

Chargors & Chargees – The Clock Is Ticking

Case Update: Thameez Nisha Hasseem v Maybank Allied Bank Berhad [2023] 4 MLJ 145, Federal Court

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In a recent judgment dated 28 February 2023, the Federal Court provided a much welcome clarification on the applicability of Section 21 of the Limitation Act 1953 in applications for orders for sale of charged property under Section 256 of the National Land Code (“**NLC**”). 6 questions of law were argued before the Court and this update focuses on 2 main issues:

- a. The application of the 12 year limitation period to charge actions; and
- b. The legal effect of the limitation period.

A. Brief Facts

The Appellant, Thameez is the administrator of the estate of Bee Fathima, the deceased who had granted power of attorney to one Charijah to manage the land of the deceased (“**the land**”).

In 1984, Charijah charged the land to the Co-operative Central Bank Ltd which was taken over by Maybank Allied Bank Berhad (“**MABB**”) as a security for a loan. On 30 July 1986, a statutory notice in Form 16D under Section 254 of the NLC was issued but ignored by Charijah. In 1991, MABB obtained an Order for Sale of the land and the said Order for Sale was set aside by the High Court in 2010. Since then, no action was taken by MABB to enforce the said charge or to recover the loan from Charijah. In 2015, the administrator Thameez wrote to MABB requesting for information on the status of the charge and MABB did not respond to the same.

In 2016, Thameez brought an action against Charijah, seeking inter alia, an order compelling Charijah to pay MABB all sums required for the discharge of the charge. MABB intervened and was subsequently added to the action as the 2nd defendant. Thameez's claim was amended to seek inter alia, a declaration that MABB ceased to have any interest in the land and MABB's rights to enforce the charge had extinguished by operation of law.

The High Court dismissed Thameez's action against Charijah on the basis that Thameez has no cause of action to compel Charijah to repay the loan to MABB. The High Court also dismissed the claim as "the bank cannot discharge the charge until the debt is fully settled".

The Court of Appeal affirmed the High Court's decision.

B. The Law

Section 340 of the NLC deals with the conferment of indefeasibility of title or interest upon registration. However, subsection 4(b) provides for the determination of any title or interest by operation of law. The question that arose was whether Section 21(1) of the Limitation Act is within the meaning and application of "by operation of law".

Section 21(1) of the Limitation Act provides that "*no action shall be brought to recover any principal sum of money secured by a mortgage or other charge on land or personal property or to enforce such mortgage or charge, or to recover proceeds of the sale of land or personal property after the expiration of twelve years from the date when the right to receive the money accrued.*"

Prior to this Federal Court decision, there were judgments supporting contrary propositions finding that:

- a. The 12 years limitation period is applicable to charge actions¹; and
- b. The 12 years limitation period is not applicable to charge actions².

¹ *CIMB Bank Bhd v Sivadevi Sivalingam* [2020] 2 CLJ 151, the judgment of Ahmad Maarop PCA; *Lim Ban Hooi & Anor v Malayan Banking Bhd* [2018] 6 CLJ 545; *Wan Zubaidah Wan Mahmood & Anor v CIMB Bank Bhd* [2019] 8 CLJ 197; *Sivakadatcham P Sethuram Vandayar v CIMB Bank Bhd* [2019] 6 CLJ 504; *Sri Rimba Mentari Development Sdn Bhd v Southeast Asia Special Asset Management Bhd (SEASAM)* [2019] 8 CLJ 322.

² *CIMB Bank Bhd v Sivadevi Sivalingam* [2020] 2 CLJ 151, the judgment of Rohana Yusof FCJ, Mohd Zawawi Salleh FCJ; *Peh Lai Huat v MBF Finance Bhd* [2011] 3 MLJ 470, the judgment of Abdul Aziz Mohamad JCA.

Interestingly, in the fairly recent Federal Court case of *CIMB Bank Bhd v Sivadevi Sivalingam* [2020] 2 CLJ 151, although the Court reached a unanimous decision, the reasoning of the Judges differed. Justice Ahmad Maarop PCA was of the view that the limitation period of 12 years applies to charge actions while Justices Rohana Yusof FCJ and Mohd Zawawi Salleh FCJ held otherwise.

The Federal Court in *Thameez* carefully dissected the historical points and precedents on the Limitation Act and highlighted the rationale behind limitation being to “sweep aside this vast compilation of various types of action leading to interminable argument and in many cases gross injustice by substituting it with a simple and uniform system which can be understood by all and sundry” and “discouraging plaintiffs from sleeping on their actions and more importantly, to have a definite end to litigation”.

On the two issues that this update focuses on, the Federal Court having held that applications for orders for sale of charged land under the National Land Code are “actions” within Section 21 Limitation Act, found that Section 21(1) of the Limitation Act does apply to charges actions, and that the date of commencement of the limitation period is the date of the default of repayment and not the date of failure to remedy a 16D Notice. The Federal Court reasoned that certainty is important and as such the limitation date should not be based on the issuance of a 16D Notice which is dependent on the chargee’s discretion.

Consequentially, when the statutory limitation lapses, the Court is empowered to determine the question of title or interest by operation of law (under Section 340(4)(b) of the NLC) which has an effect on the indefeasibility or otherwise of the title or interest.

In this instant case, the Federal Court granted consequential orders including a declaration that MABB shall cease to have any estate or interest in the said land and MABB’s rights to enforce the charge had extinguished by operation of law. MABB was also ordered to discharge the charge and to take necessary steps to give effect thereto.

In view of the above, it is important for financial institutions to bear in mind the following:

- Limitation period starts running from the date of the default of repayment.
- Do not delay the enforcement of charges/recovery of loans.
- Once the 12 year limitation expires, an unenforced charge is deemed legally unenforceable by virtue of limitation.
- If unenforced, a land owner may then be entitled to an unencumbered title depending on the facts of the case.

This material is for general information only and is not intended to provide legal advice. If you have any queries on matters related to the above, please feel free to contact the authors:

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