

28 April 2017

### What Happens When Your Right to Foreclose is Foreclosed?

*Thameez Nisha Hasseem (as administrator for the estate of Bee Fathima, deceased) v Charijah Bt Ameerudin Mohamed Shariff and Maybank Allied Berhad* (Originating Summons No PA-24NCvC-30-01/2016) (HC)

In 1984, Bee Fathima charged her land to the Co-operative Central Bank Limited, the predecessor of Maybank Allied Berhad, as security for a loan taken out by her then daughter-in-law, Charijah.

In 1987, the borrower defaulted. The bank then took steps to enforce the charge over the land and obtained an order for sale of the land in a charge action.

In 1991, the order for sale was set aside on the grounds that the service of process in the charge action was irregular.

Thereafter, no further steps were taken to enforce the charge.

In 2016, after more than 12 years had lapsed since the bank's cause of action for foreclosure arose, the deceased's estate applied for a discharge of the charge and the return of the issue document of title, on the grounds that the bank's interest in the land had been extinguished by virtue of s 21 of the Limitation Act 1953.<sup>[1]</sup>

The High Court dismissed the claim on the basis that the limitation of action on the remedy of foreclosure is distinct and separate from the extinguishment of the rights and interest of the charge,<sup>[2]</sup> and that it would be unjust on the bank if the chargor were allowed to discharge the charge without a settlement of the loan.

Consequently, a charge will remain registered against the title of the land until discharged by payment, notwithstanding that a chargee may be statute-barred from enforcing the charge.

The legal position in Malaysia is different from that under English law, where a mortgagee ceases to have any estate or interest in the land on the expiry of the limitation period,<sup>[3]</sup> such rights and interest having been extinguished by operation of law.<sup>[4]</sup> This difference was highlighted in an earlier decision by the High Court<sup>[5]</sup> which made it clear that in Malaysia, although limitation can be used as a defence to a charge action, it cannot support an action for a discharge of charge and for recovery of the issue document of title.

Associate Parvinder Kaur Cheema appeared as counsel for the bank.

*Parvinder Kaur Cheema*

This Legal Update is brought to you by the Dispute Resolution Practice Group. If you have any queries, please do not hesitate to contact the team:

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<sup>[1]</sup> [Act 254]

<sup>[2]</sup> *Ali Hassan v Bumiputra-Commerce Finance Berhad* [2003] 6 CLJ 301. See also *Thiagarajan Pavadai v CIMB Bank Berhad* [2013] 1 LNS 943 and *CIMB Bank Berhad v Muzlan Ariffin* [2011] 8 CLJ 945.

<sup>[3]</sup> Real Property Limitation Act 1833, s 34 and Real Property Limitation Act 1874, s 1

<sup>[4]</sup> *Lewis v Plunket* [1937] 1 All ER 530

<sup>[5]</sup> *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd* [2004] 4 MLJ 259

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