

Court rules on banks' rights under absolute assignment after issue of title to land

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Litigation, Malaysia

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Introduction

One of the issues which the Malaysian banking industry has faced is whether a bank can exercise its rights to sell land under an absolute assignment without first creating a charge over the land where title to the land has been issued. The courts have issued differing opinions in this regard.

In *Ooi Chin Nee v Citibank Bhd v Chew Ai Eng Sdn Bhd* and *OCBC Bank (Malaysia) Bhd*, the courts held that a charge is required in order for a bank to exercise its rights to the land where title to the land has been issued. Banks have no right to auction land unilaterally. Conversely, it is also a well-settled principle that an absolute assignment creates an equitable mortgage. This was evident in *Chuah Eng Khong v Malayan Banking Bhd*, where the court ruled in favour of effecting and recognising the contractual rights between the parties in the absence of any statutory provisions or common law which required the equitable mortgagee to obtain a court order in order to realise its security under the absolute assignment of rights to the land. Notwithstanding this, in *Damai Freight (M) Sdn Bhd v Affin Bank Berhad* the Federal Court took a clear stance and clarified all uncertainties in this regard.

Facts

The Selangor state government sold a piece of land to Perbadanan Kemajuan Negeri Selangor (PKNS). While waiting for the title document to the land to be issued, PKNS entered into a lease agreement with the appellant, Damai Freight (M) Sdn Bhd. The appellant obtained loans from Bank Buruh (Malaysia) Bhd (BBMB) pursuant to a loan agreement with assignment by assigning BBMB all of its rights, title and interest under the principal agreement. Subsequently, BBMB transferred and vested its business and assets – including the loan agreement – to the respondent, Affin Bank Berhad. The appellant defaulted on its loan repayments and thus was indebted to the respondent. The respondent subsequently put the land up for public auction. It had no knowledge that the title to the land had been issued to PKNS.

Decisions

The high court ruled in favour of the appellant, holding that the bank had to create a charge over the land before realising its security under the absolute assignment, as the title document had been issued. The bank could not proceed by way of a private sale.

The Court of Appeal overturned this decision. The matter subsequently came before the Federal Court, which had to decide whether a bank can realise its security under an absolute assignment after the Land Office has issued a title document without resorting to the remedies under the National Land Code, 1965.

The Federal Court unanimously affirmed the Court of Appeal's decision and dismissed the appeal. It held that the bank had secured all of the borrower's rights, title and interest under the absolute assignment, even though no charge was created. Further, the bank did not lose its security or power of sale under the loan agreement, as the absolute assignment under the agreement survived, despite the fact that the title document was issued later. As such, the bank was entitled to realise its security for the loans by auctioning the land. There was no need to create a charge or resort to the remedies under the National Land Code. Section 206(3) of the National Land Code recognises the contractual obligation of any transaction relating to alienated land or any interest therein which is provided for in the loan agreement.

Comment

The Federal Court's decision is welcomed, as it clarifies a situation which has long plagued the banking industry. In accordance with the decision, a bank with absolute assignment of the rights to land may realise its security under the assignment without creating a charge, regardless of any subsequent issue of a title document. This safeguards the bank's position as a lender in the event that the borrower defaults on its loan repayments; and the bank will always secure its right to sell 'choses in action' under the absolute assignment in a recovery action.

This landmark decision has removed the doubt and confusion surrounding this area of law. Further, it will prevent future defaulting borrowers from bringing actions against banks despite no charge being created, which will in turn reduce unnecessary litigation and save the courts time and effort.

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