

9/84

No.50 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
(Chargor/Respondent)

- AND -

ASIA COMMERCIAL BANKING CORPORATION
LIMITED

Respondent
(Chargee/Applicant)

RECORD OF PROCEEDINGS

KINGSFORD DORMAN
14 Old Square
Lincoln's Inn
London WC2 3UB

Solicitors for the
Appellant

COWARD CHANCE
Royex House
Aldermanbury Square
London EC2V 7LD

Solicitors for the
Respondent

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

KOH KIM CHAI

Appellant
(Chargor/
Respondent)

- AND -

ASIA COMMERCIAL BANKING CORPORATION LIMITED

Respondent
(Chargee/
Applicant)

RECORD OF PROCEEDINGS

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- 3) Notice of Motion on behalf of the Appellant dated 18th July 1980
- 4) Affidavit of Koh Kim Chai in support sworn 14th July 1980
- 5) Affidavit of Poh Kar Chiow in opposition sworn 29th July 1980 and caveat exhibited thereto
- 6) Affidavit of Sivaran Singh Gill sworn 31st July 1980 and two exhibits thereto
- 7) Affidavit of R. Padmanbhan sworn 2nd August 1980 and exhibit thereto

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

A

B E T W E E N :-

KOH KIM CHAI

Appellant
(Chargor/Respondent)

- AND -

ASIA COMMERCIAL BANKING CORPORATION LIMITED

B

Respondent
(Chargee/Applicant)

RECORD OF PROCEEDINGS

C

No.1
Originating Summons dated 7th June
1977

IN THE HIGH COURT
OF MALAYA AT
JOHORE BAHRU

D

IN THE HIGH COURT OF MALAYA AT JOHORE BAHRU
CHARGEES' APPLICATION

No.1
Originating
Summons dated 7th
June 1977

E

ORIGINATING SUMMONS)
NO.144 OF 1977)

In the Matter of a Chargee's
Application under Sections
256 and 257 of the National
Land Code, Act No.56 of
1965

And

F

In the Matter of a Charge
dated the 22nd day of May
1973 bearing Presentation
No. 5641/73 Charge Volume
179 Folio 4 on all that
piece of land comprised
and delineated in Grant
23940, Lot 2605, Mukim
of Senai-Kulai, Johore.

G

IN THE HIGH
COURT OF MALAYA
AT JOHORE BAHRU

Between

ASIA COMMERCIAL BANKING
CORPORATION LIMITED of No.110
Robinson Road, Singapore 1

A

No.1
Originating
Summons dated
7th June 1977
(Contd.)

... Chargee/Applicant

And

KOH KIM CHAI of No. 2E Jalan
Ah Fook Johore Bahru
Chargor/Respondent

B 10

ORIGINATING SUMMONS

LET KOH KIM CHAI of No. 2E Jalan Ah Fook,
Wong Shee Fun Building Johore Bahru within eight
(8) days after service of this Summons on him,
inclusive of the day of such service, cause an
appearance to be entered for him to this Summons,
which is issued upon the application of the
abovenamed Chargee/Applicant, ASIA COMMERCIAL
BANKING CORPORATION LIMITED of No. 110 Robinson
Road, Singapore 1 for an Order:-

C

D 20

1. That all that piece of land comprised in
Grant 23940, Lot 2605 in the Mukim of Senai-
Kulai and containing an area of 53 Acres
0 Rood 30 Poles or thereabouts be sold by
public auction under the direction of the
Senior Assistant Registrar;

E

2. That the sale be held on a date not less
than one month after the date upon which
this Order is made;

F 30

3. That the total amount due to the Chargee/
Applicant in respect of the principal and
interest up to the 9th day of January 1975
is \$420,328-63 which sum together with
interest at the rate of 14.75% per annum
to the 31st day of March 1977 amounts to
\$572,264-68;

G

4. That the Chargee/Applicant is further
entitled to interest at the rate of 14.75%
per annum with monthly rests from the date
of this Order to the date of realisation;

40

5. That The Senior Assistant Registrar of the
Court shall further fix a reserve price for
the purposes of the said sale equal to the
estimate market value of the said land;

6. That there be liberty to all parties to apply;

IN THE HIGH COURT
OF MALAYA AT
JOHORE BAHRU

10 7. That the costs, charges, expenses of and incidental to this application and of the sale hereby directed be taxed by The Senior Assistant Registrar on the Higher Scale and be paid by the Chargor/Respondent to the Chargee/Applicant and the amount of such costs, charges and expenses when duly taxed may be added by the Chargee/Applicant to the amount due for principal and interest owing under the said Charge.

No.1
Originating
Summons dated
7th June 1977
(Contd.)

Dated this 7th day of June 1977.

Sd. Illegible

Senior Assistant Registrar
High Court, Malaya,
JOHORE BAHRU

Entered No.521/77

20 This Summons is taken out by Messrs. Yeow & Chin of No.16-B Jalan Station, Tan Chan Cheng Building, Johore Bahru, Solicitors for the abovenamed Chargee/Applicant.

The Chargor/Respondent may appear hereto by entering an appearance whether personally or by Solicitor at the Registry of the High Court at Johore Bahru.

30 NOTE: If the Chargor/Respondent does not enter appearance within the time and at the place abovementioned, such order will be made and proceedings taken as the Judge may think just and expedient.

A person appearing personally may, if he desires, enter his appearance by post and the appropriate forms may be obtained by sending a Postal Order for \$5-00 with an addressed envelope to the Senior Assistant Registrar of the High Court at Muar.

40 To: Koh Kim Chai
2E Jalan Ah Fook
Wong Shee Fun Building
Johore Bahru

IN THE HIGH COURT
OF MALAYA AT
JOHORE BAHRU

No. 2

AFFIDAVIT OF ONG BEN TIONG dated
16th May 1978

No.2
Affidavit of
Ong Beng Tiong
dated 16 May
1978

IN THE HIGH COURT OF MALAYA AT MUAR

CHARGEES' APPLICATION

ORIGINATING SUMMONS)
NO.144 OF 1977)

10

In the Matter of a Chargee's
Application under Section
256 and 257 of the National
Land Code, Act No. 56 of
1965

And

In the Matter of a Charge
dated the 22nd day of May 1973
bearing Presentation No.
5641/73 Charge Volume 179
Folio 4 on all that piece
land comprised and delineated
in Grant 23940, Lot 2605,
Mukim of Senai-Kulai, Johore

20

Between

ASIA COMMERCIAL BANKING
CORPORATION LIMITED of No.
110 Robinson Road,
Singapore 1

30

... Chargee/Applicant

And

KOH KIM CHAI of No.2E Jalan
Ah Fook, Johore Bahru

... Chargor/Respondent

A F F I D A V I T

I, ONG BENG TIONG (NRIC No.0596114/I) of
No.110 Robinson Road, Singapore 1, of full age
do solemnly and sincerely affirm and say as
follows:-

40

1. I am the Bank Officer of the Chargee/
Applicant Bank, a company incorporated in the
Republic of Singapore and having a place of
business at No.110 Robinson Road, Singapore 1.

2. The abovenamed Chargor/Respondent is the

registered owner of all that piece of land held under Grant 23940, Lot 2605 containing an area of 53 Acres 0 Rood 30 Poles or thereabouts situated in the Mukim of Senai-Kulai, Johore (hereinafter referred to as the said land)

IN THE HIGH COURT
OF MALAYA AT
JOHORE BAHRU

No.2

Affidavit of
Ong Beng Tiong
dated 16 May
1978 (Contd.)

10 3. By a Third Charge dated the 22nd day of May 1973 and registered in the Land Office under Presentation No.5641/73 Volume 179, Folio 4 the Chargor/Respondent charged the said land to the Chargee/Applicant as security for an advance on current account in favour of the Overseas Lumber Private Limited with the Chargee/Applicant Bank in Singapore to the limit of \$350,000-00 and with interest thereon at 10.8 per centum per annum. A copy of the said Charge is annexed hereto and marked "A".

20 4. Under the terms of the said Charge the amount owing by the Chargor/Respondent for principal and interest is payable on demand. By a Notice of Demand in Form 16E dated the 22nd day of August 1976 and served on the Chargor/Respondent, the Chargee/Applicant demanded payment of the total sum of \$420,328-63 being principal and interest up to the 9th day of January 1975. Thereafter interest runs daily at \$168-46 per day. A copy of the said Notice of Demand and Bank Statement are annexed hereto and marked "B" and "C" respectively.

30 5. By a letter dated the 13th September 1976 through his Solicitors, Messrs. K.C. Koh & Co., the Chargor/Respondent acknowledged receipt of the said Notice of demand. A copy of the said letter is annexed hereto and marked "D".

6. Notwithstanding such demand the Chargor/Respondent has failed and still and fails to pay the amount due for principal and interest or any part thereof.

40 7. The amount now owing by the Chargor/Respondent to the Chargee/Applicant is \$572,264-68 inclusive of interest up to the 31st day of March 1977. Thereafter interest runs daily at \$217-46 per day calculated at 14.75 per centum per annum.

8. There are two other previous Charges (First and Second Charge) on the said land registered under Presentation No.5639/73, Volume 179, Folio 2 and Presentation No. 5640/73, Volume 179, Folio 3 respectively.

50 9. In the Circumstances I pray for an Order in

IN THE HIGH
COURT OF MALAYA
AT JOHORE BAHRU

No. 2
Affidavit of
Ong Beng Tiong
dated 16 May
1977 (Contd.)

terms of the application.

AFFIRMED by the abovenamed)
ONG BENG TIONG at Johore) Sd. Illegible
Bahru this 16th day of May)
1977.)

Before me,

Sd. Illegible
Haji Mohd. Yusoff Bin Haji A.
Rahim PLP
Commissioner for Oaths
JOHORE BAHRU

10

This affidavit was filed by Messrs. Yeow
& Chin of No. 16-B Jalan Station, Tan Chan Cheng
Building, Johore Bahru, Solicitors for the
abovenamed Chargee/Applicant.

IN THE HIGH
COURT OF MALAYA
AT JOHORE BAHRU

No. 3
Affidavit of
Koh Kim Chai
dated 12th
February 1978

No. 3

Affidavit of KOH KIM CHAI 12th February
1978

20

IN THE HIGH COURT OF MALAYA AT JOHORE BAHRU

ORIGINATING SUMMONS)
No.144 OF 1977)

In the Matter of a Chargee's
Application under section 256
and 257 of the National Land
Code, Act No.56 of 1965

30

And

In the Matter of a Charge
dated the 22nd day of May
1973 bearing Presentation
No. 5641/73 Charge Volume
179, Folio 4 on all that
piece of land comprised and
delineated in Grant 23940
Lot 2605, Mukim of Senai-
Kulai, Johore.

40

Between

Asia Commercial Banking
Corporation Limited of No.110
Robinson Road, Singapore 1.

IN THE HIGH
COURT OF MALAYA
AT JOHORE BAHRU

... Chargee/Applicant

And

Koh Kim Chai of No. 2E Jalan
Ah Fook Johore Bahru

No. 3
Affidavit of
Koh Kim Chai
dated 12th
February 1978

10

... Chargor/Respondent

A F F I D A V I T

I, Koh Kim Chai of No. 2E Jalan Ah Fook,
Johore Bahru, affirm and say as follows:-

1. I am the abovenamed Chargor/Respondent.

2. I am the registered owner of all the piece
of land containing an area of 53 Acres 0 Roods
30 poles or thereabouts situated in the Mukim
of Senai-Kulai and comprised in Grant No.23940
for Lot 2605.

20

3. The said land was purportedly charged to
the Chargee/Applicant as follows:-

(a) First Charge

Charge dated 22nd May 1973 registered in
Presentation No. 5639/73 Volume 179 Folio
2 for securing the sum of \$400,000/-.

(b) Second Charge

Charge dated 22nd May 1973 registered in
Presentation No. 5640/73 Volume 179 Folio
3 for securing the sum of \$500,000/-.

30

(c) Third Charge

Charge dated 22nd May 1973 registered in
Presentation No. 5641/73 Volume 179 Folio
4 for Securing the sum of \$350,000/-.

4. The aforesaid purported First, Second and
Third Charges were made by me in good faith in
favour of the Chargee/Applicant as a guarantee
for the overdraft facilities given to

(a) Overseas Lumber (Pte) Ltd

(b) Overseas Lumber Berhad

IN THE HIGH
COURT OF MALAYA
AT JOHORE BAHRU

No. 3
Affidavit of
Koh Kim Chai
dated 12th
February 1978

(c) Kimwood Trading Company

5. At the time the said purported First, Second and Third Charges were created by me that is to say on 22nd May 1973 the overdraft facilities had already been given to the aforesaid three Companies and it was because the Applicant bank had problems with the Monetary Authorities Singapore with regard to unsecured loans given by the Applicant bank to numerous customers including the aforesaid three Companies that I was requested to allow the Applicant bank to charge my abovementioned property so that the Monetary Authorities Singapore would not query the Applicant Bank on the three accounts mentioned above. After numerous requests made by Officers of the Applicant bank. I gave in and allowed them to charge my property for the overdraft facilities already granted and additional facilities up to the limits stated in the purported First, Second and Third Charges. 10 20

6. I have to state that in breach of contract the Applicant bank had returned a cheque for \$100,000/- issued by Overseas Lumber Berhad on 9th June 1973 although as on that date the overdraft account of Overseas Lumber Berhad was at \$273,733.46. I contend that there is a failure of consideration if the purported First, Second and Third Charges are valid, which is denied. 30

7. I am advised and verily believe that the aforesaid purported Charges created by me as Chargor in favour of the Applicant bank is invalid and of no legal effect and as such unenforceable because the Applicant bank is not licensed to carry on banking business in Malaysia under Section 3 of the Banking Act 1973, and as such I contend that the purported Charges are merely documents pertaining to purely money-lending transaction. 40

8. I am advised and verily believe that the Chargee/Applicant has illegally held themselves out as the "Bank" in the Charge documents Form 16A thereby contravening Section 9 of the Banking Act 1973 and as such the aforesaid purported Charges are therefore void and unenforceable.

9. I am advised and verily believe that the aforesaid purported Charges are purely money-lending transactions within the meaning of the Moneylenders Ordinance and that the Chargee/Applicant not being licensed moneylenders are therefore not entitled to enforce that purported Charges which I contend are void and unenforceable. 50

10. I am advised and verily believe that the aforesaid purported Charges created in favour of a foreign bank not being licensed in Malaysia under the Banking Act 1973 nor was there any consideration having been passed is in fact and in law contrary to the Exchange Control laws of Malaysia and as such the said Charges are void and unenforceable.

IN THE HIGH
COURT OF MALAYA
AT JOHORE BAHRU

No. 3
Affidavit of
Koh Kim Chai
dated 12th
February 1978

10 11. I deny that I am personally indebted to the Applicant Bank and I therefore pray that this Application by the Chargee/Applicant bank be dismissed with costs.

AFFIRMED by the abovenamed)
KOH KIM CHAI at Johore) Sd. Illegible
Bahru this 12th day of)
February, 1978)

Before me,

20 Sd. Illegible
Mustapha Bin Mohammad P.I.S.
Commissioner for Oath
High Court
JOHORE BAHRU

No. 4

Affidavit of Lim Cheun Ren dated
19th April 1978

IN THE HIGH
COURT OF MALAYA
AT JOHORE BAHRU

No. 4
Affidavit of
Lim Cheun Ren
dated 19th
April 1978

30 IN THE HIGH COURT IN MALAYA AT JOHORE BAHRU

CHARGEES APPLICATION

ORIGINATING SUMMONS)
NO.144 of 1977)

In the Matter of a Chargee's
Application under Section
256 and 257 of the
National Land Code, Act No.
56 of 1965

40 And

IN THE HIGH
COURT OF MALAYA
AT JOHORE BAHRU

No. 4
Affidavit of
Lim Cheun Ren
dated 19th
April 1978

In the Matter of a Charge
dated the 22nd day of May
1973 bearing Presentation
No. 5641/73 Charge Volume
170 Folio 4 on all that
piece of land comprised and
delineated in Grant 23940,
Lot 2605, Mukim of Senai-
Kulai, Johore

Between

10

ASIA COMMERCIAL BANKING
CORPORATION LIMITED of No. 110
Robinson Road, Singapore 1.
... Chargee/Applicant

And

KOH KIM CHAI of No.2E Jalan
Ah Fook, Johore Bahru.
... Chargor/Respondent

A F F I D A V I T

I, LIM CHEUN REN, an Advocate & Solicitor
practising at No. 16-B Jalan Station, Tan Chan
Cheng Building, Johore Bahru, affirm and say as
follows:-

20

1. I am the Solicitor in charge of this matter
and I am duly authorised to make this Affidavit.

2. The amount owing by the Chargor/Respondent
inclusive of interest as at the 23rd day of
April 1978 amounts to \$665,053-68. A copy of
the letter dated 6th April 1978 from the
Chargee/Applicant is now produced and shown to
me and marked "E".

30

AFFIRMED by the abovenamed)
LIM CHEUN REN at Johore) Sd. Illegible
Bahru this 19th day of)
April 1978)

Before me,

Sd. Illegible
Haji Mohd. Yusoff Bin Haji.
A. Rahim P.L.P.
Commissioner for Oaths
JOHORE BAHRU

30

IN THE HIGH COURT OF MALAYA AT JOHORE BAHRU
ORIGINATING SUMMONS

No. 144 of 1977

In the Matter of Chargee's
Application under Section
256 and 257 of the National
Land Code, Act No. 56 of
1965

IN THE HIGH
COURT OF MALAYA
AT JOHORE BAHRU

No. 5.
Affidavit of
Koh Kim Chai
dated 31st
July 1978

10

And

In the Matter of a Charge
dated the 22nd day of May
1973 bearing Presentation
No.5641/73 Charge Volume
179 Folio 4 on all that
piece of land comprised and
delineated in Grant 23940, Lot
2605, Mukim of Senai - Kulai,
Johore.

20

Between

Asia Commercial Banking
Corporation Limited of
No. 110 Robinson Road
Singapore 1.
... Chargee/Applicant

And

KOH KIM CHAI of No.2E
Jalan Ah Fook, Johore
Bahru
... Chargor/Respondent

30

FURTHER AFFIDAVIT

I, KOH KIM CHAI, a Malaysian Chinese of
full age, residing at No.2E Jalan Ah Fook, Johore
Bahru affirm and say as follows:-

1. Further to my Affidavit affirmed by me on
the 12th day of February, 1978 I beg to state
that I have been advised by my Solicitors that
the Chargee/Applicant is not legally entitled to
enforce the three Charges all dated 22nd May
1973 on the following grounds:-

40

- (a) that the Charge documents refer to money
lending transactions entered into between
the Chargee/Applicant and the borrower
mentioned in the aforesaid Charges and, as

IN THE HIGH
COURT OF MALAYA
AT JOHORE BAHRU

No. 5
Affidavit of
Koh Kim Chai
dated 31st
July 1978

such, are contrary to the Moneylenders Ordinance and are therefore illegal and are unenforceable.

(b) that the documents of Charges having reference to the Chargee/Applicant as "the Bank" invariably refer to banking transactions which are illegal is contrary to section 3 of the Banking Act and therefore are illegal and unenforceable.

(c) that the security by way of the aforesaid three charges is contrary to Sections 9, 11 and 15(a) of the Exchange Control Act and is illegal and therefore unenforceable in this Honourable Court.

10

2. Under the above circumstances I have been advised by my Solicitors and I verily believe that by reason of the averments mentioned above the Chargee/Applicant cannot have and maintain its claim and is not entitled to the reliefs sought by the Chargee/Applicant in the above Originating Summons and that the Charges are illegal and unenforceable.

20

3. The Grant No.23940 was delivered to the Chargee/Applicant by me together with the relevant forms of Charges duly executed by me at Johore Bahru on the 22nd day of May 1973 upon which a memorial of the said Charges has been made on the Grant by the Registrar of Titles, Johore.

4. I am further advised by my Solicitors and I verily believe that by reason of the aforesaid averments I am entitled to have the Charges discharged and to have the memorial of the said discharge entered on the said Grant No. 23940 and also to have the said Grant No. 23940 returned to me.

30

5. I therefore pray:-

(a) that the Chargee/Applicant's Originating Summons herein be dismissed;

(b) for an Order that the Charges bearing Presentation Nos. 5639/73, 5640/73 and 5641/73 and in favour of the Chargee/Applicant all the land held under Johore Grant No. 23940 has at all times been and is unenforceable and is cancelled;

40

(c) for an order that the Chargee/Applicant do immediately discharge the said Charges bearing Presentation Nos. 5639/73, 5640/73

and 5641/73 and the entries relating thereto on the said Grant and in the Registry of Titles, Johore, cancelled;

IN THE HIGH
COURT OF MALAYA
AT JOHORE BAHRU

No. 5
Affidavit of
Koh Kim Chai
dated 31st
July 1978

- 10 (d) for an order that if the Chargee/Applicant fails to comply with prayer (c) above within one (1) month of the order, the Senior Assistant Registrar of this Court do execute a discharge of the said Charges and deliver the said discharge to the Chargor/Respondent for presentation to the Registrar of Titles, Johore;
- (e) for an order that the Registrar of Titles, Johore do register either of the said discharges, as may be presented to him, of the said Charges;
- 20 (f) for an order that the Chargee/Applicant do return to the Chargor/Respondent the issue document of Johore Grant No. 23940 and duplicate of the said Charges bearing Presentation Nos. 5639/73, 5640/73 and 5641/73;
- (g) for costs of this claim and counterclaim and
- (h) for such other and further relief as the Honourable Judge or the Court may deem fit.

AFFIRMED by the abovenamed)
KOH KIM CHAI at Johore)
Bahru on the 31st day of) Sd. Illegible
July, 1978)

Before me,

Sd. Illegible
Mustapha Bin Mohammad P.I.S.
Commissioner for Oath
High Court
JOHORE BAHRU

No.6
Note of
Proceedings in
Chambers and in
Open Court 16th
October 1977 to
28th December
1978

IN THE HIGH COURT IN MALAYA AT JOHORE BAHRU

ORIGINATING SUMMONS NO.144 OF 1977

10

Between

Asia Commercial Banking Corporation
Ltd. .. Applicant

And

KOH KIM CHAI .. Respondent

NOTES RECORDED BY DATO SYED OTHMAN, F.J.

In Chambers.

16th October, 1977

Lim Cheun Ren for applicant.

20

K.C. Koh in person.

Ong Beng Tiong - Exec. Officer of Bank.

Koh - Mr. Paramjothy is to appear for me. But
he is away at the moment. I would ask for
postponement 2 months.

Lim Cheun Ren - I agree to a month's postponement.

Till 4.12.77. No order as to costs as
agreed.

In Chambers.

4th December, 1977.

30

Lim Cheun Ren for applicant. Present Ong
Beng Tiong for Bank. K.C. Koh in person.

Lim - Application for sale - default of charge.

Koh - There are 3 companies involved. O.S. 145
& 146 of 77. Relate to same matter. I am
seeking postponement for all these - 3 months
with a view to settle matter with the bank. A
number of people are involved. Amount large.

Lim - Matter has been postponed twice. Last postponement. Till 17.1.78. Connected matters O.S. 145-146/77 to this date.

IN THE HIGH COURT
OF MALAYA AT
JOHORE BAHRU

In Chambers.

No.6

17th January, 1978.

Note of
Proceedings in
Chambers and in
Open Court 16th
October 1977 to
28th December
1978 (Contd.)

- 10 Lim Cheun Ren for applicant.
- Thara Singh for respondent.
- Present - Ong Ben Tiong. Senior Executive
 Officer of Bank.

Lim - Matter postponed twice to enable applicant to see bank with a view to settlement. Nothing so far.

Thara - I have been instructed to apply for last postponement with a view to settling matter. 3 weeks will be enough.

- 20 Lim - Objects to application. Respondent granted two adjournments. Respondent himself was present last time. Till 12.2.78 last postponement.

In Chambers.

12th February, 1978.

Chandrasekaran for applicant.

Paramjothy for respondent.

Chandrasekaran - I ask for postponement. File passed to me this morning. Other side has not received affidavit in support of O.S.

- 30 Till 23.4.78.

In Chambers. - O.S. 144/77

23rd April, 1978.

Lim Cheun Ren for applicant.

Paramjothy for respondent.

Present - Ong Beng Tiong, Bank Officer.

Lim - Matter was postponed to enable - no settlement. I ask for Order.

Paramjothy - K.C. Koh's affidavit.

IN THE HIGH
COURT OF MALAYA
AT JOHORE BAHRU

Lim - Amount as today is shown in affidavit.
(Ct. - to be enclosed (9)).

Ct. Order in terms of O.S. - Para 3 to show
amount due as at date of Order.

No.6
Note of
Proceedings in
Chambers and in
Open Court 16th
October 1977 to
28th December
1978 (Contd.)

O.S. 145/77

Parties as above.

Lim - Same as above. This is affidavit showing
sum due as at today - (9).

Paramjothy - K.C. Koh has filed affidavit.

Ct. - Order in terms of O.S. - Para 3 to
be amended to show sum due as at today.

O.S. 146/77

Parties as above.

Lim - This is affidavit showing amount due as at
today - encl. (9).

Paramjothy - K.C. Koh has filed affidavit.

Ct. - Order in terms of O.S. - Para 3 to
be amended to show amount due as at today.

In Open Court

1st July, 1978

O.S. 144, 145 & 146/77

Asia Commercial Banking Corp. v. Koh Kim Chai.

Miss Cheah Chew Kwee for applicant.

Paramjothy for respondent.

Paramjothy. - For further argument I have to
apply for postponement. Respondent wishes to
engage another counsel to argue this matter.
Prepared to pay costs. This is the first time
matter comes up in Open Court.

Miss Cheah - We have not been informed about
this. I ask for an early date.

Till 31.7.78. Costs agreed \$200/- to
respondent.

In Open Court.

31st July, 1978.

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O.S. 144/77 (for further arguments)

Asia Commercial Banking Corp. v. Koh Kim Chai

Miss Cheah Chew Kwee for applicant.

Paramjothy for respondent.

Both parties indicate that they are ready.

10 Paramjothy - I have asked for further argument in this case. Facts are not disputed - as appearing in applicant's affidavit. But amount is disputed.

20 Application for an Order for sale by public auction pursuant to a charge registered and consequential orders under the charge. Respondent filed an affidavit offering applicant date 12.2.78. O.S. 145 and 146/77 will, I agree, follow the result of this O.S. They relate to same land. Parties same, but different charges. Each one of them is a 3rd party charge for different borrows.

O.S. 144/77 borrower Overseas Lumber Pte. Ltd. - a Singapore Co.

O.S. 145/77 borrower Kimwood Trading Co. - a Malaysian firm.

O.S. 146/77 borrower Overseas Lumber Berhad - a Malaysian Co.

30 These 3 companies were granted loans by applicant under 3 separate accounts guaranteed by the respondent under the 3 different charges for the same piece of land in Johor. Affidavit of respondent 12.2.78 - encl. (8) para 5. See also paras 7, 8, 9 & 10. Application for foreclosure for these reasons I would submit at law is illegal. Applicant is bank incorporated in Singapore; loan given in Singapore to 2 Malaysian companies and one Singapore company. Loans were in Singapore before the charge.
40 No evidence that these moneys came to Malaysia. If applicant had proceeded in Singapore and brought judgment here then there would have been different consideration. Bank is seeking to enforce charge created under Malaysian Law in respect of security governed by Malaysian law. Lex fori applies.

50 So Ct. must look into the status of the applicant as a bank. This is a Singapore bank which cannot operate in Malaysia unless it is licensed in Malaysia. S.3 of the Banking Act 102/73. Applicant does not have the status of a bank in this country. Since it is not a bank for the

IN THE HIGH COURT
OF MALAYA AT
JOHORE BAHRU

No.6
Note of
Proceedings in
Chambers and in
Open Court 16th
October 1977 to
28th December
1978 (Contd.)

IN THE HIGH
COURT OF MALAYA
AT JOHORE BAHRU

No.6
Note of
Proceedings in
Chambers and in
Open Court 16th
October 1977 to
28th December
1978 (Contd.)

purpose of our law it is a moneylender. S.5
Moneylenders Ord. will apply and it is not
licensed. Prepared to concede that at the
time there was no restriction as to the movement
of moneys between Singapore and Malaysia -
at all material times to the transactions. I
believe that in 1974 Singapore was taken out
from scheduled territory. Sums in excess of
\$1,000/- requires approval of the Exchange
Control Authority. (Miss Cheah, I agree to
this). Section 9 (1) Exchange Control Ord.
Under existing law - scheduled territory and
that is Malaysia. No evidence to show that
applicant is a person who has authority under
s.9(1). See s.11(1), 15 Exchange Control Act.
Applicant not a bank, not a moneylender for
purposes of our law or a person not having
authority under Exchange Control Act to recover
monies under securities which have been charged
to a foreign bank. Law precludes bank from
recovering a security unless permission from
Controller of Foreign Exchange. The applicant's
remedies should be in Singapore - not here.
Respondent making an application for purpose of
expunging charge - not yet filed.

10

20

I have filed another affidavit in this
matter stating that the charge is bad at law
and asking that the charge be cancelled and
for consequential orders. On the grounds fore-
going I submit that charge is bad and should be
cancelled in terms of the prayers in the
affidavit - encl. (11).

30

Miss Cheah - I have just received this affidavit.
I ask that matter be deferred to another date to
prepare for this fresh ground.

To a date to be fixed.

Costs of the day fixed at \$100/- to
applicant.

In Open Court.

29th October, 1978

40

O.S. 144-6/77

Miss Cheah Chew Kwee for applicant.

Paramjothy for respondent.

Paramjothy - I ask for further arguments. I
have already made my submission, 31.7.78. 3
charges are involved and unenforceable on the
ground transactions are those of a loan. Charge

of Malaysian property executed in favour of foreign bank not licensed to carry on in Malaysia under Banking Act. If not bankers they are moneylenders. Deeds executed in Singapore. Money disbursed in Singapore. Transaction in breach of sections 9, 11 & 15 of the Exchange Control Act.

IN THE HIGH COURT
OF MALAYA AT
JOHORE BAHRU

No.6
Note of
Proceedings in
Chambers and in
Open Court 16th
October 1977 to
28th December
1978 (Contd.)

10

Miss Cheah - I have here written submission.

Ct. - I think the 1st 4 pages can be omitted. If I am not mistaken the effect of Mr. Paramjothy's argument is that if the transactions had taken place in Malaysia with a local bank they would have been valid.

Paramjothy - I agree.

20

Miss Cheah - reads from p.4. Another point brought up by respondent in affidavit - Charge made subsequent to overdraft facilities. This ground should fail - common banking practice to facilitate business overdraft granted first on the understanding the land would be charged as security. Even if there was a previous arrangement the creation of charge amounted a novation of any previous arrangement. It was a continuing contract.

30

Failure of consideration on the part of the applicant for having returned cheque for \$100,000/- by Overseas Lumber Bhd. on 9.6.73 although as on that date the overdraft limit had not been exceeded. To this, see proviso to Cl.5 in the charge. The bank had power to do this.

40

Paramjothy - Loan related to overdraft and to Singapore. No evidence that money came to Malaysia. Banking Act. F.E. Act do not apply. Applicant are foreclosing in Malaysia and seeking to take money out of Malaysia. Entire transaction. Applicant should have got permission from Central Bank to enter into the transaction at the initial stages. Charges executed in June, 1973.

Cheah - Amendment to Foreign Exchange Act came into force in May, 1973.

Paramjothy - Transactions infringed Act at the time. Whole transaction is vitiated.

50

Another argument. Common banking practice. Prudent bank should not indulge this practice. There must be a charge first, then overdraft. Applicant has other remedies but Malaysia is not the forum. Under Contract Act part consideration

IN THE HIGH COURT
OF MALAYA AT
JOHORE BAHRU

is good consideration.

Both counsel - We can come for another day for
judgment. (Deepavali eve).

28th December, 1978. C.A.V.

O.S. 144/77.

Asia Commercial Banking Corporation v. Koh Kim Chai. 10

Miss C.K. Cheah for applicant.

Paramjothy for respondent.

Judgment delivered. Order of 23.4.78 to remain.

Paramjothy - May I ask for stay in the event of appeal.

CT. - I would not order this at this stage.
You may apply if respondent is in fact appealing. 20

Sd. S. Othman Ali

Certified copy.

J. Leon

(J. LEON)
Secretary to Judge.

IN THE HIGH COURT
OF MALAYA AT
JOHORE BAHRU

No. 7

JUDGMENT OF SYED OTHMAN BIN ALI J.
dated 28th December 1978

No. 7
Judgment of Syed
Othman Bin Ali
J. dated 28th
December 1978

30

IN THE HIGH COURT OF MALAYA AT JOHORE BAHRU

ORIGINATING SUMMONS NO.144 OF 1977

Between

Asia Commercial Banking Corporation
Ltd.

Applicant

And

Koh Kim Chai

Respondent

JUDGMENT OF SYED OTHMAN, F.J.

40

The applicant seeks the sale by public auction

under the direction of Senior Assistant Registrar of a piece of land comprised in Grant 23940, Lot 2605 in the Mukim of Senai-Kulai, Johor, measuring 53 acres 0 rood 30 poles, to recover the amount due to the applicant on a charge over the land by the respondent. As at 9.1.1975 the amount due, i.e. principal and interest, was \$420,328.63. This was in fact the third charge by the respondent. It was a security for an advance on current account in favour of the Overseas Lumber Private Ltd. to the limit of \$350,000.

IN THE HIGH COURT
OF MALAYA AT
JOHORE BAHRU

No.7

Judgment of Syed
Othman Bin Ali
J. dated 28th
December 1978
(Contd.)

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There are two other previous charges on which the applicant is also seeking sale of the land in Originating Summons (O.S.) 145/77 and 146/77. It is agreed that the decision of the Court in this O.S. will apply to those two O.S. The first charge was to the account of Kimwood Trading Company and the amount shown as at 9.1.1975 was \$499,463.26. The second charge was to the account of Overseas Lumber Berhad and the amount due as at 9.1.1975 was \$94,721.55.

The respondent objected to the sale on the land that when the charges were entered, the overdraft facilities had already been given to the three companies, and they were executed because the applicant had problems with Monetary Authorities Singapore and to save the applicant from query; that there was a breach of contract by the applicant returning a cheque of \$100,000 issued by Overseas Lumber Berhad when the overdraft account was still under the agreed limit; and that the charges were invalid, illegal or unenforceable as the applicant is not licensed to carry on the business of a bank in Malaysia (section 3 of the Banking Act, 1973), and is holding itself out as a "bank" in contravention of section 9 of the Banking Act. By a further affidavit he says that the applicant is not legally entitled to enforce the charges, as it has acted in contravention of the Moneylenders Ordinance, and that the security under the charges is contrary to sections 9, 11 and 15(a) of the Exchange Control Act, 1953 (Revised - 1969). He seeks that the charges be discharged and the titles be returned to him.

The matter first came up before me on 16.10.1977. The respondent appeared in person. At his request it was postponed till 4.12.1977 when the respondent again appeared in person and asked for postponement with a view to settlement, as according to him, a number of people were involved. The Court postponed the matter till 12.2.1978 to enable the respondent to see the bank with a view to settlement. On 12.2.1978 the

No.7
Judgment of Syed
Othman Bin Ali
J. dated 28th
December 1978
(Contd.)

respondent filed his first affidavit. The matter was again postponed till 23.4.1978. After hearing the brief arguments of both sides, order in terms of O.S. was granted except that para 3 was to be amended to show amount due as at the day of the Order to comply with section 257 (1) (c) of the National Land Code. The respondent then applied for further arguments. 1.7.1978 was fixed for the arguments but counsel for respondent then applied for postponement indicating that the respondent was engaging another counsel to argue the matter. The Court gave 31.7.1978. On this very date the respondent filed the further affidavit, but there was no new counsel. Encik Paramjothy appeared for the respondent as on previous occasions. Encik Paramjothy does not dispute the facts as in applicant's affidavit except the amount. He submits further in effect the three loans were given to two Malaysian companies and one Singapore company; as the applicant is seeking to enforce the charges here, the law here applies; but the applicant, being a bank in Singapore, cannot operate here unless licensed in compliance with section 3 of the Banking Act; as it is not a bank for the purpose of the law here, it is moneylender; and it is not licenced moneylender. He concedes that at the time of the loan, Singapore was a scheduled territory, but from 1974 it is no longer Scheduled territory, and this being the case, any transfer of money exceeding \$1,000 would require approval of the Exchange Control. He refers to the provisions of law indicated in the further affidavit.

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I find that there was no breach of contract when the applicant refused payment of \$100,000 on a charge issued by the Overseas Lumber Berhad on 9.6.1973. Clause 5 of the Charge, as pointed out by the applicant's side, clearly says that nothing in the charge shall be deemed to render it obligatory upon the bank to meet advances to the Borrower.

40

The respondent says that he is disputing the amount but does not show in what way the amount claimed is incorrect.

I can see no valid argument for the respondent's contention that the charges were in effect bad by reason of his having executed them when the three companies had in fact already received the overdrafts. On his own contention, there was in fact adequate consideration when he executed the charges, as they were to secure the overdrafts that had been granted to his companies.

50

I come to the various provisions of law referred to by the respondent which are asaid to render the charges illegal.

IN THE HIGH COURT
OF MALAYA AT
JOHORE BAHRU

10 Section 3 of the Banking Act relates to a bank operating in this country. It is not disputed that the applicant was operating as a bank in Singapore. The transaction was good according to Singapore laws. This is what matters. Section 9 of the Banking Act has application to a bank operating here.

No.7
Judgment of Syed
Othman Bin Ali
J. dated 28th
December 1978
(Contd.)

Section 5 of the Moneylenders Ordinance, 1951: again this was a transaction outside the country. There is nothing to show that the transaction could be contrary to any equivalent Singapore law. As a bank, the Court must presume that it was authorised to lend out money.

20 Section 9 of the exchange Control Act does not appear to have any application here. The applicant is seeking the order of the Court for the sale of land under the National Land Code on charges which were executed under the Code. The proper provision that seems to operate is para 1 of the Fourth Schedule to Act, which so far as applicable, provides that it shall be implied in any order of any court in Malaysia that any sum required to be paid by the order to which the provisions of Part III apply shall not be paid except with the permission of the Controller. I would be a matter for the
30 applicant to get the permission of the Controller before the Senior Assistant Registrar here can make any payment to it from the proceedings of sale.

Sections 11 and 15 of the Exchange Control Act can be dealt with together. Both provisions relate to securities. They read:

40 "11. (1) Except with the permission of the Controller, no person shall, in Malaysia, issue any security or do any act which involves, is in association with, or is preparatory to, the issuing outside Malaysia of any security which is registered or to be registered in Malaysia, unless the following requirements are fulfilled:

(a) neither the person to whom the security is to be issued nor the person, if any, for whom he is to be a nominee is resident outside the scheduled territories; and

50 (b) the prescribed evidence is produced to

No.7

Judgment of Syed
Othman Bin Ali
J. dated 28th
December 1978
(Contd.)

the person issuing the security as to the residence of the person to whom it is to be issued and that of the person, if any, for whom he is to be a nominee.

(2) The subscription of the memorandum of association of a company to be formed under the Companies Act, 1965, by a person resident outside the scheduled territories, or by a nominee for another person so resident, shall, unless he subscribes the memorandum with the permission of the Controller be invalid in so far as it would on registration of the memorandum have the effect of making him a member of or shareholder in the company, so, however, that this provision shall not render invalid the incorporation of the company; and if by virtue of this sub-section the number of the subscribers of the memorandum who on its registration become members of the company is less than the minimum number required to subscribe the memorandum, the provisions of the said Act relating to the carrying on of business of a company the number of whose members is reduced below the legal minimum shall apply to the company as if the number of its members had been so reduced."

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"15. Except with the permission of the Controller:-

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(a) no person in Malaysia shall do any act with intent to secure that capital moneys payable on a security registered in Malaysia are paid outside Malaysia, or that, where the certificate of title to a security is in Malaysia, capital moneys payable on the security are paid outside Malaysia without production of the certificate to the person making the payment;

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(b) no person resident in the scheduled territories shall, in Malaysia, do any act which involves, is in association with, or is preparatory to, any such transaction outside Malaysia as is referred to in paragraph (a)."

"Securities" is defined in section 2 to mean shares, stocks, bonds notes (other than promissory notes) debenture, debenture stock, units under a trust scheme and shares in an oil royalty. Charges of land do not come within the definition.

50

I find no merit to the respondent's contention

that this application for sale should be made in Singapore courts. The application for sale of the land is pursuant to section 256 of the National Land Code, which specifically empowers the High Court of Malaya to make an Order for sale. Further, as the respondent resides within the jurisdiction of this Court, I find that the applicant has rightly sought recourse here.

IN THE HIGH COURT
OF MALAYA AT
JOHORE BAHRU

No.7

Judgment of Syed
Othman Bin Ali
J. dated 28th
December 1978
(Contd.)

10 Considering all the arguments, I see no reason to alter my decision granting the application in terms, except that para 3 of the O.S. to be amended so as to show the amount due as on the date of the order in compliance with section 257 (1) (c) of the National Land Code.

20 The respondent's application for the charges to be discharged and the title to be returned to him is dismissed. But I should add that even if the respondent has established illegality on any of the grounds stated, I would find that he is not entitled to remedy, as his claim is founded on an illegal act, of which he was more to blame, as it was he who went to the bank outside the country.

Costs to applicant.

DATUK SYED OTHMAN BIN ALI
(Syed Othman Bin Ali)
Federal Judge.

30 Johor Bahru
28th December, 1978.

Counsel -

Encik Lim Cheun Ren and Miss Cheah Chew Kwee
(M/s. Yeow & Chin) for applicant)

Encik C. Paramjothy (M/s. Wong & Paramjothy)
for respondent.

Certified copy.

Sd. J. Leon)
(J. LEON)
Secretary to Judge.

IN THE HIGH COURT
OF MALAYA AT
JOHORE BAHRU

No.8

ORDER OF SYED OTHMAN BIN ALI J. dated
28th December 1978

No.8
Order of Syed
Othman Bin Ali
J. dated 28th
December 1978

IN THE HIGH COURT IN MALAYA AT JOHORE BAHRU

CHARGEES' APPLICATION

ORIGINATING SUMMONS)
No.144 of 1977)

10

In the Matter of a Chargee's
Application under Sections
256 and 257 of the National
Land Code, Act No.56 of 1965

And

In the Matter of a Charge
dated the 22nd day of May
1973 bearing Presentation
No. 5641/73 Charge Volume
179 Folio 4 on all that
piece of land comprised and
delineated in Grant 23940,
Lot 2605, Mukim Senai-Kulai,
Johore

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Between

Asia Commercial Banking
Corporation Limited of No.
110 Robinson Road, Singapore
l.

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Chargee/Applicant

And

Koh Kim Chai of No. 2E Jalan
Ah Fook, Johore Bahru
Chargor/Respondent

BEFORE THE HONOURABLE MR. JUSTICE IN CHAMBERS
DATO SERI SYED OTHMAN BIN ALI THIS 28TH DAY
 OF DECEMBER,
 1978

O R D E R

40

UPON the application on the part of ASIA
COMMERCIAL BANKING CORPORATION LIMITED, the
abovenamed Chargee/Applicant, made by way of
Originating Summons Entered No.521 of 1977 dated
the 7th day of June, 1977 coming on for hearing
on the 23rd day of April 1978 AND UPON further
argument in Open Court on the 31st day of July

1978, 29th day of October 1978 and 28th day of December 1978 AND UPON READING the said Originating Summons and the Affidavit of Ong Beng Tiong affirmed on the 16th day of May 1977 and filed herein on the 7th day of June 1977 and the exhibits referred to therein and the Affidavit of A. Chani bin Md. Tahir affirmed and filed herein on the 18th day of July 1977 and the exhibit referred to therein and the Affidavit of Lim Cheun Ren affirmed on the 19th day of April 1978 and filed herein on the 23rd day of April 1978 and the exhibit referred to therein and the Further Affidavit of Koh Kim Chai Affirmed and filed herein on the 31st day of July 1978 AND UPON HEARING Miss Cheah Chew Kwee of Counsel for the abovenamed Chargee/Applicant and Mr. Paramjothy of Counsel for the abovenamed Chargor/Respondent THIS COURT DOTH ORDER:-

IN THE HIGH COURT
OF MALAYA AT
JOHORE BAHRU

No.8

Order of Syed
Othman Bin Ali
J. dated 28th
December 1978
(Contd.)

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1. That all that piece of land comprised in Grant 23940, Lot 2605 in the Mukim of Senai-Kulai and containing an area of 53 Acres 0 Rood 30 Poles or thereabouts be sold by public auction under the direction of The Senior Assistant Registrar;
2. That the sale be held on a date not less than one month after the date upon which this Order is made;
3. That the total amount due to the Chargee/Applicant in respect of the principal and interest at the rate of 14.75% per annum up to the 23rd day of April 1978 amounts to \$665,053-68;
4. That the Chargee/Applicant is further entitled to interest at the rate of 14.75% per annum with monthly rests from the 23rd day of April 1978 to the date of realisation;
5. That The Senior Assistant Registrar of the Court shall further fix a reserve price for the purpose of the said sale equal to the estimate market value of the said land;
6. That there be liberty to all parties to apply;
7. That the costs, charges, expenses of and incidental to this application and of the sale hereby directed be taxed by The Senior Assistant Registrar on the Higher Scale and be paid by the Chargor/Respondent to the Chargee/Applicant and the amount of such costs, charges and expenses when duly taxed be added by the Chargee/Applicant to the

IN THE HIGH COURT
OF MALAYA AT
JOHORE BAHRU

amount due for principal and interest
owing under the said Charge.

Given under my hand and the Seal of the
Court, this 28th day of December 1978.

No.8
Order of Syed
Othman Bin Ali
J. dated 28th
December 1978
(Contd.)

Sd. Abdul Kadir bin Musa
SENIOR ASSISTANT REGISTRAR
HIGH COURT, MALAYA,
JOHORE BAHRU.

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IN THE FEDERAL
COURT OF MALAYSIA
AT JOHORE BAHRU

No. 9

Notice of Appeal to the Federal Court
dated 31st December 1978

No.9
Notice of Appeal
to the Federal
Court dated 31st
December 1978

IN THE FEDERAL COURT OF MALAYA
(APPELLATE JURISDICTION)

20

FEDERAL COURT CIVIL APPEAL NO.4 of 1979

BETWEEN

Koh Kim Chai of No. 2E,
Jalan Ah Fook, Johore
Bahru

Appellant

And

Asia Commercial Banking Corporation
Limited of No.110 Robinson Road,
Singapore 1

Respondent

(In the Matter of Johore Bahru High
Court Originating Summons No. 114
of 1977

30

Between

Asia Commercial Banking
Corporation Limited of No.110
Robinson Road, Singapore 1
Chargee/Applicant

And

Koh Kim Chai of No.2E Jalan Ah
Fook, Johore Bahru
Chargor/Respondent

40

NOTICE OF APPEAL

TAKE NOTICE that Koh Kim Chai the Appellant

abovenamed, being dissatisfied with the decision of the Honourable Mr. Justice Dato Syed Othman given at the High Court, Johore Bahru on the 28th day of December, 1978 appeals to the Federal Court against the whole of the said decision.

IN THE FEDERAL
COURT OF MALAYSIA
AT JOHORE BAHRU

Dated this 31st day of December 1978.

No.9
Notice of Appeal
to the Federal
Court dated 31st
December 1978
(Contd.)

10

Sd. M/s. Wong & Paramjothy
Solicitors for the Appellant

- To: 1. Senior Assistant Registrar
High Court, Johore Bahru
2. Chief Registrar
Federal Court, Kuala Lumpur
3. M/s. Yeow & Chin
Advocates & Solicitors
Johore Bahru

20

This Notice is filed by M/s. Wong & Paramjothy whose address for service is at No. 50-C5 Bangunan Koperasi Melayu Johor, Jalan Segget, Johore Bahru, Solicitors for the abovenamed Appellant.

No.10

Memorandum of Appeal dated 8th November
1979

IN THE FEDERAL
COURT OF MALAYSIA
AT JOHORE BAHRU

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IN THE FEDERAL COURT OF MALAYSIA HOLDEN
AT KUALA LUMPUR
(APPELLATE JURISDICTION)
CIVIL APPEAL NO.4 OF 1979

No.10
Memorandum of
Appeal dated 8th
November 1979

Between

Koh Kim Chai

Appellant

And

Asia Commercial Banking Corporation
Limited

Respondent

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(In the Matter of Johore Bahru High Court
Chargee's Application Originating Summons
No.144 of 1977)

IN THE FEDERAL COURT OF MALAYSIA
AT JOHORE BAHRU

Between
Asia Commercial Banking Corporation
Limited Chargee/Applicant

No.10
Memorandum of Appeal dated
8th November 1979 (Contd.)

And
Koh Kim Chai Chargor/Respondent

MEMORANDUM OF APPEAL

10

KOH KIM CHAI, Appellant abovenamed appeals to the Federal Court against the whole of the decision of the Honourable Justice Dato Syed Othman bin Ali, F.J. given at Johore Bahru on the 28th day of December, 1978 on the following grounds:-

1. The Learned Judge erred in Law and fact in failing to consider:-

(a) That the Applicant an unlicenced 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 unforceable and void.

20

(b) That being an unlicenced Bank in Malaysia and an unlicenced moneylender, the Applicant's Charge on Malaysian land is not enforceable pursuant to the Moneylenders Ordinance 1951 resulting in the Charge obtained being unforceable and void.

30

(c) That the Charge was created without the requisite permission being obtained under the Exchange Control Act 1953 and consequently, the said Charge is illegal, unforceable and void.

2. The Learned Judge erred in law and fact in coming to the conclusion:-

(a) That as the Applicant was operating in Singapore and the transaction was good under Singapore Law, Section 3 and Section 9 of the Banking Act has no application.

40

(b) That as the transaction place outside Malaysia, the Moneylenders Ordinance of Malaysia is not applicable.

(c) That Section 9 of the Exchange Control Act has no application as the Applicant is seeking the Order of the Court for sale of land under the National Land Code on Charges which were executed under the National Land Code, and that

the proper provision that is applicable is paragraph 1 of the 4th Schedule of the Exchange Control Act.

IN THE FEDERAL
COURT OF MALAYSIA
AT JOHORE BAHRU

3. The Learned Judge failed to consider:-

No.10
Memorandum of
Appeal dated 8th
November 1979
(Contd.)

10 (a) With regard to the matters stated in 2(a) and 2(b) above, that the law applicable to the foreclosure of the Charge in Malaysia is Malaysian Law and that the transaction should be valid and enforceable according to Malaysian Law, before foreclosure can be granted.

20 (b) With regard to paragraph 2(c) above the Exchange Control Act has relevance as the entire transaction becomes illegal if the requisite permission has not been obtained under the said Act, which was not done in this case and that the fact that the Charge was created under the National Land Code does not exempt it from the requirements to comply with the Exchange Control Act. Further the Learned Judge failed to consider that paragraph 1 of the 4th Schedule of the Exchange Control Act is not applicable as it has application only to payments to be made abroad after a judgment has been obtained.

30 5. That the Learned Judge erred in coming to the conclusion "that even if illegality is established, the Respondent is not entitled to a remedy as his claim is found on an illegal act", particularly when the Respondent was resisting the enforcement of the illegal transaction and not enforcing it.

Dated this 8th day of November 1979

Solicitors for the Appellant/
Respondent abovenamed

To: 1. The Chief Registrar
Federal Court, Kuala Lumpur
2. The Senior Assistant Registrar
High Court, Johore Bahru
3. Messrs. Yeow & Chin
Solicitors for the Respondent/Applicant
40 Johore Bahru

This Memorandum of Appeal is filed on behalf of the abovenamed Appellant/Respondent by Messrs. Ng Ek Teong & Partners of 2nd Floor, Bangunan Persatuan Hokkien Selangor, Jalan Raja Chulan, Kuala Lumpur, Solicitors for the abovenamed Appellant/Respondent.

IN THE FEDERAL
COURT OF
MALAYSIA AT
JOHORE BAHRU

No.11

JUDGMENT OF FEDERAL COURT dated 24th
JUNE 1980

No.11
Judgment of
Federal Court
dated 24th
June 1980

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT
JOHORE BAHRU (Appellate Jurisdiction)

Federal Court Civil Appeal No.4 of 1979

Between

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KOH KIM CHAI

Appellant

And

ASIA COMMERCIAL BANKING
CORPORATION LIMITED

Respondent

(In the Matter of Johore Bahru High Court
Chargee's Application Originating Summons
No.144 of 1977

Between

ASIA COMMERCIAL BANKING
CORPORATION LIMITED

Chargee/Applicant

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And

KOH KIM CHAI

Chargor/Respondent)

Coram: Lee Hun Hoe, C.J. Borneo
Wan Suleiman, F.J.
Hamid, J.

JUDGMENT OF THE FEDERAL COURT

This appeal is against the decision of the
learned Judge ordering the sale by public auction
of that piece of land comprised in Grant 23940,
Lot 2605 in the mukim of Senai-Kulai containing
an area of 53 acres 0 rood 30 poles. Three
cases on the same grounds of appeal are involved.
For convenience, one case was heard and the
decision would be binding on the other two.

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Appellant is the registered owner of the
land. Respondent is a bank carrying on business
in Singapore. Appellant agreed to charge his
land in favour of the bank as a guarantee for
overdraft facilities given to two Malaysian
companies and a Singapore company who were the
bank's customers. Three charges were effected
on 23rd May, 1973. The first charge relates to
overdraft facilities to Kimwood Trading Company
up to a limit of \$400,000.00 with interest at
the rate of 10.8 per centum. The second charge

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relates to similar facilities to Overseas Lumber Berhad up to a limit of \$500,000.00 with interest at same rate. The third charge (with which we are concerned in this appeal) relates to similar facilities to Overseas Lumber Private Limited of 20A, Robinson Road, Singapore up to a limit of \$350,000.00 with interest at the same rate. As at 9th January, 1975 the amount due on the third charge, i.e. principal and interest was \$420,328.63. Under the terms of the charge the amount owing is payable on demand. A demand in Form 16E under the National Land Code was made on 22nd August, 1976 for payment of the amount due. No payment was made. So, by an Originating Summons dated 7th June, 1977 appellant sought for an order for the sale of the land by public auction.

IN THE FEDERAL
COURT OF MALAYSIA
AT JOHORE BAHRU

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dated 24th June
1980 (Contd.)

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As regards the other two charges the amount due on 9th January, 1975 on the first charge was \$499,463.26 and on the second charge \$94,721.55. Similar applications were made for the sale of the land by public auction.

It is the contention of appellant that respondent has flouted the Banking Act, 1973 and the Moneylenders Ordinance. Respondent is a Singapore bank and not licensed to carry on banking business in Malaysia under section 3 of the Banking Act, 1973. Anything the bank does which is related or incidental to creating advances to its customers is carrying on banking business. The making of advances to customers and receiving payment are interdependent act forming an essential part of banking business. The obtaining of security and enforcement of security in respect of the advance made are part of the process of advancement. He, therefore, argued that by requiring and accepting charges of Malaysian land to secure loan and by seeking to enforce the security respondent was carrying on banking business in Malaysia.

In his reply respondent pointed out that the main contract was the contract of loan between the bank and the borrower. The proper law of contract is that of Singapore. There is nothing to show any contravention of Singapore law. To secure the loan, a third party (the appellant), executed a charge in favour of the bank of his property in Malaysia. By paragraph 5 of his affidavit appellant stated, inter alia, that "I gave in and allowed them to charge my property for the overdraft facilities already granted and additional facilities up to the limits stated in the purported First, Second and Third Charges". Appellant did not pursue the contention which he

IN THE FEDERAL
COURT OF
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raised in the lower court that the charges were bad by reason of his having executed them when the three companies had in fact already received the overdrafts. This argument was rightly rejected by the learned Judge as there was in fact adequate consideration when appellant executed the charges. They were to secure the overdrafts that had been granted to his companies.

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The loan was given to the borrower in Singapore. Other than taking a charge of land in Malaysia there was no evidence that respondent had transacted any banking business in Malaysia. The property does not belong to the borrower but appellant who is a third party. It was submitted that the mere taking of a charge of property in Malaysia was not carrying on a banking business. Should an individual from Singapore take such a charge there would be no breach. The fact that respondent which happens to be a bank took such a charge should make no difference. Merely seeking to enforce a charge is also not carrying on banking business. There does not seem to be any provision in any law expressly forbidding a charge to a foreign person.

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That every contract is in general to be regulated by the law of the country in which it is made is expressed by the Latin term lex loci contractus. Where a contract made in one country is to be performed in another, then the law to be applied is that of the country where the contract is to be performed. This is expressed by the Latin term lex loci solutionis. The borrower and the guarantor are two different entities, each entering a separate contract of a different nature.

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The appeal is primarily concerned with the proper construction of statutes. It is a well recognised principle in the interpretation of statutes that a statute must be looked at as a whole. Before a bank can transact banking business either in Malaysia or Singapore it must obtain a licence. It seems that a bank operating in Malaysia but was subsequently refused a licence could still recover debts due to it as proceedings to recover debts did not amount to carrying on banking business, contrary to section 3 of the Banking Ordinance, 1958. See Bank of China v. Lee Kee Pin (1) and Bank of China v. Chew Kean Kor (2). In Bank of China v. Lee Kee Pin (1) Rigby, J., after referring to the facts and the relevant provisions of the Banking Ordinance, 1958 stated:-

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10 "..... It is said that for this Court to entertain the action would be to disobey the Legislature and - to quote the words of Lord Shaw of Dunfermline in the case of *Vacher & Sons, Ltd. v. London Society of Compositors* (3) - 'would on the part of the judiciary constitute a usurpation'. It was suggested that if the plaintiffs had outstanding debts due to them after the transitional period of three months had elapsed then their remedy might well be to apply to the Court, under the Companies Ordinance, for the Bank to be wound up and a receiver appointed to collect the debts due.

20 In support of his argument that in trying to recover money it had lent to its clients in the course of its business the Bank was carrying on business, Mr. B.K. Das, for the applicant, cited a number of authorities:- Theophile v. Solicitor-General (4), In re Reynolds (5), and Rawlinson v. Pearson (6).

30 As a general proposition I entirely accept the conclusion to be drawn from these cases that, generally speaking, a person or firm does not cease to carry on business merely because 'the shutters may have been put up', but continues until the sums due are collected and all debts paid. But the words 'bank' and 'banking business' are specifically defined in the Banking Ordinance, 1958. 'Bank' means 'any person who carries on banking business'; and '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'. Paragraph 4 of the defendant's affidavit in support of this application states:-

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-
- (1) (1961) M.L.J.40.
 - (2) (1963) M.L.J.41.
 - (3) (1913) A.C. 107 @ 127.
 - (4) (1950) A.C. 186 @ 201; (1950) 1 All E.R.405.
 - (5) (1915) 2 Q.B. 186 @ 189.
 - (6) 106 E.R. 1139 @ 1140.

50 '4. By a notice of action dated 23rd January, 1959 the plaintiffs' solicitors demanded payment of certain sums alleged to be due by me on overdraft account and stated: 'Our clients regret having to take this action but would

inform you that under the provisions of the Banking Ordinance, 1958, they have been notified by Government to wind-up their business in terms thereof'.

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Federal Court
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1980 (Contd.)

In my view, in seeking to recover the moneys due to them the plaintiffs were and are not 'transacting a banking business' within the meaning of the prohibition contained in section 3 and within the definition of 'banking business' as contained in the Ordinance itself. As I understand it, the mischief which the Ordinance seeks to avert is to prevent a person or company carrying on banking business in this country without being in possession of the requisite capital paid up in this country. To extend the meaning of the words 'transacting banking business' so as to place a prohibition upon the plaintiffs taking action, in the course of winding-up their business, to recover overdrafts allegedly due to them, would be, in my view, to impose upon them an intolerable hardship and injustice not justified by the plain meaning of the words 'banking business' as defined in the Ordinance." 10
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The result is that now section 12 of the Banking Act, 1973 allows a bank whose licence has been revoked to carry on such business as may be approved for winding up of his banking business which includes enforcing outstanding claims. 30

The Banking Ordinance, 1958 defines "banking business" to mean "the business of receiving money on account or deposit account, paying and collecting cheques drawn by or paid in by customers, and making advances to customers". This definition has now been replaced by section 2 of the Banking Act, 1973 which provides as follows:- 40

"'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." 50

Section 2 also defines "bank" to mean:-

" any person who carries on banking business".

It will be seen that this definition is very wide and may include individual partnership, association, society, company and other organisations. However, section 3(1) restricts the definition by providing that:-

10 "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 authorizing it to do so."

20 The section clearly permits transaction of banking business by a licensed corporation. The crucial question is whether the respondent, in acquiring and accepting charges of Malaysia's land, was conducting banking business. We are of the view that such transaction could not be said to come within the ambit of section 3 of the Banking Act 1973. It lacks the essential characteristic of banking business as principal part of the business of a bank. "Banking business" as defined under section 2 must, we think, be construed to embrace predominating business of banking. For this purpose it will be observed that -

30 "A "banker" is an individual, partnership or corporation, whose sole or predominating business is banking, that is the receipt of money on current or deposit account and the payment of cheques drawn by and the collection of cheques paid in by a customer. The judicial recognition of the banker's lien implies the inclusion in banking business of the making of advances or the granting of overdrafts to customers" (2 Halsbury's Laws (3rd Edn.) 150, 151).

Section 24 of the Contract Act, 1950 provides that:-

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

- (a) it is forbidden by law; or
.....
- (e) the Court regards it as immoral, or opposed to public policy."

50 Every agreement of which the object or consideration is unlawful is void. Appellant says the contract should not be allowed to be enforced because it also contravenes the provisions of the Exchange Control Act, 1953 (Act 17) (Revised - 1969). "Securities" is defined in section 2 to

IN THE FEDERAL
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mean shares, stocks, bonds, notes (other than promissory notes), debentures, debenture stock, units under a trust scheme and shares in an oil royalty. These provisions relate to securities and have been dealt with by the learned Judge who stated that charges of land did not come within the meaning of "securities" as defined in section 2. Suffice it to say that we agree with his interpretation.

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At the time of the loan transaction there was no restriction as to the movement of moneys between Singapore to Malaysia. It was only in 1974 when Singapore ceased to be regarded as a scheduled territory that any transfer of money exceeding \$1,000.00 would require approval of the Controller. Furthermore, appellant was not a customer of the bank but merely a guarantor for his companies. Does the fact that a Singapore bank took from a guarantor a charge of land in Malaysia necessarily mean that it was carrying on banking business in Malaysia, contrary to the Banking Act. This will be so regarded if such act falls within those words underlined in the definition of banking business, that is, "such other business as the Central Bank with the approval of the Minister may prescribe for the purposes of this Act". Appellant has not informed us the nature of "such other business". It is a matter of some difficulty. Thus, Myint Soe in "A Source Book of Banking Law in Singapore and Malaysia" at page 10 asks: "Does it mean business in addition to the business already mentioned in the definition, or does it mean "business" which may not include those already mentioned in the definition, but is "prescribed" by the relevant authority?". We are not told what are such other business "prescribed" for the purpose of the Act. Another point to note is that there is no provision in the National Land Code preventing a foreigner including a foreign bank from effecting a charge of land in Malaysia.

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All the contentions before us were made in the lower court. The learned Judge considered the points carefully and expressed his views shortly at page 43 of the Appeal Record as follows:-

"I come to the various provisions of law referred to by the respondent which are said to render the charges illegal.

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Section 3 of the Banking Act relates to a bank operating in this country. It is not disputed that the applicant was operating

as a bank in Singapore. The transaction was good according to Singapore laws. This is what matters. Section 9 of the Banking Act has application to a bank operating here.

IN THE FEDERAL
COURT OF MALAYSIA
AT JOHORE BAHRU

No.11
Judgment of
Federal Court
dated 24th June
1980 (Contd.)

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Section 5 of the Moneylenders Ordinance, 1951: again this was a transaction outside the country. There is nothing to show that the transaction could be contrary to any equivalent Singapore law. As a bank, the Court must presume that it was authorised to lend out money.

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Section 9 of the Exchange Control Act does not appear to have any application here. The applicant is seeking the order of the Court for the sale of land under the National Land Code on charges which were executed under the Code. The proper provision that seems to operate is para. 1 of the Fourth Schedule to the Act, which so far as applicable, provides that it shall be implied in any order of any court in Malaysia that any sum required to be paid by the order to which the provisions of Part III apply shall not be paid except with the permission of the Controller. It would be a matter for the applicant to get the permission of the Controller before the Senior Assistant Registrar here can make any payment to it from the proceedings of sale."

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We are of the opinion that the learned Judge was right in ordering the sale of the land by public auction. In making the order the implication is that the learned judge was satisfied that the bank was not carrying on banking business in Malaysia. There is no ground for us to interfere with the order made. We would dismiss the appeal with costs. Deposit to respondent on account of taxed costs.

(Sgd.) Lee Hun Hoe
CHIEF JUSTICE,
BORNEO.

Delivered in Kuala Lumpur
on 24th June, 1980

Notes:

- 1) Hearing of arguments in Johore Bahru on Sunday, 3rd February, 1980.

IN THE FEDERAL
COURT OF
MALAYSIA AT
JOHORE BAHRU

2) Counsel:

Encik V.C. Gorge (Encik K.S. Narayanan
with him) for appellant.
Solicitors: Messrs Ng Ek Teong & Partners.

No.11
Judgment of
Federal Court
dated 24th June
1980 (Contd.)

Encik Masacorale (Encik Lim Cheun Ren with
him) for respondent.
Solicitors: Messrs. Yeow & Chin.

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Certified True Copy:
Valerie Knew
P/A to Chief Justice
Borneo
8/7/80

IN THE FEDERAL
COURT OF
MALAYSIA AT
JOHORE BAHRU

No.12

ORDER OF THE FEDERAL COURT dated 24th
June 1980

No.12
Order of the
Federal Court
dated 24th
June 1980

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT
JOHORE BAHRU

(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO.4 OF 1979

Between

KOH KIM CHAI

Appellant

And

ASIA COMMERCIAL BANKING
CORPORATION LIMITED

Respondents

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(In the Matter of Johore Bahru High Court
Originating Summons No.144 of 1977

Between

ASIA COMMERCIAL BANKING
CORPORATION LIMITED

Chargee/Applicant

And

KOH KIM CHAI

Chargor/Respondent)

CORAM: LEE HUN HOE, CHIEF JUSTICE, HIGH COURT,
BORNEO; WAN SULEIMAN, JUDGE, FEDERAL
COURT, MALAYSIA; ABDUL HAMID, JUDGE,
FEDERAL COURT, MALAYSIA.

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IN OPEN COURT.
THIS 24TH DAY OF JUNE
1980.

IN THE FEDERAL
COURT OF MALAYSIA
AT JOHORE BAHRU

O R D E R

No.12
Order of the
Federal Court
dated 24th June
1980 (Contd.)

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THIS APPEAL coming on for hearing on the 3rd day of February 1980 in the presence of Encik V.C. George (Encik K.S. Narayanan with him) of Counsel for the Appellant and Encik Upali Masacorale (Encik Lim Cheun Ren with him) of Counsel for the Respondent AND UPON READING the Record of Appeal filed herein AND UPON HEARING Counsel as aforesaid for the parties IT WAS ORDERED that this Appeal do stand adjourned for Judgment AND the same coming on for Judgment this day in the presence of Encik V.C. George (Encik K.S. Narayanan with him) of Counsel for the Appellant and Encik Gan Eng Chee

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of Counsel for the Respondents IT IS ORDERED that this Appeal be and is hereby dismissed with costs to be taxed and be paid to the Respondents by the Appellant AND IT IS LASTLY ORDERED that the sum of \$500/- (Ringgit Five hundred only) paid into Court by the Appellant as security for costs of this Appeal be paid out to the Respondents towards taxed costs.

Given under my hand and the Seal of the Court, this 24th day of June 1980

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SENIOR ASSISTANT REGISTRAR,
FEDERAL COURT, MALAYSIA,
KUALA LUMPUR.

IN THE FEDERAL
COURT OF
MALAYSIA AT
JOHORE BAHRU

No.13

ORDER GRANTING CONDITIONAL LEAVE TO
APPEAL dated 4TH AUGUST 1980

No.13
Order Granting
Conditional
Leave to Appeal
dated 4th
August 1980

O R D E R

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT
KUALA LUMPUR

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(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO: 4 OF 1979

B E T W E E N

KOH KIM CHAI

Appellant

AND

ASIA COMMERCIAL BANKING CORPORATION
LIMITED

Respondent

(In the Matter of Johore Bahru High
Court Chargee's application Originating
Summons No. 144 of 1977)

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B E T W E E N

ASIA COMMERCIAL BANKING CORPORATION
LIMITED

Chargee/Applicant

AND

KOH KIM CHAI

Chargor/Respondent

CORAM: LEE HUN HOE, CHIEF JUSTICE, HIGH COURT,
BORNEO; CHANG MIN TAT, JUDGE, FEDERAL
COURT, MALAYSIA; SALLEH ABAS, JUDGE,
FEDERAL COURT, MALAYSIA.

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IN OPEN COURT
THIS 4TH DAY OF AUGUST 1980

UPON MOTION made unto the Court this day
by Encik V.C. George for the Appellant
abovenamed in the presence of Encik Lim Cheun
Ren Counsel for the Respondent abovenamed AND
UPON READING the Appellant's Notice of Motion
dated the 18th day of July 1980, the Affidavit
of Koh Kim Chai affirmed on the 14th day of
July 1980, the Affidavit of Poh Kar Chiow
affirmed on the 29th day of July 1980, the

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Affidavit of Sivaran Singh Gill affirmed on the 31st day of July 1980 and the Affidavit of R. Padmanabhan affirmed on the 2nd day of August 1980 all filed herein AND UPON HEARING Counsel for the Appellant and Counsel for the Respondent as aforesaid IT IS ORDERED that leave be and is hereby granted to the Appellant to appeal to his Majesty the Yang Di-Pertuan Agong against the whole of the decision of this Honourable Court given on the 24th day of June 1980 which said decision is binding in both Federal Court Civil Appeals No: 3 and No:5 of 1979, upon the following conditions:-

IN THE FEDERAL COURT OF MALAYSIA AT JOHORE BAHRU

No.13
Order Granting Conditional Leave to Appeal dated 4th August 1980 (Contd.)

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- (a) that the Appellant abovenamed do within three (3) months from the date hereof enter into good and sufficient security to the satisfaction of the Chief Registrar of the Federal Court in the sum of \$5,000.00 (Ringgit Five Thousand) only for the due prosecution of the Appeal and the payment of all such costs as may become payable to the Respondent abovenamed in the event of the abovenamed Appellant not obtaining an Order granting final leave to appeal or of the Appeal being dismissed for non-prosecution or of His Majesty the Yang Di-Pertuan Agong ordering the abovenamed Respondent costs of the Appeal as the case may be; and
- (b) that the abovenamed Appellant do within three (3) months from the date hereof take the necessary steps for the purpose of procuring the preparation of the Appeal Record and despatch thereof to England.

AND IT IS FURTHER ORDERED that the Appellant's prayer (b) contained in the Appellant's Notice of Motion dated the 18th day of July 1980 requesting for the stay of execution of the Judgment of this Honourable Court given on the 24th day of June 1980 pending appeal on the said judgment to his Majesty the Yang Di-Pertuan Agong be and is hereby allowed AND IT IS LASTLY ORDERED that costs of the Appellant's application be costs in the cause.

GIVEN under my hand and the Seal of the Court this 4th day of August 1980.

(Sgd.) A.S. TAN

Senior Assistant Registrar
Federal Court, Malaysia
Kuala Lumpur.

IN THE FEDERAL
COURT OF
MALAYSIA AT
JOHORE BAHRU

This Order is filed by Messrs Ng Ek Teong
& Partners of 2nd Floor, Bangunan Persatuan
Hokkien Selangor, Jalan Raja Chulan, Kuala
Lumpur, Solicitors for the Appellant
abovenamed.

No.13
Order Granting
Conditional
Leave to Appeal
dated 4th August
1980 (Contd.)

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IN THE FEDERAL
COURT OF
MALAYSIA AT
JOHORE BAHRU

No.14

ORDER GRANTING FINAL LEAVE TO APPEAL
DATED 7TH MARCH 1981

No.14
Order Granting
Final Leave to
Appeal dated
7th March 1981

IN THE FEDERAL COURT IN MALAYSIA HOLDEN AT
JOHORE BAHRU

(APPELLATE JURISDICTION)

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FEDERAL COURT CIVIL APPEAL NO: 4 OF 1979

Between

Koh Kim Chai

Appellant

And

Asia Commercial Banking Corporation
Limited

Respondent

(In the Matter of Johore Bahru High
Court Originating Summons No:144 of 1977

Between

Asia Commercial Banking Corporation
Limited

Chargee/Applicant

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And

Koh Kim Chai

Chargor/Respondent

CORAM: WAN SULEIMAN, ACTING CHIEF JUSTICE,
HIGH COURT, MALAYA; SALLEH ABAS, JUDGE,
FEDERAL COURT, MALAYSIA; ABDUL HAMID,
JUDGE, FEDERAL COURT, MALAYSIA.

O R D E R

IN OPEN COURT
THIS 7TH DAY OF MARCH 1981

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UPON MOTION made on to Court this day by

10 Encik C Paramjothy of Counsel for the Appellant and Encik Sivaran Singh Gill of Counsel for the Respondent abovenamed AND UPON READING the Notice of Motion dated the 30th January 1981 and the Affidavit of Encik K S Narayanan affirmed on the 29th January 1981 AND UPON HEARING Counsel for the Appellant aforesaid and Encik S S Gill Counsel for the Respondent abovenamed IT IS ORDERED that final leave be and is hereby granted to the Appellant to appeal to His Majesty the Yang Di-Pertuan Agong against the whole of the decision of this Honourable Court given on the 24th day of June 1980 which said decision is binding on both the Federal Court Civil Appeal Nos: 3 and 5 of 1979.

IN THE FEDERAL
COURT OF MALAYSIA
AT JOHORE BAHRU

No.14
Order Granting
Final Leave to
Appeal dated 7th
March 1981
(Contd.)

Given under my hand and seal of the Court this 7th day of March 1981.

(Sgd.) A.S. TAN

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SENIOR ASSISTANT REGISTRAR
FEDERAL COURT
MALAYSIA
KUALA LUMPUR.

This Order is filed by M/s Ng Ek Teong & Partners, Solicitors for the Appellant abovenamed whose address for service is at 2nd Floor, Bangunan Persatuan Hokkien Selangor, Jalan Raja Chulan, Kuala Lumpur.

EXHIBIT "A"
TO AFFIDAVIT OF
ONG BENG TIONG
Charge
Registration
Number 5641/73
Volume 179,
Folio 4 dated
22nd May 1973

CHARGE/APPLICANT'S EXHIBITS

EXHIBITS TO AFFIDAVIT OF ONG BENG TIONG

EXHIBIT "A"

CHARGE REGISTRATION
NUMBER 5641/73 VOLUME
179, FOLIO 4

CHARGE REGISTRATION
NUMBER 5641/73
VOLUME 179, FOLIO 4
22ND MAY 1973

10

NATIONAL LAND CODE

FORM 16A

(Section 242)

C H A R G E

Stamps to be affixed - or payment of duty
certified - in this space

This is the exhibit marked "A"

Haji Mohd Yusoff Bin Haji A Rahim, P.L.P.
Pesuruhjaya Sumpah.
(COMMISSIONER FOR OATHS)
JOHOR BAHRU
JOHOR, MALAYSIA

20

FOR REGISTRY USE

Memorial registration made in the register
document/s of title scheduled below, with effect
from 12 hrs. 32m on the 7th day of July 1973.

Registrar
State Johor

30

File of Gaduian
Volume 179
Folio 4
Presentation No. 5641/73

I, KOH KIM CHAI (I/C No.4428458) of No.2E,
Jalan Ah Fook, Johore Bahru, Johore,
proprietor of the land described in the Schedule
below;

For the purpose of securing the payment to the Chargee named below, with interest of the sum from time to time due to the said Chargee on the current account kept by OVERSEAS - LUMBER PRIVATE LIMITED of No.80A, Robinson Road, Singapore.

EXHIBIT "A" TO
AFFIDAVIT OF ONG
BENG TIONG
Charge Registra-
tion Number
5641/73 Volume
179, Folio 4
dated 22nd May
1973 (Contd.)

10 Hereby charge the said land with the payment to the Chargee of the said sum and interest thereon in accordance with the provisions annexed hereto.

Dated this 22nd day of May, 1973.

Signed: illegible

I, CHARLES NORBERT MANDIS an Advocate and Solicitor of the Supreme Court of the Republic of Singapore practising in Singapore hereby testify that the above signature was written in my presence this 22nd day of May 1973 and is

20 (a) according to my own personal knowledge I verily believe, the true signature of KOH KIM CHAI who has acknowledged to me

(i) that he is of full age,

(ii) that he has voluntarily executed this instrument, and

(iii) that he understands the contents and effect thereof.

A S W I T N E S S my hand this 22nd day of May, 1973.

30 Charles N Mandis
Advocate & Solicitor
Singapore

WE, ASIA COMMERCIAL BANKING CORPORATION LIMITED a company incorporated in the Republic of Singapore and having its registered office at No.110, Robinson Road, Singapore, accept this Charge.

40 The Execution of this Instrument by)
ASIA COMMERCIAL BANKING CORPORATION)
LIMITED was duly effected in a)
manner authorised by its) (S E A L)
constitution under its Common Seal)
which said Common Seal was hereunto)
affixed at Singapore this 2nd day)
of June 1973 in the presence of:)

DIRECTORS

Secondly, in pursuance of the said Charge and in consideration of the abovementioned land and buildings the Chargor hereby covenant with the Bank on demand in writing made to the Chargor to pay to the Bank the balance (if any) which at the date of such demand shall be owing to the Bank by the Borrower on any account or accounts whether alone or jointly with or as surety for any other person or persons or for any firm or company and whether on current account cheques bills notes or drafts drawn accepted or indorsed by or on behalf of the Borrower and for loans or advances made to or for the use or at the request of the Borrower for moneys which the Borrower shall become liable to pay to the Bank in any manner whatsoever either alone or jointly with or as surety for any other person or persons or for any firm or company and for interest on daily balance at the rate of ninety (90) cents for every Dollars One hundred (\$100.00) per month (or at such other rate as may from time to time be fixed by the Bank with monthly rests commission and other usual banker's charges legal and other costs charges and expenses and also to pay interest on such balance from the date of such demand being made till payment at the rate aforesaid.

Thirdly for the consideration aforesaid the Chargor hereby charges unto the Bank All the above said land and buildings thereon TO HOLD the same unto the Bank its successors and assigns forever and to the covenants and conditions contained in the National Land Code (Act 56 of 1965).

Fourthly if upon such demand as aforesaid or without demand the Borrower or the Chargor shall pay to the Bank all moneys hereby covenanted to be paid the Bank will at the request and cost of the Chargor discharge the charged property to the Chargor or as the Chargor shall direct.

Fifthly that the Chargor will during the continuance of this security keep all buildings on the said land insured against loss or damage by fire in the joint names of the Bank and the Chargor to the full insurable value thereof and shall make all payment required for the above purpose not later than one week after the same shall be due and forthwith deliver to the Bank the policy or policies and the receipt for such payment of premium in respect thereof.

EXHIBIT "A" TO
AFFIDAVIT OF ONG
BENG TIONG
Charge Registra-
tion Number
5641/73 Volume
179, Folio 4
dated 22nd May
1973 (Contd.)

EXHIBIT "A" TO
AFFIDAVIT OF ONG
BENG TIONG
Charge
Registration
Number 5641/73
Volume 179,
Folio 4 dated
22nd May 1973
(Contd.)

Sixthly that during the continuance of this security the Chargor will continue to maintain and cultivate the said land in a proper and workmanlike manner after the methods of good husbandry and the Chargor will keep all buildings on the said land in good and substantial condition and repair and if the Chargor shall neglect to do so the Bank may at its discretion enter upon the said land from time to time with or without workmen, servants and agents to view and inspect the state of maintenance or cultivation and to repair and keep in repair the said buildings without becoming liable as charges in possession and that its expenses of so doing shall be added to the principal monies and interest owing hereunder.

10

Seventhly to pay to the Bank the Bank's usual commission and charges on all transactions made between the Borrower and the Bank or by the Bank or on the Chargor's account.

20

Eighthly the Chargor hereby become tenant at will to the Bank of the said land or such part or parts thereof as are now or may hereafter come into the Chargor's occupation at a peppercorn rent provided that the Bank may at any time determine the tenancy hereby created or without giving any previous notice may enter into and upon take possession of the said land whereof the Chargor have attorned tenant as aforesaid and determine the tenancy created by such attornment and that neither the receipt of the said rent nor the tenancy created by the said attornment shall render the Bank liable as a chargee in possession.

30

Provided always and it is hereby declared and agreed as follows:

1. That notwithstanding the provisions hereinbefore contained relating to insurance the Bank at any time hereafter during the continuance of this security shall be entitled to insure against loss or damage by fire any building forming part of the said land and the premium paid for any such insurance shall be added to the principal monies and interest owing hereunder.

40

2. That the Bank and its agents and workmen shall be at liberty at all reasonable times of the day to enter into the said land and into any building or structure thereon to view the condition and repair thereof.

50

10 3. That the Chargor will during the continuance of this security punctually pay all rents falling due to the State Authority, all rates, taxes, outgoings and assessments and also all charges for gas, electricity, water and other services in respect of or rendered or supplied to the said land or the occupiers thereof and the Bank shall in default be at liberty to pay the same and any monies expended by the Bank under the provisions of this sub-paragraph shall be added to the principal monies and interest owing hereunder.

EXHIBIT "A" TO
AFFIDAVIT OF ONG
BENG TIONG
Charge
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Number 5641/73
Volume 179,
Folio 4 dated
22nd May 1973
(Contd.)

20 4. That the Chargor will not be at liberty at any time during the continuance of the Charge hereby created let or demise or grant any licence in respect of the said land or any buildings on the said land or any portion thereof for any period without the prior written consent of the Bank being obtained and the provisions of Section 251 of the National Land Code shall not apply to these presents.

5. Nothing herein contained shall be deemed to render it obligatory upon the Bank to make any advances to the Borrower.

30 6. For the purpose of ascertaining whether the limit of the principal sum intended to be hereby secured has been exceeded or not all accumulated and capitalised interest shall be deemed to be interest and not principal money.

7. Nothing herein contained shall prejudice or affect any lien to which the Bank is by law entitled or any other securities which the Bank may at the time hold for or on account of the monies hereby received.

40 8. Any demand for payment of the balance intended to be hereby secured may be made by a notice in writing in such form as may be prescribed by or under the National Land Code and may be signed by the Agent, Sub-Agent, Manager, Sub-Manager, Secretary or Accountant of the Bank on behalf of the Bank or by any solicitor or firm of solicitors purporting to act for the Bank and such notice shall be deemed to have been sufficiently served on the Borrower and the Chargor if it is left at the Borrower's or Chargor's last or usual known place of business in Singapore or sent by registered letter to such address and in the
50 last mentioned case the service shall be deemed

EXHIBIT "A" TO
AFFIDAVIT OF ONG
BENG TIONG

Charge
Registration
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22nd May 1973
(Contd.)

to be made at the time when the registered
letter would in the ordinary course be
delivered.

9. In the event of any breach of any of the
terms covenants and stipulations herein
provided and on the part of the Borrower and
the Chargor to be observed and performed
occurring and continuing for a period of seven
(7) days or more (other than the covenant to
pay the sums for the time being owing to the
Bank on demand as aforesaid) it shall be
lawful for the Bank forthwith to give notice
to the Borrower and the Chargor under Section
254 of the National Land Code requiring the
Borrower and the Chargor to remedy the said
breach within a period of not less than fourteen
days and service of such notice shall be
effected in the same manner as a notice
demanding payment of the balance due as
hereinbefore provided.

10

20

10. The provisions of Section 245 of the
National Land Code shall not apply to these
presents.

11. When the payment of any money hereby
secured or intended so to be shall be further
secured to the Bank by any bill of exchange
promissory note draft receipt or other
instruments reserving a higher rate of interest
to be paid in respect thereof than that
hereinbefore covenanted to be paid such higher
rate of interest shall be payable in respect
of such monies and nothing herein contained
or to be implied from these presents shall
affect the right of the Bank to enforce and
recover payment of such higher rate of interest
or as the case may be the difference between
such higher rate and the rate which shall have
been paid hereunder.

30

12. That the security hereby created is to be
a continuing one for all monies and interest
now or from time to time owing by the Chargor
to the Bank on the said account or other
account or accounts or in respect of the other
banking facilities notwithstanding the said
account or other account or accounts may from
any cause cease to be current accounts.

40

13. Notwithstanding anything hereinbefore
contained it is agreed that the Bank shall be
at liberty without thereby affecting its rights
hereunder at any time (i) to determine or vary
any credit to the Borrower (ii) to vary
exchange or release any other securities held

50

or to be held by the Bank for or on account of the moneys hereby secured or any part thereof (iii) to renew bills and promissory notes in any manner and to compound with given time for payment to accept composition from and make any other arrangements with the Chargor or any person liable on bills notes or other securities held or to be held by the Bank for or on behalf of the Borrower.

EXHIBIT "A" TO
AFFIDAVIT OF ONG
BENG TIONG
Charge
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Folio 4 dated
22nd May 1973
(Contd.)

10

14. The Bank shall not be liable for any involuntary loss which may happen on or may arise out of the powers herein or by the said National Land Code conferred on that Bank as chargee.

20

15. In these presents where the context admits the expression "the Chargor" and "the Bank" shall include the persons deriving title under the Chargor and the Bank respectively and words importing the singular number or the masculine gender only include the plural number or the feminine gender and words importing persons include corporations.

SIGNED by the abovenamed)
CHARGOR in the presence) Signed; illegible
of:)

Charles N Mandis
Advocate & Solicitor
Singapore.

30

THE COMMON SEAL of OVERSEAS)
LUMBER PRIVATE LIMITED was)
hereunto affixed in the) (S E A L)
presence of:-)

Director

Signed: illegible

Secretary

Signed: illegible

EXHIBIT "B" TO
AFFIDAVIT OF ONG
BENG TIONG
Notice of Demand
dated 22nd
August 1976

EXHIBIT "B"

NOTICE OF DEMAND

NATIONAL LAND CODE

FORM 16E

(Section 255)

DEMAND FOR PAYMENT OF A PRINCIPAL SUM

10

To:

KOH KIM CHAI (NRIC No. 4428458) of No.2E
Jalan Ah Fook, Johore Bahru, Johore Chargor
under the charge described in the schedule
below of the land so described;

WHEREAS the principal sum secured by the
charge amounts to \$417,777.35 inclusive of
interest up to 25/1/74 but exclusive of
interest as from 26/12/74 - 9/1/75 (which is
\$2,553.28) and daily interest thereafter is
at \$168.46 (that is the secured sum of
\$350,000.00 at 14/75% per annum with monthly
rests; and the excess at 15.5% per annum with
monthly rests) and is payable on demand;

20

WE, ASIA COMMERCIAL BANKING CORPORATION
LIMITED, a company incorporated in the Republic
of Singapore and having its registered office
at No.110, Robinson Road, Singapore 1, as
Chargee, by virtue of the powers conferred by
Section 255 of the National Land Code, hereby
require payment of the sum forthwith;

30

TAKE NOTICE that, if the said sum is not
paid within one (1) month of the service of
this notice, we shall apply for an Order of
Sale.

Dated this 22nd day of August, 1976.

Signed by M/s Yeow & Chin
Solicitors for the Chargee

(Where the address of the person claiming under
this instrument is outside the Federation, an
address within the Federation for the service
of notices is to be added in this space)

40

c/o 16-B, Jalan Station, Tan Chan Cheng
Building, Johore Bahru, Johore

SCHEDULE OF LAND* AND INTEREST

EXHIBIT "B" TO
AFFIDAVIT OF ONG
BENG TIONG
Notice of Demand
dated 22nd
August 1976
(Contd.)

| Mukim | Lot No. | Description and title | Share of land (if any) | Registered no. of lease (if any) | Registered no. of sub-charge (if any) |
|-------|------------------------|---------------------------------------|------------------------|----------------------------------|---|
| 10 | (1) Senai- Kulai | (2) (3) 2605 Grant No. 23940 | (4) whole | (5) nil | (6) Pres. No. 5641/73 Vol. 179 Fol. 4 |

EXHIBIT "C" TO
AFFIDAVIT OF
ONG BEN TIONG
Statement of
outstanding
principal and
interest
dated 9th
January 1975

EXHIBIT "C"
STATEMENT OF OUTSTANDING PRINCIPAL
AND INTEREST

ASIA COMMERCIAL BANKING CORPORATION LIMITED

Our Ref: LD/TGP/5749/6190/6434/kcs
Your Ref: LBL.M.12204/74

10

10th January, 1975.

M/s. Lee & Co.,
A.C.B.C. Bldg., 5th fl.,
Singapore.

Dear Sirs,

Re: Kimwood Trading Co.
Overseas Lumber Bhd.
Overseas Lumber (Pte.) Ltd.

We refer to your letter dated 7th January,
1975.

20

The monies owing under the three accounts
are as follows:-

1. A/C 6190 - Kimwood Trading Co.

| | |
|---|----------------------------|
| Amount owing as at today's date (exclusive of interest from 26.12.74) | \$496,424.39 |
| Interest from 26.12.74 to 9.1.75 | <u>3,038.87</u> |
| Total: | <u><u>\$499,463.26</u></u> |

Daily interest thereafter is \$200.49.

30

The interest chargeable on:

- a) the secured sum of \$400,000.00 is 14.75% p.a. with monthly rests; and
- b) the excess is 15.5% p.a. with monthly rests.

2. A/C 5749 - Overseas Lumber Bhd.

| | |
|---|---------------------------|
| Amount owing as at today's date (exclusive of interest from 26.12.74) | \$94,150.86 |
| Interest from 26.12.74 to 9.1.75 | <u>570.69</u> |
| Total: | <u><u>\$94,721.55</u></u> |

40

Daily interest thereafter is \$37.66.

The interest chargeable is 14.75% p.a. with monthly rests.

3. A/C 6434 - Overseas Lumber (Pte.) Ltd.

Amount owing as at today's date \$417,775.35
(exclusive of interest from
26.12.74)

10

Interest from 26.12.74 to 9.1.75 2,553.28

Total: \$420,328.63

Daily interest thereafter is \$168.46.

The interest chargeable on:

a) the secured sum of \$350,000.00 is 14.75%
p.a. with monthly rests; and

b) the excess is 15.5% p.a. with monthly rests.

Yours faithfully,

for ASIA COMMERCIAL BANKING CORP. L.D.

20

Legal Department

EXHIBIT "C" TO
AFFIDAVIT OF ONG
BENG TIONG
Statement of
outstanding
principal and
interest dated
9th January 1975
(Contd.)

EXHIBIT "D" TO
AFFIDAVIT OF
ONG BENG TIONG
Letter K.C. Koh
to Messrs. Yeow
& Chin dated
13th September
1976

EXHIBIT "D"
LETTER K.C. KOH TO MESSRS. YEOW & CHIN

K.C. KOH & CO.
Peguam2bela dan Peguam2chara
Advocates & Solicitors

Your Ref: YHC/CF/1010/75
Our Ref: PVD/M/HC/2302/76

10

13th September 1976.

Messrs. Yeow & Chin,
Advocates & Solicitors,
Johore Bahru.

Dear Sirs,

Re: First, Second and Third Charge
on Johore Grant 23940

Your letter dated 22nd August, 1976
addressed to Mr. Koh Kim Chai has been handed
to us for our attention.

20

We have to inform you that our client
contends that the Charges entered into
between your clients and ours are illegal and
therefore void and are enforceable.

We are now instructed to file a Writ of
Summons against your clients for a declaration
that the charges created in favour of your
clients are illegal banking business extended
by your clients without a license in writing
from the Minister of Finance or that they are
purely moneylending transactions which are
also illegal as your clients do not have a
moneylenders license under the Moneylenders
Ordinance.

30

Please let us know if you have any
instructions to accept service of process. In
the meantime would you be good enough to
stay further proceedings under the National
Land Code. Your early reply will be
appreciated.

40

Yours faithfully,

Signed: illegible

EXHIBIT "E"

LETTER ASIA COMMERCIAL BANKING
CORPORATION LIMITED TO MESSRS. YEOW
& CHIN

EXHIBIT "E" TO
AFFIDAVIT OF
LIM CHEUN REN
Letter Asia
Commercial
Banking
Corporation to
Messrs. Yeow &
Chin dated 6th
April 1978

ASIA COMMERCIAL BANKING CORPORATION LTD

10 Date: 6th April, 1978

Our Ref: LD/PKC/6190/5749/6434/SSE

Your Ref: Lcr/fg/1010/75

M/s Yeow and Chin,
Advocates and Solicitors,
16-B, 2nd floor, Jalan Station,
Johore Bahru, West Malaysia.

Dear Sirs,

Re: J.B. High Court O.S. Nos. 144/145/146 of
1977

20 We refer to the above matter and as requested
the amount owing to us by the debtors are as
follows:

A/c No.6190 - KIMWOOD TRADING CO.

Amount owing as at 23/4/1978
(inclusive of interest) \$790,261.20

Int. rate with monthly rest
(flat rate) 14% p.a.

Daily interest with monthly
rest from 24/4/78 \$ 296.99

30 A/c No.5749 - OVERSEAS LUMBER BHD.

Amount owing as at 23/4/1978
(inclusive of interest) \$149,874.66

Int. rate with monthly rest
(flat rate) 14% p.a.

Daily interest with monthly
rest from 24/4/78. \$ 56.32

A/c No.6434 - OVERSEAS LUMBER PTE. LTD.

40 Amount owing as at 23/4/1978 \$665,053.68
(inclusive of interest)

Int. rate with monthly rest
(flat rate) 14% p.a.

Daily interest with monthly
rest from 24/4/78 \$ 249.93

Yours faithfully,
for ASIA COMMERCIAL BANKING CORP. LTD

K.C. Poh Asst. Legal Officer Legal Dept.

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
(Chargor/Respondent)

- AND -

ASIA COMMERCIAL BANKING CORPORATION
LIMITED

Respondent
(Chargee/Applicant)

RECORD OF PROCEEDINGS

KINGSFORD DORMAN
14 Old Square
Lincoln's Inn
London WC2 3UB

Solicitors for the
Appellant

COWARD CHANCE
Royex House
Aldermanbury Square
London EC2V 7LD

Solicitors for the
Respondent