

9/84

No. 49 of 1981  
No. 50 of 1981  
No. 51 of 1981

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

KOH KIM CHAI

Appellant

- and -

10 ASIA COMMERCIAL BANKING  
CORPORATION LIMITED

Respondent

APPELLANT'S CASE

Record

1. These are three appeals from judgments dated 24th June 1980 of the Federal Court of Malaysia (Lee Hun Hoe C.J., Wan Suleiman F.J. and Hamid J.) dismissing appeals from judgments dated 28th December 1978 of the High Court of Malaya (Syed Othman Bin Ali F.J.) ordering the sale of a piece of land comprised in Grant 23940, Lot 2605 in the Mukim of Senai-Kulai and containing an area of 53 acres 0 Roods 30 Poles or thereabouts under three charges dated 22nd May 1973, making declarations as to the sums due to the Respondent under the said Charges and granting various ancillary relief.

p. 40

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2. These appeals relate to three Charges on the same piece of land granted on the same day between the same parties and raise identical questions of law. The appeals were consolidated by an Order of the Judicial Committee of the Privy Council dated 4th October 1983. Both in the High Court of Malaya and in the Federal Court of Malaysia argument was heard only in the proceedings leading to the second above-mentioned appeal (No. 50 of 1981) the determination of which, it was agreed, would be binding in the other two cases. This Case is accordingly related to the said appeal

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Record

No. 50 of 1981 and references herein to the Record are references to the Record of those proceedings.

3. The issues arising on these appeals, stated shortly, are as follows:

(1) Whether the said Charges dated 22nd May 1973 are illegal and void as being contrary to Section 3 of the Banking Act 1973;

(2) Whether the said Charges are illegal and void as being in breach of the Exchange Control Act 1953 as amended;

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(3) In the event of any such illegality being established, the relief to which the Appellant is entitled.

p. 46 4. By a Charge dated 22nd May 1973 and registered in the Land Office under Presentation No. 5641/73 Volume 179, Folio 4 the Appellant charged the said land to the Respondent as security for an advance on current account made by the Respondent to Overseas Lumber Private Limited to the Limit of \$350,000 with interest at the rate of 10.8 per cent per annum and covenanted on demand in writing to pay to the Respondent the balance owing to the Respondent by Overseas Lumber Private Limited at the date of such demand.

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p. 54 5. By a notice dated 22nd August 1976 to the Appellant, the Respondent demanded payment of the sum of \$420,328.63 being principal and interest up to 9th January 1975. By a letter dated 13th September 1976 the Respondent's Solicitors acknowledged receipt of the said demand but contended that the charge was illegal as a banking transaction effected without a licence or a money-lending transaction effected by an unlicensed moneylender. The Appellant did not pay the sum demanded or any part thereof.

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p. 2 6. The Respondent commenced these proceedings by Originating Summons dated 7th June 1977 claiming an order for sale of the said land, a declaration as to the sum owing under the said Charge and ancillary relief. In affidavits sworn in the proceedings on 12th February 1978 and 31st July 1978 the Appellant contended (inter alia) that the said Charge was illegal and unenforceable (1) because the Respondent was not licensed to carry on banking business in Malaysia and the creation of the Charge was consequently in breach of Sections 3 and 9 of the Banking Act 1973, (2) because the transaction was an illegal moneylending transaction in breach of the Moneylenders Ordinance 1951 and (3) because the

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transaction was in breach of Sections 9, 11 and 15(a) of the Exchange Control Act 1953 as amended. The Appellant therefore counterclaimed for an order that the said Charge should be declared unenforceable and cancelled and ancillary relief.

pp.12-13

7. The proceedings came before Syed Othman Bin Ali F.J. on a number of occasions in Chambers and on 23rd April 1978 he made an order in terms of the Originating Summons. At the request of the Appellant he heard further argument in Court on 31st July and 29th October 1978 and on 28th December 1978 he delivered a reserved judgment upholding the previous order. After summarising the facts and the Appellant's submissions and rejecting certain arguments not relevant to these appeals he held that the Charge was not illegal on any of the grounds claimed by the Appellant. He held that neither Sections 3 or 9 of the Banking Act 1973 could apply because they applied only to banks operating in Malaysia whereas the Respondent was operating as a bank in Singapore. He held that the Moneylanders Ordinance could not apply since the transaction was effected outside Malaysia. He held that Section 9 of the Exchange Control Act 1953 had no application and that the relevant provision of that Act was paragraph 1 of the Fourth Schedule under which the permission of the Controller would be required before any part of the proceeds of sale could be paid to the Respondent. Finally, he held that Sections 11 and 15 of the Exchange Control Act could not apply because a charge on land is not a security, as defined in Section 2 of that Act. He also stated that, if any illegality had been established, the Appellant would not have been entitled to any relief since his claim was founded on an illegal act for which he was more to blame.

pp.14-16

p.16 1.4

pp.17-20

p.20

p.25 1.10

p.23 11.4-10

p.23 11.11-16

p.23 11.17-33

p.23 1.34 -

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pp.28-29

8. By a notice of appeal dated 31st December 1978 the Appellant appealed to the Federal Court of Malaysia. The grounds of appeal were set out in a memorandum of appeal dated 8th November 1979. These were, in summary, as follows:-

pp.29-31

(1) That the Respondent an unlicensed bank in Malaysia had conducted banking business in Malaysia in obtaining a charge on land situated in Malaysia as security for a loan in contravention of the Banking Act 1973 resulting in the said charge being illegal unenforceable and void;

p.30 11.19-  
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(2) That being an unlicensed bank in Malaysia and an unlicensed moneylender the

<u>Record</u>			
p.30	11.25-30	Respondent's charge on Malaysian land was not enforceable pursuant to the Moneylenders Ordinance 1951 resulting in the charge being unenforceable and void;	
p.30	11.31-34	(3) That the charge was created without the requisite permission being obtained under the Exchange Control Act 1953 and consequently the said charge was illegal, unenforceable and void;	
p.31	11.25-31	(4) That the Judge erred in concluding that even if any illegality had been established, the Appellant would not have been entitled to any remedy as his claim was founded on an illegal act for which he was more to blame.	10
pp.32-40		9. The appeal was heard by the Federal Court (Lee Hun Hoe C.J., Wan Suleiman F.J. and Hamid J.) on 3rd February 1980 and the judgment of the Court dismissing the appeal was delivered on 24th June 1980. After summarising the facts the Court then summarised Counsel's submissions on the effect of the Banking Act 1973. It had been contended for the Appellant that anything done by the Respondent which was related or incidental to making advances to its customers constituted the carrying on of banking business and that by obtaining and seeking to enforce in Malaysia a charge to secure a loan the Respondent was carrying on banking business in Malaysia. It had been contended for the Respondent that the contract of loan between the Respondent and the borrower was governed by the law of Singapore, that there was no evidence that the Respondent had transacted any banking business in Malaysia and that neither taking a charge on property in Malaysia nor seeking to enforce such a charge constituted the carrying on of banking business. After considering certain authorities and the definitions of "bank" and "banking business" in the Banking Act 1973 the Court concluded that in acquiring and accepting charges on land in Malaysia the Respondent had not conducted banking business and consequently had not been in breach of Section 3 of the Banking Act 1973. The Court agreed with Syed Othman Bin Ali F.J. in rejecting the other submissions of the Appellant and adopted his reasoning. They expressed specific agreement with his conclusion that a charge on land is not a security as defined by the Exchange Control Act 1953.	20
p.33	11.23-41		
p.33	1.42 -		
p.34	1.27		30
pp.34-37			
p.37	11.12-21		40
p.38	1.44 -		
p.39	1.32		
p.38	1.9		50

They expressed no view on the question whether, if illegality had been established, the Appellant would be disentitled to relief for the reason given by Syed Othman Bin Ali F.J.

10. On 4th August 1980 the Federal Court made an order granting the Appellant conditional leave to appeal to his Majesty the Yang Di-Pertuan Agong and on 7th March 1981 the Federal Court made an order granting final leave to appeal. pp.42-43  
pp.44-45

10 11. The Appellant respectfully submits that both the Courts in Malaysia erred firstly in holding that the Respondent had not transacted banking business in Malaysia without a licence in breach of section 3 of the Banking Act 1973 and secondly in holding that the creation of the Charge was not in breach of Section 9 of the Foreign Exchange Act 1953. He further submits that Syed Othman Bin Ali F.J. erred in his conclusion that, if illegality were established, 20 the Appellant would not be entitled to any remedy.

12. In relation to the first submission the Appellant respectfully refers to the following provisions of the Banking Act 1973:-

"2. in this Act unless the context otherwise requires -

"bank" means any person who carries on banking business;

30 "banking business" means the business of receiving money on current or deposit account, paying and collecting cheques drawn by or paid in by customers, and making advances to customers and includes such other business as the Central Bank, with the approval of the Minister, may prescribe for the purposes of this Act;

40 3. (1) Banking business shall not be transacted in the Federation except by a corporation which is in the possession of a licence in writing from the Minister authorising it to do so.

(5) Any person who contravenes the provisions of this Section shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding three years or to both such fine and imprisonment."

Record

The Appellant also respectfully refers to the Contracts Act 1950 Section 24 which provides that:-

"The consideration or object of an agreement is lawful unless -

(a) it is forbidden by a law;

(b) it is of such a nature that, if permitted, it would defeat any law; .....

In each of the above cases the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void." 10

13. It is respectfully submitted that in requiring and accepting and subsequently attempting to enforce a charge over land in Malaysia the Respondent was transacting banking business without a licence in contravention of Section 3(1) of the Banking Act 1973. The Courts below adopted an unduly narrow view of the definition of banking business in the Banking Act. The Charge in this case was created 20

p.48 11.35-  
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by way of security for both the existing and any future overdraft of the borrower. The procuring of a charge on property and guarantee by the Appellant as collateral security were so closely related to the making of advances to the borrower as to constitute an integral part of the business of making such advances. The business of making advances should be construed so as to include the taking and enforcement of security for such advances. Since this was done in Malaysia there was an infringement of the Banking Act. The Federal Court erred in holding that the Respondent could not be said to have been conducting banking business 30

p.36 11.19-  
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in Malaysia because the transaction lacked the essential characteristic of banking business as a principal part of the business of a bank and that "banking business" as defined by Section 2 of the Banking Act must be construed to embrace the predominating 40

p.36 11.21-  
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business of banking. The usual characteristics of banking are not the same as usual banking transactions and the essentials of banking business are not exhaustive of all that is ordinary in that business (Royal Bank of Canada v. Inland Revenue Commissioners /1972/ Ch. 665 at 679). The transaction was not therefore outside the ambit of Section 3 of the Banking Act 50

simply because it lacked an essential characteristic of banking business if, as the Appellant submits, it was an ordinary and usual element in such business and part of the business of making advances to customers.

14. In relation to the second submission the Appellant respectfully refers to the following provisions of the Exchange Control Act 1953:-

10           "9. (1) Except with the permission of the Controller, no person shall, in Malaysia, do any act which involves, is in association with, or is preparatory to, the making of any payment outside Malaysia, to or for the credit of a person resident outside the scheduled territories;

20           10.(1) Except with the permission of the Controller no person shall, in Malaysia, make any payment to or for the credit of a person resident in the scheduled territories, or do any act which involves, is in association with or is preparatory to, the making of any such payment outside Malaysia, as consideration for, or in association with -

30           (a) the receipt by any person of a payment made outside the scheduled territories, or the acquisition by any person of property which is outside the scheduled territories".

15. Singapore ceased to be within the scheduled territories on 8th May 1973. It was stated in the judgments of both the Courts in Malaysia that it had been conceded by the Appellant that at the time of the loan transactions Singapore was within the scheduled territories. This concession was correct since the loan secured by the Charge was made before 8th May 1973. No concession was made that Singapore was within the scheduled territories when the Charge was created and Counsel for the Appellant argued that the Charge infringed the Exchange Control Act because it was executed after Singapore ceased to be within the scheduled territories. The Courts in Malaysia were in error in saying that Singapore ceased to be a scheduled territory in 1974, the correct date being 8th May 1973.

p.22 11.28-30  
p.38 11.11-13

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Record

16. It is respectfully submitted that the Courts below did not properly consider the Appellant's argument that the creation of the Charge infringed the Exchange Control Act. It is common ground that the consent of the Controller to the creation of the Charge was not sought or obtained. The creation of a charge over land in Malaysia by a resident of Malaysia as security for the borrower's indebtedness to a bank in Singapore and the giving of a covenant by a resident of Malaysia by way of guarantee to meet such indebtedness on demand were acts preparatory to the making of payments outside Malaysia to a person resident outside the scheduled territories and consequently in breach of Section 9(1) of the Act. The High Court held that under paragraph 1 of the Fourth Schedule to the Act the permission of the Controller would be required before any proceeds of sale of the mortgaged property could be paid to the Respondent. This does not meet the argument that the creation of the Charge was in itself illegal.

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17. The Appellant further respectfully submits that there was no justification for the view of Syed Othman Bin Ali F.J. that the Appellant should be disentitled to any remedy as his claim is founded on an illegal act for which he was more to blame. He submits:-

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p.25 11.18-  
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(a) that, since any offence under Section 3 of the Banking Act was committed by the Respondent alone, the Respondent was solely to blame for any illegality of the transaction under that Act. Accordingly, if such illegality be established, the Appellant would not be disentitled to the relief he seeks even if in seeking such relief he relies on an illegal transaction (Anderson Ltd. v. Daniel /1924/ 1 K.B. 138 C.A. and Marles v. Philip Trant & Sons Ltd. (No. 1) /1953/ 1 All E.R. 645).

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(b) that in any event there was no basis for any finding that the Appellant was more to blame for any illegality than the Respondent,

(c) that if, contrary to submission (a), the parties were in pari delicto, a declaration as to the illegality of the Charge should nevertheless be made (Chapman v. Michaelson /1909/ 1 Ch. 238) and an order that the Respondent return to the Appellant the issue document of Johore Grant No. 23940 since the

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Appellant can claim such document without relying on any illegal act or transaction.

18. It is therefore respectfully submitted that the judgment of the Federal Court of Malaysia was wrong and ought to be reversed, and this appeal ought to be allowed with costs for the following (amongst other)

R E A S O N S

10 1. Because the Charge was created in contravention of Section 3 of the Banking Act 1973

2. Because the Charge was created in contravention of Section 9(1) of the Exchange Control Act 1953

3. Because the Charge was by reason of its illegality on one or both of the above grounds void and unenforceable in accordance with Section 24 of the Contracts Act 1950.

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ALLAN HEYMAN,

W.R. STEWART SMITH

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B E T W E E N:

KOH KIM CHAI Appellant

- and -

ASIA COMMERCIAL BANKING  
CORPORATION LIMITED Respondent

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APPELLANT'S CASE

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