

Banking and Insolvency Update

5 July 2017

Case Update: *Malayan Banking Bhd & Anor v Bank Kerjasama Rakyat Malaysia Bhd* [2016] 5 CLJ 136 (HC)

This is a note on a decision of the High Court that addresses the issue relating to priority of fixed and floating charges.

Between 2003 and 2006, a company known as Instyle^[1] created several debentures over all its assets in favour of Maybank^[2] to secure banking facilities.

Two years later, Bank Rakyat took a charge over monies placed by Instyle in fixed deposit with Bank Rakyat^[3] to secure banking facilities granted by Bank Rakyat. The debentures prohibited further charges to be created without Maybank's consent which Bank Rakyat had notice of. The debentures also provided that the floating charge would automatically crystallise in the event Instyle encumbered the assets subject to the floating charge.

The question arose as to whether Maybank's floating charge under the debentures had priority over Bank Rakyat's charge over the monies in the fixed deposits.

It was argued by Bank Rakyat, among others, that Maybank did not have priority over the monies because the fixed deposit accounts did not exist at the time Maybank's floating charge was created.

The High Court held that:

- (a) Maybank's charge had priority over Bank Rakyat because it was created and crystallised before Bank Rakyat's charge;
- (b) Maybank's charge covered not only all of Instyle's assets which existed at the date of the charge, but also those which might afterwards become the property of Instyle; and
- (c) The onus is on a subsequent chargee, who has notice of a prohibition against further charges being created, to show that they have displaced the prior encumbrancer.

Bank Rakyat's appeal to the Court of Appeal^[4] was dismissed, as was their application for leave to appeal to the Federal Court,^[5] by unanimous decision in both courts.

The High Court considered principles laid down in cases from three different jurisdictions.^[6]

Mr Sean Yeow, partner, and Mr Aric Wong, senior associate, of Messrs Lee Hishammuddin Allen & Gledhill, appeared for Maybank.

^[1] Instyle Furniture Industries Sdn Bhd

^[2] Malayan Banking Berhad and Maybank Islamic Bank Berhad

^[3] Bank Kerjasama Rakyat Malaysia Berhad

^[4] Court of Appeal Civil Appeal No W-02(NCC)(A)-964-06/2015. Dismissed with costs on 2 June 2016

^[5] Federal Court Civil Application No 08(f)-347-07/2016(W). Dismissed with costs on 22 November 2016

^[6] *Re Panama* (1870) 5 Ch App 318; *Kay Hian & Co (Pte) v Jon Phua Ooi Yong & Ors* [1989] 1 MLJ 284; *Affin Bank Berhad v Malayan Banking Berhad* [2009] 3 CLJ 320

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