

CHUAH TEIK HUAT

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v.

CITIBANK BERHAD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
NOOR AZIAN SHAARI JC
[SUIT NO: S7-22-15-2005]
12 JULY 2006

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CIVIL PROCEDURE: *Striking out - Writ and statement of claim - Appeal against - Whether allowed - Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (c), (d)*

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LAND LAW: *Charge - Order for sale - Failure to notify plaintiff of agent appointed - Whether there was duty imposed on defendant to do so - Whether sale of property null and void*

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This was an appeal by the appellant (plaintiff) against the decision of the deputy registrar allowing the respondents' (defendants') application to strike out the writ and statement of claim of the plaintiff under O. 18 r. 19(a), (b), (c) and (d) of the Rules of the High Court 1980 ('RHC'). The plaintiff filed the suit against the defendants ('D1') and the second defendant ('D2') for a declaration that the sale of the property of the plaintiff ('the said property') by D1 to D2 was null and void. The other prayers asked for were for a further declaration that the plaintiff was the beneficial owner of the said property and that the plaintiff does not owe the defendants the sum of RM39,245.21, damages, interest and cost. The plaintiff and the defendants had entered into a facility agreement. As security for the said facility the plaintiff charged the said property and a deed of assignment was executed on the same date. *Vide* a letter the plaintiff informed D1 that he was not in a position to continue with the facility and gave permission to D1 to appoint a real estate agent to sell the said property. D1 was able to auction the said property. It was the plaintiff's allegation that the instruction to sell was subject to the plaintiff being informed and notified of the agent appointed who was then to contact the plaintiff. The plaintiff submitted that because D1 failed to do so, the sale was null and void.

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A Held (dismissing the appeal):

- (1)** The plaintiff himself admitted that he could not continue with the facility and that he had given D1 authority to sell and to appoint an agent to deal with the property. The property was sold by auction in accordance with the terms and conditions of the facility agreement and the deed of assignment. Nothing in both the documents stated above required D1 to inform the plaintiff of the agent appointed nor was it a condition for the agent to contact the plaintiff. (para 7)
- (2)** There was no duty imposed on D1 to inform the plaintiff of the agent appointed or for the agent to contact the plaintiff. Therefore it was not incumbent on D1 to notify the plaintiff of the appointment of the agent and even the intended sale. As such the request stated in the last paragraph of the plaintiff's letter which was not met by D1 did not invalidate the sale/auction of the said property. Under the circumstances, the plaintiff's claim would tantamount to what was enumerated in O. 18 r. 19(1)(a) to (d) of the RHC 1980. (paras 13 & 14)

[Decision of deputy registrar affirmed.]

Case(s) referred to:

Phileoallied Bank (Malaysia) Bhd v. Bhupinder Singh Avtar Singh & Anor
[2002] 2 CLJ 621 FC (**refd**)

Public Bank Bhd v. Siaw Sat Lin [2002] 1 MLJ 449 (**refd**)

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19(a), (b), (c), (d)

For the plaintiff - Norhakmawati; M/s Yip & Co

For the defendant - CP Lee; M/s YH Teh & Quek

Reported by Suhainah Wahiduddin

JUDGMENT**Noor Azian Shaari JC:**

[1] This is an appeal by the appellant (plaintiff) against the decision of the learned deputy registrar of 30 August 2005 in allowing the respondents' (defendants') application to strike out the writ and statement of claim of the plaintiff under O. 18 r. 19(a), (b), (c) and (d) of the Rules of the High Court 1980 (RHC).

[2] The plaintiff, Chuah Teik Huat filed the suit against the defendants, Citibank Berhad (first defendant – “D1”) and Cheong Yew Keong (second defendant – “D2”) for a declaration that the sale of the property of the plaintiff held under H.S.(D) 7829, P.T. No. 2748 Mukim Serendah, Daerah Ulu Langat, Negeri Selangor Darul Ehsan (“the said property”) by the D1 to D2 is null and void. The other prayers asked for are further declaration that the plaintiff is the beneficial owner of the said property, that the plaintiff does not owe the defendants the sum of RM39,245.21, damages, interest and cost.

[3] The facts of the case are as follows:

- (1) The plaintiff and the defendants entered into a facility agreement on 15 March 1995.
- (2) As security for the said facility the plaintiff charged the said property and a deed of assignment was executed on the same date ie, 15 March 1995.
- (3) *Vide* a letter dated 27 May 2003 the plaintiff informed D1 that he was not in a position to continue with the facility and gave permission to D1 to appoint a real estate agent to sell the said property.
- (4) The D1 was able to auction the said property.
- (5) The D1 has also filed a suit against the plaintiff in the Sessions Court (S10-52-23075-04) claiming RM39,245.21, that is the short-fall in respect of the facility after taking into account the arrears in relation to the sale price.

[4] The plaintiff’s appeal is premised basically on the ground that D1 had not complied with his letter of 27 May 2003 (exh. “HFY3” to encl. 7). The contents of said letter is as follows:

Citibank Berhad
Banking Collection Department
8 Floor Menara Citibank
165 Jalan Ampang
50450 Kuala Lumpur

27 May 2003

A Dear Sir,

Loan Account No: 701-02-000-433914

I am the borrower under the loan account stated above granted to us by yourself.

B In consideration of the above loan granted to me, I executed a change/assignment over the abovementioned property for your benefit as security for my loan.

C In view of the fact that I am no longer able to service my loan, I decided to realize the security by selling the property in order to satisfy the amount outstanding under my loan account and request that you assist me in the matter of the sale.

D I hereby unreservedly consent to and fully authorized you to appoint an estate agent of your choice to do all that is necessary to procure a buyer for the said property. I agree to pay the estate agent a commission of 2% of the sale price for the services rendered to me upon the successful sale of the property. I understand that the promptness of the sale and the price of the property are dictated by the market forces and as such, I shall not in any way hold you or the appointed estate agent liable in the event of any dissatisfaction with regards to the aforementioned on my part. I agree to give my fullest cooperation to execute all necessary documents to give effect to the sale when a buyer is procured by the estate agent.

E I agree to settle any balance that may still be outstanding in my account after the sale of the property.

Kindly have the appointed estate agent to contract me at 012-334 8186 as soon as possible.

G Your faithfully,

(Signed illegible)

...

H Name: Eddie Chuah Teik Huat

Address: Walton International Property
Group Sdn. Bhd.
Level 9 Wisma Genting
Jalan Sultan Ismail
I 50250 Kuala Lumpur

[5] In the statement of claim the plaintiff alleges that the instruction to sell was subject to the plaintiff being informed and notified of the agent appointed who was then to contact the plaintiff. The plaintiff further alleges that because the D1 failed to do so, the sale is null and void.

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[6] I have to dismiss the plaintiff's appeal against the learned deputy registrar's decision and affirm the decision in allowing the defendants' application to strike out the writ and the statement of claim.

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[7] The reasons advanced in favour of the D1 are as follows:

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- (i) the plaintiff himself did admit that he could not continue with the facility;
- (ii) the plaintiff gave the D1 authority/consent to sell and to appoint an agent to deal with the property;
- (iii) the property was sold by auction in accordance with the terms and conditions of facility agreement and the deed of assignment; and
- (iv) nothing in both the documents stated above requires the D1 to inform the plaintiff of the agent appointed nor is it a condition for the agent to contact the plaintiff.

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[8] In the application to strike out the suit by the defendants, D2 claimed that the suit filed does not disclose any cause of action, scandalous, frivolous or vexatious, may prejudice, embarrass or delay the fair trial of the action or/and abuse of the person of the cost ie, under all the paragraphs of O. 18 r. 19 of the RHC.

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[9] On examining the statement of claim, the affidavit of the defendants supporting the application to strike out the writ and statement of claim, the affidavit of the defendants and the relevant letter of 27 May 2003, the facility agreement and the deed of assignment, it appears that the only ground that the plaintiff is relying on in the claim is the failure of the D1 in not informing the plaintiff of the agent appointed and the agent did not contact the plaintiff.

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[10] Section 28.01 (1)(a) and 28.02 (1) of the facility agreement reads as follow:

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The Bank may (but shall not be under any obligation whether at law or in equity so to do), by written notice to the Borrower declare that the Commitment shall be cancelled ... and all other sums payable under this Agreement to be forthwith due and payable, whereupon ... if the Borrower or any Security Party fails to pay any sum due or secured or intended to be secured under this Agreement or any of the Security Documents on due date.

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28.02(1)

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At any time after the moneys hereby secured shall become immediately repayable under any provisions of Section 28.01, the Bank may, without being required to give further notice to the Borrower, institute such proceedings and take such steps (including any proceedings for the realization of its security under any of the Security Documents) as it may think fit to enforce payment of all amounts due and payable under or pursuant to this Agreement and the Security Documents.

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[11] In the case of *Phileoallied Bank (Malaysia) Bhd v. Bhupinder Singh Avtar Singh & Anor* [2002] 2 CLJ 621 where the borrower had assigned absolutely to the lender, the Federal Court decided:

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(1) ... Dalam hukum adat, pemegang gadai janji di sisi undang-undang atau pemegang gadai janji ekuiti mempunyai kuasa menjual dan menyerahkan hartanah kepada pihak ketiga secara sah tanpa satu perintah mahkamah sekiranya penggadai janji mungkir dalam pembayaran balik menurut terma nyata surat ikatan gadai janji.

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(2) ... Mahkamah sepatutnya mengakui dan memutuskan hak kontraktual dan kewajipan seperti yang telah dipersetujui di antara peminjam dan pihak bank

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[12] In the case of *Public Bank Bhd v. Siaw Sat Lin* [2002] 1 MLJ 449 it was held that:

(1) The right of the plaintiff to force sell the pledged shares were contained in the MOD and it was a term of the MOD that the plaintiff may sell the pledged shares at any time and in any manner as the Plaintiff deemed fit without notice to the defendant. As such, it was not incumbent on the plaintiff to notify to defendant every time the plaintiff wished to exercise its rights to sell the shares pledged under the MOD.

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[13] It is very clear that there is no duty imposed on D1 to inform the plaintiff of the agent appointed or for the agent to contact the plaintiff. Therefore it is not incumbent on the D1 to notify the plaintiff of the appointment of the agent and even the intended sale. As such the request stated in the last paragraph of the plaintiff's letter of 27 May 2003 which was not met by the D1 does not invalidate the sale/auction of the said property.

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[14] Under the circumstances, I agree that the plaintiff's claim would tantamount to what is enumerated in O. 18 r. 19(1)(a) to (d) of the RHC 1980.

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[15] As such the learned deputy registrar had correctly allowed the defendants' application to strike out the plaintiff's writ and statement of claim. I therefore dismissed the appeal and affirmed the learned deputy registrar's decision of 30 August 2005.

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