CHUAH ENG KHONG

v.

MALAYAN BANKING BHD

FEDERAL COURT, KUALA LUMPUR
CHONG SIEW FAI CJ (SABAH & SARAWAK)
PEH SWEE CHIN FCJ
MOHAMED DZAIDDIN FCJ
[CIVIL APPEAL NO: 02-19 OF 1997(W)]
23 MAY 1998

CONTRACT: *Interest - Covenant to pay interest - Contractual interest rate higher than statutory rate - Whether covenant to pay interest independent - Application of res judicata*

LAND LAW: *Mortgage - Equitable mortgage - Borrower assigned all rights, title and interests in land to lender - Whether a charge or a mortgage - Whether loan agreement created any interests in land - Whether principles of equity applied*

The appellant ('the borrower') entered into a loan agreement ('the loan agreement') with the respondent ('the lender') by which it borrowed RM60,000 to pay the purchase price of some lands ('the land'), and agreed to pay interest thereon. In consideration thereof, the borrower assigned to the lender all his rights, title and interests in the land as security for the loan. Subsequently, the borrower defaulted in his repayment instalments and interest and the lender filed an action in the Sessions Court for the whole sum together with interest thereon. Summary judgment was given by the Sessions Court but neither party appealed against it. Based on the summary judgment, the lender caused to be issued a bankruptcy notice, claiming interest at the higher contractual rate as per the loan agreement and not at 8% p/a as granted in the summary judgment.

The lender contended that it was entitled to keep the document of title because a mortgagee is entitled to retain the security until the contractual interest stipulated by the mortgage has been paid. The Court of Appeal found that under the loan agreement, the covenant to pay interest was an independent covenant. The borrower appealed on the ground that the loan agreement was not a charge or mortgage, and that the covenant on the contractual rate of interest had merged into the summary judgment of the Sessions Court. It was argued that *res judicata* applied to the summary judgment and the lender could only claim interest at 8% p/a.

Held:
Per Peh Swee Chin FCJ

[1] At common law and under the rules of equity, the loan agreement would amount to an equitable mortgage because the assignment of the rights, title and interests in the land was expressly for the purpose of securing the loan. Although nowhere in the loan agreement was the word 'mortgage' used, it was a security transaction in connection with the loan given by the lender with a provision for repayment, after which, the borrower would be entitled to obtain a discharge and release of the land from the lender. The borrower at the time of signing the loan agreement, had no legal estate but only an equitable interest as a purchaser by contract from a housing developer. This gave the borrower a second right to redeem after the contractual right to redeem the land by a contractual date had lapsed due to expiry of time.

As the loan agreement was an equitable mortgage, the next issue was whether such equitable mortgage could exist in the face of the National Land Code 1965 ('the NLC'). The NLC does not contain any provision similar to s. 4 of the Selangor Registration of Titles Regulations 1891 which would render such equitable mortgage null and void. Therefore, the decision of *Hj Abdul Rahman & Anor v. Mohamed Hassan* in refusing to uphold the agreement there on account of the said s. 4 should not be used as an authority to invalidate any equitable mortgage or equitable charge created by contract outside any enactment of the Torrens System's registration of titles such as the NLC.

Therefore, the submission that the loan agreement did not create any interests in land was fallacious. The submission that the loan agreement was a mere chose in action dealing with personal property (as opposed to land) would also fly in the face of the said interests in land.

[2] It is purely a matter of construction whether a document contains a covenant for a contractual rate of interest overriding the maximum rate allowed by the law or rules of court on any judgment sum claimed under such document. In the present loan agreement, the covenanted rate of interest was an independent covenant and the contractual rate, though above the statutory maximum rate, was recoverable.

[3] The contractual rate of interest under the loan agreement was higher than the 8% p/a allowable under the law then applicable to the summary judgment. Repayment of principal and interest was claimed on the basis of such contractual rate in the Sessions Court. Since there was no appeal from the decision of the Sessions Court by the lender, *res judicata* applied to bar any further claim on account of the same kind of interest.

Further, O. 42 r. 12 of the Rules of the High Court 1980 enables the court to award, in appropriate cases, interest on sums owed at the contractual rate of interest not only up to the date of judgment but also to award the same contractual rate on and after the date of judgment until satisfaction.

Obiter:

[1] The decision of the Privy Council in *United Malayan Banking Corp Bhd & Anor v. Pemungut Hasil Tanah, Kota Tinggi*, in so far as it precludes rules of equity in relation to land transactions based on contracts between persons, represents and remains a voice in the wilderness which need never be heeded.

[Appeal allowed; cross-appeal dismissed.]

Case(s) referred to:

Abigail v. Lapin [1934] AC 491 ***(refd)***
American International Assurance Co Ltd v. Union Builders (Malaysia) Sdn Bhd [1973] 1 MLJ 95 ***(dist)***
Arumugam v. The Motor Emporium [1933] MLJ 276 ***(refd)***
Arunasalam Chetty v. Teah Ah Poh & Anor [1937] MLJ 17 ***(foll)***
Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 ***(refd)***
Economic Life Assurance Society v. Usborne & Ors [1902] AC 147 ***(dist)***
Frazer v. Walker [1967] AC 569 ***(refd)***
Hj Abdul Rahman & Anor v. Mohamed Hassan [1917] AC 209 ***(dist)***
Karuppan Chetty v. Muthiah Chetty [1938] MLJ 221 ***(refd)***
Mahadevan & Anor v. Manilal & Sons (M) Sdn Bhd [1984] 1 CLJ 286 ***(refd)***
Malayan Banking Bhd v. Zahari Ahmad [1988] 2 MLJ 135 ***(refd)***
Murugappa Chetty v. S Seenivasagam & Ors [1936] MLJ 217 ***(refd)***
Oh Hiam & Ors v. Tham Kong [1980] 2 MLJ 159 ***(refd)***
Pawlett v. A-G [1667] Hard 465 ***(refd)***
Sim Lim Finance Ltd v. Pelandok Enterprises Pte Ltd & Anor [1981] 1 MLJ 280 ***(dist)***
UMBC Ltd v. Goh Tuan Laye & Ors [1976] 1 MLJ 169 ***(refd)***
United Malayan Banking Corp Bhd & Anor v. Pemungut Hasil Tanah, Kota Tinggi [1984] 2 CLJ 146 ***(not foll)***
Usborne v. Scarfe [1738] 1 Atk 603 ***(refd)***
William Brandt's Sons & Co v. Dunlop Rubber Co Ltd [1905] AC 454 ***(refd)***

Legislation referred to:

Limitation Act 1953, s. 21(1)
National Land Code 1965, s. 134(2)
Registration of Titles Regulations 1891 (Selangor), ss. 4, 41
Rules of the High Court 1980, O. 42 r. 12
Rules of the Supreme Court 1957, O. 40 r. 11(2)

Other source(s) referred to:
Hogg's Registration of Title to Land Throughout The Empire, 1920, pp 278 to 285
Law of Real Property, Sir Robert Megarry & HSR Wade, 5th edn, p 914

For the appellant - Malik Imtiaz Sarwar (Mathew Thomas Philip with him); M/s Malik Imtiaz Sarwar
For the respondent - Simon Hue Fook Chuan; M/s Ho Loke & Koh

[Appeal from Court of Appeal; Civil Appeal No: W-02-615-1995; [1998] 1 CLJ 869]

Reported by Alex KC Lee

JUDGMENT

Peh Swee Chin FCJ:

This appeal raises difficult and complicated questions of law between a borrower of money for the payment of the purchase price of some land which he had bought by agreement and the lender of the said money to whom the borrower had assigned his right title and interest in the said land to the lender. The questions arise out of the matter of rates of interest payable on money lent in such a security transaction.

The appellant/borrower entered into a loan agreement with lender/respondent dated 26 March 1984 and entitled "Loan Agreement cum Assignment" whereby the appellant borrowed RM60,000 and agreed to pay interest thereon. In consideration thereof, the appellant *inter alia*, "assigns unto the Lender all his rights, title and interest in the said lot ... by way of security for Loan hereby granted".

The payment of the rates of interest is of crucial importance in this appeal and the relevant cl. 1(i), (ii) and (iii) provide as follows:

> 1(i) To repay to the Lender on demand the Loan together with interest thereon at the rate of twelve per centum (12%) per annum (hereinafter referred to as "the Prescribed Rate" which expression shall where the context so permits include any other rate or rates which the Lender may from time to time stipulate in the manner hereinafter provided) AND until demand as aforesaid to repay to the lender the Loan together with interest thereon at the Prescribed Rate by one hundred and twenty (120) equal monthly instalments of Ringgit Eight Hundred and Eighty-Five only (Ringgit 885.00)
>
> each (hereinafter referred to as "the Monthly Installments" the first of such payments to be made on the 1st day of the month following next after the date on which the full amount of the Loan has been paid or advanced to or on behalf or for the benefit of the Borrower (or at such other time as the Lender may in its absolute discretion stipulate) and the subsequent instalments to be paid at regular successive intervals of one (1) month until the full amount of the Loan and interest thereon together with all other monies owing and payable to the Lender shall have been fully paid and satisfied.

The appellant is hereafter called "the borrower" and the respondent, "the lender". The loan agreement cum assignment is hereafter "the said loan agreement".

The borrower defaulted in the payment of interest and instalments and the lender filed an action in the Sessions Court on 16 December 1987 stating in the statement of claim to the effect that by virtue of the default, the whole of the sum lent together with interest thereon become wholly due and payable. The borrower claimed:

(a) the sum of RM80,644.84;

(b) interest thereon at the rate of 10% per annum at yearly rests and penalty interest of 1% per annum above the prescribed rate on the arrears of instalment both calculating from 13th day of November 1987 until satisfaction;

(c) vacant possession of the said property:

(d) costs of this action;

(e) such further or other relief as this Court deems fit and just

Summary judgment was granted by the Sessions Court in terms of the prayers aforesaid in open court, most probably after a contest. Extracted summary judgment in the appeal record does not state that summary judgment was granted on account of the non-appearance of the borrower and his counsel; neither does it mention the presence of any counsel.

It is important to note that neither party appealed against the summary judgment. Therefore the judgment in the Sessions Court was final and conclusive between the same parties.

Then on 15 August 1994 the lender based on the summary judgment, caused to be issued a bankruptcy notice of the same date claiming a total sum of RM132,177.76 with the break-down figures shown there in as follows:

Judgment sum	RM 80,644.84
Interest @ 10% per annum on the sum of RM80,644.84 from 13/11/87 to 3/10/88 (x 325 days)	RM 7,180.70
Penalty interest @ 11% per annum (i.e. 1% per annum above prescribed rate) on the arrears of installments from 13/11/87 to 3/10/88	RM 2,849.81

Further interest @ 8% per annum on the sum of RM80,644.84 from 4/10/88 to 15/8/94 (x 2141 days)	RM 37,843.41
Costs	RM 3,659.00
Amount due:	RM132,177.76

The summary judgment is hereafter referred to as the said final judgment.

Before a bankruptcy petition was presented to the High Court the borrower filed on 22 December 1994 an originating summons, with its heading as follows:

DALAM MAHKAMAH TINGGI KUAIA LUMPUR
DALAM WILAYAH PERSEKUTUAN, MALAYSIA
(BAHAGIAN SIVIL)

SAMAN PEMULA NO. S1-24-1016-94 tahun 1994

Dalam perkara Perjanjian Pinjaman dan Serah Hak bertarikh 26 Mac 1984

dan

Dalam Perkara Notis Kebankrapan bertarikh 15 Ogos 1994 di bawah No. Kebankrapan D2-29-1832-94

dan

Dalam perkara Kanun Tanah Negara

dan

Dalam perkara mengenai Tanah yang terkandung dalam H.S. (M)14801, PT. 5533, Lot 023815, Mukim Ampang

ANTARA

CHUAH ENG KHONG ... PLAINTIF

DAN

MALAYAN BANKING BERHAD ... DEFENDAN

The originating summons claimed as follows:

(a) bahawa pembayaran jumlah wang sebanyak RM132,177.76 dari Plaintif kepada Defendan, sepertimana yang dituntut oleh Defendan menerusi Notis Kebankrapan Mahkamah Tinggi Kuala Lumpur No. D2-29-1832-94, adalah merupakan penjelasan dan penyelesaian penuh hutang Plaintif kepada Defendan di bawah Perjanjian bertarikh 26 Mac 1984 dan Penghakiman bertarikh 3 Oktober 1988 di antara kedua-dua pihak;

(b) bahawa Defendan memulangkan kembali Dokumen Hakmilik Sementara bagi tanah yang dikenali sebagai Daftar H.S. Mukim Ampang, No.H.S. (M) 14801, No. P.T. 5533 Lot 023815 kepada Plaintif apabila menerima wang sebanyak RM132,177.76 yang tersebut di atas, tanpa apa-apa kesekatan atau hak ke atasnya;

(c) kos permohonan ini ditanggung oleh Defendan;

(d) lain-lain Perintah yang dianggap perlu dan bersesuai manfaat oleh Mahkamah yang Arif.

In support of the originating summons aforesaid, the borrower stated in an affidavit that he sent trough his solicitors a cheque dated 16 November 1994 for total amount as claimed in the bankruptcy notice to the solicitors for the lender with instructions that the said cheque should be only paid to the lender upon the lender forwarding the document of title of the said land to solicitors for the borrower.

When not getting a reply, the borrower's solicitors asked for the return of the said cheque. By "fax" letter dated 1 December 1994 the solicitors for the lender replied that the payment by the borrower was unacceptable and claimed that the borrower owed the lender RM241,447.31 as at 2 December 1994 (and not the amount claimed in the bankruptcy notice). The larger sum was as a result of the lender claiming interest on the contractual rate as in the said loan agreement until satisfaction and not at 8% pa as granted by the said final judgment. It appears that the lender could not agree with the condition of payment imposed by the borrower ie, the return of the document of title, and the lender contended that it was entitled to keep and hold on to it because a mortgagee was entitled to retain the security or the document of title until the contractual interest stipulated by the mortgage had been paid. The lender relied on *Economic Life Assurance Society v. Usborne and Others* [1902] AC 147. It was also argued that under the said loan agreement, the covenant to pay interest was an independent covenant because cl. 14 of the said loan agreement said "until ... of the whole of the moneys secured by the said lot together with interest thereon and all other moneys payable to the Lender hereunder are paid in full".

It was finally argued for the borrower that the said loan agreement was not a charge or mortgage, and that the covenant about the contractual rate of interest had merged in the said final judgment of the Sessions Court.

The originating summons was dismissed with costs by the High Court and the borrower appealed to the Court of Appeal which allowed the appeal to the extent only that the bankruptcy notice was set aside. Costs was awarded to the borrower in the Court of Appeal and the High Court. The borrower then applied for and obtained leave to appeal to the Federal Court which did not impose any condition limiting the further appeal to be heard only on any particular or specific issue. This means all the issues canvassed in the courts below could be reheard if either party wished.

Principally the borrower appeals on the following grounds:

(a) The Court of Appeal was wrong in treating the originating summons of the borrower as proceedings concerned only with the validity of the bankruptcy notice;

(b) The Court of Appeal was wrong in not holding that the said loan agreement had merged in the said final judgment obtained by the lender.

(c) The Court of Appeal was wrong in not ordering the return of the document of title in question to the borrower.

The lender has also cross-appealed on the following grounds:

(a) The Court of Appeal was wrong in granting costs, and this was not supported by the grounds of judgment of the Court.

(b) The Court of Appeal was wrong in setting aside the bankruptcy notice, a matter not connected with the originating summons of the borrower.

(c) In view of the ambiguity of the heading and body of the originating summons, the Court of Appeal should have struck out with costs the originating summons.

(d) Having found the hands of the borrower soiled, the Court of Appeal ought to have refused the declaratory reliefs sought by the borrower.

The arguments of learned counsel did not however proceed on all the grounds of appeal summarised above, but only on certain points to be mentioned later. This court will use its discretion to refer, where necessary, to such of the points though not argued to make any necessary orders as justice of the case may require.

It was argued for the borrower before us, this has to be borne in mind at all times, that the covenant in the said loan agreement providing for the rate of interest (higher than the statutory maximum rate of interest allowed on judgment in the Session Court) had merged in the said final judgment. This issue then lies at the heart of the instant case, in support of which following further arguments were advanced.

It was further argued that the said loan agreement was not a charge and that *American International Assurance Co. Ltd. v. Union Builders (Malaysia) Sdn Bhd* [1973] 1 MLJ 95 FC, which concerned a charge, did not apply to the said loan agreement.

It was also argued to our chagrin that the said loan agreement did not create any interest on land; that it was only "an assignment of a chose in action", and that being a chose in action, it was about "personalty" and therefore rights created by the said loan agreement were personal rights which merged in the said final judgment.

It was further argued that the covenant in the said loan agreement concerning the rate of interest was not an independent covenant. Whether a covenant was an independent covenant (or an ancillary one) would be a matter of construction or interpretation.

It was finally argued that *res judicata* applied to the said final judgment.

In reply, learned counsel for the lender argued to the contrary. It was argued, in particular, that the covenant to pay the contracted rate of interest had not merged in the said final judgment because:

(a) it was an independent covenant, (which is a matter of construction);

(b) the said loan agreement could be construed either as a charge or mortgage so that *Economic Life Assurance Society v. Usborne and Ors* [1901] AC 147 applied. *Sim Lim Finance Ltd. v. Pelandok Enterprises Pte. Ltd. and Anor* [1981] 1 MLJ 280 was also cited in support.

Both the decision of the High Court in disimissing the originating summons aforesaid and the decision of the Court of Appeal have one thing in common; both courts were of the view that the covenant providing for contractual rate of interest in the said loan agreement which was an independent covenant and not a personal covenant and (which is higher than the rate of 8% p.a. as awarded by the Sessions Court in the said final judgment) did not merge in the said final judgment, following the decision in *Sim Lim v. Pelandok* aforesaid. Therefore in effect, if the reasoning is correct, the covenant of the contractual rate of interest survives the said final judgment and that was why

the attempted payment of the total sum claimed in the bankruptcy notice aforesaid by the borrower could not in the opinion of the lender, entitle the borrower to claim the return of the document of title aforesaid. Such survival of the said final judgment by the contractual rate of interest, has all the appearance, (when the lender claimed a huge sum in far in excess of the total sum deemed in the bankruptcy notice), of an arcane extension of the said final judgment by the lender.

We would deal with the submission of learned counsel for the borrower which was to the effect that there was such merger in the said final judgment because, as argued by Counsel, the said loan agreement did not create any interest in land, neither was it a charge but that it was a mere chose in action dealing with personalty, (ie, personal property as distinct from immovable property), creating personal rights which were merged in the final judgment. This argument appears to be sweeping, muddling and extraordinary, requiring treatment at some length on the basic features respecting interest in land etc.

Under the said loan agreement, the borrower bought the land in question by borrowing the purchase price from the lender and assigning all the right, title and interest of the borrower in the said loan agreement to the lender. The borrower agreed to execute a charge over the said land once the document of title relating thereto was obtained or issued, the said land then being a part of a large piece of land which was under the process of subdivision into various small lots for which sub-divisional documents of titles would be issued later. Transactions of the above nature, which were modelled substantially from agreements which purchasers of houses would make with building societies in the United Kingdom, have been in practice in this country for many many years.

At common law and under the relevant rules of equity, the said loan agreement would amount to an equitable mortgage because the assignment of the right, title and interest in the said land was expressly or obviously for the purpose of securing the loan given to the borrower to purchase the said land. The said loan agreement is not an out-and-out purchase of the said land. This view is reinforced by the promise that when the document of title of the said land was available after the completion of the subdivision aforesaid, the borrower would execute a charge in favour of the lender according to the provisions of the National Land Code (hereinafter called "the Code"). It is true that nowhere in the said loan agreement has the word "mortgage" been used, but it is a security transaction in connection with the loan given by the lender with a provision for repayment after which, the borrower "shall be entitled ... to obtain a discharge and release of the said lot from the Lender", (see cl. 27 of the said loan agreement). Thus we have the loan, the contractual right to repay or to redeem the said land and the assignment of all "right title and interest"

in the said land pending the exercise of such contractual right to redeem. The said loan agreement therefore; at common law, will be a mortgage. It would be an equitable mortgage (and not a legal mortgage) because the borrower at the time of signing the said loan agreement had no legal estate (or registered proprietorship of a grant of land etc.) but only an equitable interest as a purchaser by contract from a housing developer, pending the issuance of a separate document of title aforesaid. In other words, it is a mortgage in equity for which the actual form of words is immaterial provided the meaning is plain when interpreting a document as a mortgage or equitable mortgage, see *William Brandt's Sons and Co. v. Dunlop Rubber Co. Ltd* [1905] AC 454, 462.

If it is an equitable mortgage, like a legal mortgage, the borrower has obtained a second right to redeem after the contractual date for redemption has expired, ie, he has got the equity of redemption for, in the eyes of equity, the lender is not the owner of the said land notwithstanding the said assignment, but the borrower is, but subject to the mortgage, and the lender is a mere "incumbrancer". The equity of redemption arises as soon as any document, on a true construction, is found to be a mortgage. The use of the word "mortgage" may sound like sacrilege in view of the presence of the Code which does not use the word, especially to a legal man who specialises in "common law" but not to one who is familiar with "Chancery practice"; for to the latter, despite the assignment, the borrower is still the owner of the said subject to the mortgage. The matter, of course, should not rest here. Further investigation into the legal position of a mortgage in this country is required.

The equity of redemption gives the borrower a second right to redeem after the contractual right to redeem the said land by a contractual date has lapsed due to expiry of time practically in defiance of such contractual (ie, legal) right to redeem. Such equity of redemption has been always recognised as an interest in land since somewhat ancient times, see *Pawlett v. Attorney General* [1667] Hard 465 at p. 469 and *Usborne v. Scarfe* [1738] 1 Atk. 603, at p. 605, if old authorities are required.

If the said loan agreement is an equitable mortgage, by virtue of rules of equity, could it exist in the presence of the Code? Let us discuss further.

Rules of equity in general are applicable by virtue of the Civil Law Act 1956 and those rules of equity relating to equitable interests in land have no doubt always been recognised and applied in Malaysia unless they are expressly or by necessary implication precluded by the Code. This view has been asserted and reasserted in a number of cases in the appellate courts in Malaysia. In *Arunasalam Chetty v. Teah Ah Poh & Ors* [1937] MLJ 17, in which money

of a creditor was secured by a deposit of document of title by the debtor to his land in Kedah. It was held that the principles of equity were applicable to land in Kedah where such application would not be inconsistent with the provisions of the Kedah Land Code which was based on F.M.S. Land Enactments 1911 and the Registration of Titles Enactment 1911, all in fact based on Torrens system of registration of titles. The Court of Appeal then unanimously held that the deposit of the documents of title as security for repayment of debts operated as an equitable charge by virtue of which the party who lent there acquired an equitable interest in the land covered by the document of title. The Court of Appeal then relied on the following authorities in support of its decision: *viz. Karuppan Chetty v. Muthiah Chetty* [1938] MLJ 221; *Abigail v. Lapin* [1934] AC 491, 502; *Hogg's Registration of Title to Land throughout the Empire,* 1920, pp. 278 to 285; *Murugappa Chetty v. S. Seenivasagam & Ors.* [1936] MLJ 217; *Arumugam v. The Motor Emporium* [1933] MLJ 276 and Ors. This is not the place and time to elaborate on these cases cited there. The Court of Appeal granted the requested declaration of the creditor that he was an "equitable chargee" though the original wording of the prayer did not use the word "equitable" as an attributive.

Of greater and more direct interest to us in that case, other than the fact that the Court of Appeal had granted the declaration asked for by the creditor that he was entitled to be considered as an equitable chargee, is that Whitley, Ag. CJ (SS) held on the facts, that the creditor was (also) an equitable mortgagee by deposit. *"Hogg's Registration to Title" supra* which was relied on by his Lordship and he also referred to it as a mortgage by deposit of document of title. Gordon Smith J also concluded that by virtue of the transaction (loan secured by deposit of document of title), the plaintiff was an equitable mortgagee or an equitable chargee. Terrell, Ag. CJ (FMS) discussed the transaction on the assumption by the clearest implication that it was an equitable mortgage by deposit. Such an equitable mortgage by deposit was, in relation to land enactments based on Torrens system, discussed by his Lordship at length, and he decided that the security did not contravene the provisions of the Land Code. At p. 20 of the report; he said:

> The learned Judge of the First Division appears to consider that the proviso makes equitable principles inapplicable in cases of immoveable property. But there is nothing in the Land Code which so provides. An equitable mortgage by deposit is not a charge contravening the express terms of the Land Code; it is a form of security quite outside the Land Code to which effect may be given as a contract *inter partes*, and which can only be implemented by means of an order of Court. That such interests may exist as contracts *inter personas*, and quite outside any registration of titles enactment is fully recognized by the Privy Council in the case of *Abigail v. Lapin* [1934] AC 491, the principle of which decision was recently adopted by the FMS Court of Appeal in the

> case of *AMM Murugappa Chetty v. S, Seenivasagam and Others* [1936] F.M.S.L.R. 33: [1936] MLJ 217 ... It is the duty of the Courts to do justice between parties, and unless expressly prohibited by Statute law, to give effect to ordinary commercial transactions, such as the advance of money on the security of title deeds. Registration of titles was introduced to prevent fraud, but to use it for the purpose of prohibiting, or rendering nugatory, ordinary commercial transactions not expressly covered by the Enactment, is to enable the Enactment to be sued as an instrument of fraud. Even in the Federated Malay States, therefore, the Courts have found themselves constrained again and again to apply equitable principles, not because English equitable principles apply, but because the application of such principles is in accordance with natural justice. I would refer in particular to the case of *Boase v. Cluny Rubber Estates Ltd, And Others*, 2 F.M.S. Law Reports, p. 130 and the more recent case of *Arumugam v. The Motor Emporium* [1933-34] F.M.S.L.R. 21; [1933] MLJ 276.

Although there is a well-known distinction between a mortgage where a borrower's land is usually transferred or assigned subject to the equity of redemption and a charge where such land is not transferred or assigned at all but it gives the chargee rights over the land, a charge of land has always been regarded as a species of mortgage for most practical purposes, see *"Law of Real Property"* by Sir Robert Megarry (former Vice Chancellor of Supreme Court of the United Kingdom) and H.S.R, Wade, 5th edn, at p. 914.

The Court of Appeal used the words "equitable mortgage" in relation to the security transaction without restraint and totally without any inhibition in the face of the National Land Code. We support such usage.

Here, the said loan agreement, on a true construction, is an equitable mortgage but not an equitable charge, as there was no deposit of document of title with the lender as in *Arunasalam Chetty, supra*, for when the said loan agreement was signed there was no actual and single document of title over the said land at the time of the signing of the said loan agreement.

The Federal Court in *Mahadevan & Anor v. Manilal & Sons (M) Sdn Bhd* [1984] 1 CLJ 286; [1984] 1 MLJ 266 FC approved *Arunasalam Chetty, supra*, and held that an equitable charge had arisen when a sum, claimed by the plaintiffs, was paid as deposit for the purchase of some land in which the plaintiffs and the defendant (receipient of the sum) were engaged in a joint venture.

Tun Suffian, LP in *UMBC Ltd. v. Goh Tuan Laye and Ors* [1976] 1 MLJ 169, held eg, that the possession of the land title "gives them an equitable interest in lands ..." In a fairly recent case of *Malayan Banking Bhd. v. Zahari bin Ahmad* [1988] 2 MLJ 135. Mohd. Dzaiddin J applied principles of equity in holding the transaction before him to be an equitable charge.

The well-known case of *Hj. Abdul Rahman v. Mohd. Hassan* [1917] AC 209 concerned an agreement dealing with land in Selangor in which a debtor transferred his land in Selangor to his creditor as security for a debt with a condition that if the debtor repaid him within six months thereafter, the land would be re-transferred to the debtor. Selangor's Registration of Titles Regulations 1891 was then in force. By s. 41 of the said Regulation, it was provided that whenever any land was intended to be made security in favour of any other person, the proprietor would have to execute a charge in the form etc, provided. Further s. 4 of the said Regulations expressly provided that land could only be dealt with in accordance with the said Regulation and that every attempt to transfer, transmit, mortgage, charge or otherwise deal with the same except in accordance with the provisions of the said Regulation "shall be null and void and of none effect ..." The Privy Council was in my opinion driven by s. 4 to hold that the agreement conferred "no real right in the land" and compare the dictum of Terrell. Ag. CJ set out above.

Subsequent Land Code and the present Code have not contained or have deliberately left out any provisions similar to s. 4 of the said 1981 Regulation. The decision of *Hj Abdul Rahman supra*, in refusing to uphold the agreement there on account of the said s. 4 should not be used as an authority to negative or invalidate any equitable mortgage or equitable charge created by contracts outside any enactments of Torrens system's registration of titles such as the Code.

The three judges in *Arunasalam Chetty, supra*, had used the expression "equitable mortgage" to the transaction of loan of money secured by a deposit of title, a *fortiori*, the said loan agreement should be called an equitable mortgage on the facts. Thus s. 21(1) of the Limitation Act 1953 provides 12 years in the case of mortgage of land. The word of "mortgage" is used. Effect should be given to the intention of Parliament.

Learned counsel's submission that the said loan agreement did not create any interest in land is therefore fallacious in view of what has been discussed above, and further the submission that the said loan agreement was a mere chose in action dealing with personal property (as opposed to land etc,) would also fly in the face of the said interest in land. A chose in action is always in respect of personalty. It is basically a right to file an action to recover money due on a debt etc, or to recover pecuniary compensation on account of breach of contract or tort.

We next deal with the submission of learned counsel for the borrower that the covenant in the said loan agreement providing for a higher contractual rate of interest (higher than the statutory maximum rate on judgment allowed in the Sessions Court by law) was not an independent covenant and therefore,

merged with the said final judgment. It was submitted that there were no words like paying the interest at a specified rate "before and after judgment" *a*

We agree with both learned counsel that it is a matter of construction of the said loan agreement containing the covenant for paying a rate of interest, (which, incidentally, would invariably be higher than the statutory maximum rate of interest on judgment), whether such a covenant is an independent one from the repayment of the principal or is ancillary to such repayment. *b*

If it is an independent covenant, what legal effect does the lender expect to arise from it? There appear to be two propositions. First, does the lender expect it to be implemented in the judgment ie, to have such interest at such enhanced rate imposed on the judgment sum on the date of giving such judgment even though it is higher than the statutory maximum rate for judgment then in force. Secondly, does the vendor expect such enhanced rate, not imposed on the judgment by the court, to be imposed subsequently on the judgment sum against the borrower after the judgment date as if it were a separate judgment *ex curia* or unilaterally on the part of the lender declared by him *ex cathedra*. The vendor seems to be acting in the second proportion. Let us probe further. *c* *d*

It is purely a matter of construction of a document as to whether it contains a covenant for a contractual rate of interest overriding the maximum rate of interest allowed by law or rules of court on any judgment sum claimed under the said document. That appears to be the unanimous view of all the Law Lords in *Economic Life Assurance Society*, *supra*, in construing the mortgage deeds in question there, where they found the contractual covenant to override the maximum rate of interest allowed by law or rules of court on the judgment sum. *e* *f*

The mortgage deeds there provided for 5% interest which was described in the covenant as that the mortgagor should pay the principal with such interest "after the rate hereinafter covenanted" at 5%. Certain section of an English statute described as "1 & 2 Vict. C 100 s. 17" allowed interest at 4% on judgment sum. All the lower courts there had awarded 4% on the judgment sum until satisfaction. On the final appeal to the House of Lords, the learned Law Lords varied the rate of 4% to 5%. *g*

The covenant providing for the 5% was drafted in language which could not be more commonplace and was nothing close to such demonstrative words as paying the x rate of interest "before or after judgment." The rationale for construing it as an independent covenant and not an ancillary one appears to be in the judgment of Lord Davey. His Lordship said at p. 155: *h*

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> Now, my Lords, it seems to me to be perfectly immaterial for this purpose whether the rights of the Economic Life Assurance Society depend upon the first deeds or the deed of 1858. If they depend upon the first deeds, they are entitled to whatever those deeds give them. If they depend upon the deed of 1858 it appears to me that they are equally entitled under that proviso for redemption to retain the property until they are paid the full amount of their principal and interest. The reason for that is this – that according to the true construction of the proviso I have read it is not a security to secure the performance of the covenant, but it entitles the mortgagees to sit upon their deeds, as we used to say, or to hold their security until they have been paid every penny of the 20,000/-, together with interest measured by what is expressed in the covenant.

If that was so, why had the whole matter been described as "the independent covenant not merging in the judgment" having regard to the circumstances in the Economic Life Assurance, as set out above?. Such description is, with the greatest respect, less than appropriate. The reason for describing it as such seems to be that learned counsel appearing in that case had dealt on 'merging or not merging in the judgment' in their submission, (see the report of the case). Thus their Lordships, in deciding that the rate of 5% was fair and just on a true construction of the proviso for redemption, had sought to go round the statutory rate of 4% on judgment by adopting the wording of independent covenant not merging in the judgment as used by Counsel.

Wee Chong Jin CJ in *Sim Lim Finance Ltd. v. Pelandok Enterprises Pte Ltd. supra,* preserved the sanctity of law, which at the time of that case also provided the maximum rate of 8% pa on judgment sum, by dismissing *Sim Lim's* appeal against the grant by the learned registrar of the said 8% pa. At the same time, however, his Lordship also varied the rate from 8% pa to 18 pa as provided in the mortgage document in question by deciding further that "the plaintiffs are entitled to retain their security until they were paid the principal sum and interest at 18 per cent (the covenanted rate)". Justice was done according to law in line with *Economic Life Assurance Society v. Usborne, supra,* upon which the learned Chief Justice relied in making the said above order.

It may be noted that the Chief Justice was deciding the point in the same case on appeal and not in a subsequent different case.

In *American International Assurance Co. Ltd v. Union Builders (Malaysia) Sdn Bhd* [1973] 1 MLJ 95, the Federal Court, relying on *Economic Life Assurance Society v. Usborne, supra,* varied the rate of interest of 6% pa awarded by the lower court to 11% pa on the judgment till satisfaction on and after the date of judgment. Under O. 40 r. 11(2) Rules of Supreme Court 1957, applicable to this cited case, it was then provided that, "Every judgment for

the payment of money shall bear interest at the rate of six per cent per annum". Again the Federal Court was deciding so in the same case on appeal.

A statutory charge under the said Code is a species of mortgage and I venture to suggest, perhaps, applying for an order of sale under such a charge in Malaysia, is somewhat like applying for an order of sale in a legal mortgage in England which by virtue of Law of Property Act 1925 of the United Kingdom, when a mortgagor directly applies for order of sale of land of mortgagee, the usual prior application to court for an order of foreclosure (which bereaves a mortgagee of his equity of redemption) is dispensed with. Perhaps also there is the equity of redemption already incorporated in a statutory charge of land under the said Code? Does this not again somewhat relegate the Code to its proper place that it is system of registration of titles based on the Torrens system.

We have in mind the discordant dictum in *United Malayan Banking Corp. Bhd & Anor v. Pemungut Hasil Tanah, Kota Tinggi* [1984] 2 MLJ 91 which reads as follows:

> The National Land Code is a complete and comprehensive code of law governing the tenure of land in Malaysia and the incidents of it, as well as other important matters affecting land there e.g; and there is no room for the importation of any rules of English law in that field except in so far as the Code itself may expressly provide for this (page 91)

With the greatest respect, the decision seems to have been based substantially on s. 134(2) of the Code which was held to have precluded rules of equity of relief against forfeiture against the State authority or land administrator from setting aside any order of forfeiture after service of prescribed notices to the registered proprietor and after the enquiry for the registered proprietor to be heard. The above dictum went beyond what was really decided. What was really decided was that detailed provisions for forfeiture contained in s. 134(2) aforesaid were inferentially meant to supplant the particular rules of equity in regard to forfeiture by the State authority.

In so far as the said dictum is meant to preclude rules of equity in relation to land transactions based on contracts between persons, the dictum represents and remains a voice in the wilderness which need never be heeded. The ratio or guidelines of the Privy Council in *Abigail v. Lapin, supra, Oh Hiam & Ors. v. Tham Kong* [1980] 2 MLJ 159, *Frazer v. Walker* [1967] AC 569, and in a host of other cases in Malaysia and Australia should be followed.

Coming back to the said loan agreement and learned counsel's submission that the covenanted rate of interest is not in an independent covenant, we find such submission unacceptable (see *Economic Life Assurance Society v. Usborne, supra,* as explained above), and that the contractual rate, though above the statutory maximum rate, is recoverable.

We shall now deal with the last point of the submission by learned counsel for the borrower that *res judicata* applied to the said final judgment.

Indeed the said final judgment is a final judgment amenable to the doctrine of *res judicata* as explained in *Asia Commercial Finance (M) Bhd. v. Kawal Teliti Sdn. Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189.

This contractual rate of interest as contained in the said loan agreement was higher than the 8% pa allowable on judgment under the law then applicable to the date of the said final judgment. Repayment of principal and interest was claimed on the basis of such contractual rate in the Sessions Court. Such claim was allowed on this basis up to the date of the said final judgment. Both parties there are the same parties here in connection with the said loan agreement and the matter there and here is the claim for the said interest. As stated earlier, there was no appeal from the decision of the Sessions Court by the lender. *Res judicata* applied to bar any further claim on account of the same kind of interest.

Economic Life Assurance Society v. Usborne, supra, Sim Lim v. Pelandok, supra, American International Assurance v. Union Builders, supra, are all appeal cases on the maximum statutory rate of interest binding upon the lower courts in question. The statutory rate were increased to the covenanted rate or contractual rate on appeal finally. These cases cannot be relied on by the lender to say that *res judicata* did not apply, for the judgments of the lower courts in question in those appellate cases were not final and conclusive judgments between the parties in question until the appellate courts there had decided.

We would add that the controversial point of contractual rate of interest overriding the statutory maximum rate of interest on judgment sum on or after the date of judgment or the question of independent covenant relating to interest on judgment has virtually ceased to be of importance in Malaysia. Order 42 r. 12 of the Rules of High Court 1980 which previously allowed only the maximum rate of interest of 8% on judgment sum or after the date of judgment was in 1986 amended by the Rules of the High Court (amendment) Rules 1986 (P.U(A)445/86). The said r. 12 now reads as follows:

> Every judgment debt shall should carry interest at the rate of 8 per centum per annum or at such other rate not exceeding the rate aforesaid as the Court directs (unless the rate has been otherwise agreed upon between the parties), such interest to be calculated from the date of judgment until the judgment is satisfied.

The words in brackets shown above were added by the amendment. The legal draftsmen seemed to be aware of the issues discussed above. The amendment enables the courts to award, in appropriate cases, interests on sums owed at contractual rate of interest not only up to the date of judgment (as courts seem to have always done) but also to award the same contractual rate on and after the dates of the judgments until satisfaction. The borrower succeeds on the point of *res judicata.*

It will be seen from above discussion that the borrower has succeeded on the point of *res judicata* and I will now make such orders as the justice of the case requires.

As regards the bankruptcy notice, it was based on the said final judgment The borrower paid the sum stated in the bankruptcy notice ie, RM132,177.76 which the lender refused to accept. The sum was subsequently returned to the borrower. What remains to be done by the borrower to discharge the monetary obligation is to effect payment of the said sum once more, if that has not, in the meantime, already been done.

The said document of title has to be returned. The Court is vaguely aware of the other parties' interest, having intervened, but such intervention did not materialise in the High Court and it still remains for this Court to confine itself to adjudicate between the only parties before the High Court and before us on all matters in dispute as stated in the in the said originating summons and its connected affidavits. The lender has no right to hold on to the said document of title after the borrower has fully repaid money due as explained above. The subdivisional document of title in question has been issued and given to the lender from the developer who was paid the price of it.

The appeal therefore is allowed and the cross-appeal of the respondent dismissed. It is further ordered that an order in terms of the originating summons herein no. S1-24-1016-94 in the High Court be granted, except that the sum of RM132,177.76 be paid within one month from the date hereof by the appellant to the respondent without any interest thereon and thereafter at 8% pa after one month from the date hereof until satisfaction and that the document of title as described in the said originating summons be returned to the appellant by the respondent on full payment of the said sum of RM132,177.76 subject as aforesaid. The respondent is to pay costs here and in the courts below.

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