported to be a security for the loan made in contravention of the Moneylenders Act 1951 — *Phuman Singh v Kho Kwang Choon* [1965] 2 MLJ 189. In this respect, counsel for the defendant submits that none of the above instances can be relied upon by the plaintiff. The instruments of charge are in the proper Form 16A as prescribed by the Code — see s 242 — and are properly executed by the plaintiff. There is no question of incapacity on the plaintiff's or his attorney's part.

G A scrutiny of the charge documents does not disclose any form of defect or illegality. The charge documents are registered in accordance with the procedure laid down in the Code and such registration does not run counter to the Enactment either, and this is so by virtue of s 9A and with the inclusion of the defendant in Sch D, nor the Enactment by virtue of s 104(1) and also with the inclusion of the defendant in Sch 26A (s 104 is one of the sections in the Enactment that has been saved upon the coming into force of the Code).

H Counsel for the plaintiff has also made a rather fleeting comment on the failure to register the power of attorney with the Pengarah Tanah dan Galian (Director of Lands and Mines) since registration of the charges was carried out by him as the said lands were being held under registry titles. Be that as it may, I do not think that such a failure would give rise to any legal impediment to the registration process in view of some directory measures

I

that have to be taken pursuant to Ch 1 and 2 of Part 18 of the Code. And coupled with the presumption of existence of certain facts as illustrated in para (e) of s 114 of the Evidence Act 1950, ie that judicial and official acts have been regularly performed, I see no reason, on the facts, to question the validity of the registration. Moreover, if the plaintiff is mindful of pursuing this issue, he should have joined in as a party, the Pengarah Tanah dan Galian — but he had not!

In view of the foregoing, I am satisfied that there is nothing in law and in fact that could deny the indefeasibility accorded by s 340 of the Code to the two charges registered on 8 May 1984 by the plaintiff's attorney in favour of the defendant. As evidenced by the charge documents, the defendant's right and interest therein only accrue as registered chargee and that is the extent of what the defendant claims.

The final issue raised by counsel for the defendant is the applicability of equitable principles to the facts of the instant case. Counsel says that:

In interpreting and analysing the documents before your Lordship, equity requires your Lordship to look into the true intention of the parties as envisaged therein ...

I wish to say that the question of intention of both parties in signing the property purchase agreement has already been discussed in the earlier part of this judgment which I consider is sufficient to cover the issue raised by counsel. I do not wish to add anything further to it.

In the result, I dismiss the motion with costs.

*Application dismissed.*

Reported by Sally Kee Seok Meng

A

B

C

D

E

F

G

H

I