

IN-HOUSE EXPERT REVIEW

PRIVATE TREATY SALE:

A COMPARATIVE STUDY BETWEEN WEST MALAYSIA AND THE SARAWAK LAND CODE

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A method often resorted to by Chargors whose properties are in the midst of a foreclosure proceeding is selling them through a private treaty sale. Such sale(s), if successfully concluded would benefit the Chargee, Chargor and the purchaser. Not only will the purchaser obtain the property; the Chargor's debts will also be redeemed whilst the Chargee's loan will be simultaneously paid by the purchaser, personally or through his financier. Despite the benefits of private treaty sales, the legality of such sales is questionable in West Malaysia, particularly after the court has granted an order for sale. The same, however, cannot be said for the East Malaysian state of Sarawak.

A general review of the articles, books and journals on foreclosure proceedings did not reveal any analysis on this area. The discussions raised were solely or mainly focused on the Chargees' rights prior to and during the foreclosure proceedings.¹ Besides an article (which mainly examined the nature of Charges and Caveats in Sarawak) and a book which focuses on land issues in Sarawak² (which made a passing observation on private treaty sales in Sarawak), there were no materials which comparatively analyse the legality of private treaty sales between West Malaysia and Sarawak. It is on this premise that this article intends to comparatively analyse the legality of private treaty sales between West Malaysia and Sarawak.

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¹ K.S. Teo and L.T. Khaw, *Land Law In Malaysia, Cases and Commentaries* (3rd edn, LexisNexis 2012); Ainul Maidin *et al*, *Principles of Malaysian Land Law* (LexisNexis 2008); S. C .Loh and P. L. Chew, "A Legal Impossibility; Arming Chargees with Private Power of Sale of Charged Land Outside the Provision of the National Land Code 1965" [1990] 1 MLJ xxxvi at p xlvi; and RR Sethu, "Challenges to Chargees: Principle and Precedent" [1993] 3 MLJ xc.

² L.C. Goh, "Nature of Charges and Caveats under the Sarawak Land Code (Chapter 81)" [1995] 2 CLJ xliii; Nasser Hamid & Salleh Buang, *Land Law in Sarawak* (Gavel Publications, Malaysia, 2011) at p. 255.

The Position in West Malaysia

Registration of land dealings in West Malaysia is primarily governed by the National Land Code ("NLC"), which adopts the Torrens system.³ In applications for orders for sale⁴ pursuant to the NLC, the court is required to amongst others "provide for [a] sale...by public auction."⁵ In *The Chartered Bank v Packiri Maideen & Anor*⁶, the court dismissed the borrower's objection against the foreclosure proceedings on ground that the borrower intended to sell his property through private treaty. Applying the then sections 149 to 154 of the Land Code⁷, the court reasoned that the Land Code only "contemplate[d] the sale of land by public auction. Once foreclosure proceedings commences the lands *have to be sold* by public auction."⁸

This principle was later affirmed in *Chong Bun Sun*⁹ where the High Court judge, Visu Sinnadurai, when faced with a similar issue came to the same conclusion. Adopting a strict pedantic approach, his lordship held that the NLC only provided for one method of judicial sale in a foreclosure proceeding and that is by public auction. Any other method of sale (*viz.* a private treaty sale) in a foreclosure proceeding would constitute a breach of the NLC. This restricted power to order only public auction sales applies to both judicial sale and sale by land administrators.¹⁰

³ *Poh Yang Hong v Ng Lai Hin & Ors* [2013] 8 CLJ 964, p. 989 which reads: "The system of land registration adopted by Parliament and codified in the NLC 1965 is based on the Torrens system of registration. The core principle of this system of registration is that the register is everything. The Torrens system strives for simplicity and certitude in transfers of Torrens system land or registered land." See also *Oh Hiam & Ors v Tham Kong* [1980] 1 LNS 53; and *Eng Mee Yong & Ors. v. Letcumanan* [1979] 2 MLJ 212 where Lord Diplock in his judgment at p. 214 stated: "The Torrens System of land registration and conveyancing, as applied in Malaya by the National Land Code, has as one of its principal objects is to give certainty to title to land and registrable interests in land."

⁴ Part Sixteen, Chapter 3, National Land Code 1965.

⁵ Section 257(1)(a) of the National Land Code 1965 provides that "[e]very order for sale made by the Court under section 256 shall be in Form 16H and shall -

(a) provide for the sale to be by public auction ..."

⁶ *The Chartered Bank v Packiri Maideen & Anor* [1963] 1 MLJ 276.

⁷ *Packiri Maideen*, n6, p. 277. Wan Adnan J in *Chung Khiaw Bank Ltd v Lau Ah Yen & Anor* [1989] 2 MLJ 247; [1989] 1 CLJ 1065 observed that "the old sections 149 to 154 of the Land Code (Cap 138) are similar to the current provisions of sections 256 to 259 of the National Land Code (procedure in respect of lands held under Registry title) and the provisions of sections 141 to 148 of the Land Code are similar to the provisions of sections 260 to 265 of the National Land Code (procedure in respect of lands held under Land Office Title)." His lordship agreed that the sale contemplated in Chapter 3, Part Sixteen of the National Land Code (sections 256 to 259 and sections 260 to 265) in this Chapter is a sale by public auction. The Court cannot order any sale by private treaty. "Prior to the former F.M.S. Land Code, Cap 138, charges on lands governed by the early Registration of Titles legislation had always been enforceable by sale only through the court ... this past division ... was retained with certain consequential procedural differences." S.Y. Wong, David, *Tenure and Land Dealings in the Malay States* (first published 1975, Singapore University Press, Reprint (1977)).

⁸ *Packiri Maideen*, n6 at page 277, See also *Chung Khiaw Bank Ltd v Lau Ah Yen & Anor* [1989] 2 MLJ 247.

⁹ *United Malayan Banking Corp Bhd v Chong Bun Sun And Another Application* [1994] 2 MLJ 221.

¹⁰ *Chong Bun Sun* n9, p. 233.

In view of the requirement under section 257(1)(a) of the NLC, various cases have repeatedly decided that subsequent private treaty sales are invalid because these transactions are prohibited once an order for sale is granted. The principle, established by the High Court cases of *Pakiri Maideen*¹¹ and *Chong Bun Sun*¹² was confirmed in a string of cases,¹³ most recently in the Court of Appeal and the High Court in *Melantras*¹⁴ and *Merit Aim Sdn Bhd*¹⁵, respectively.

Following the judgments of these cases, the author is of the opinion that all subsequent dealings pursuant to the private treaty sale will be defeasible under two grounds, *i.e.*, section 340(2)(b) of the NLC as the registration was obtained by means of an insufficient or void instrument¹⁶ and section 340(2)(c) of the NLC as the subsequent title or interest was unlawfully acquired because the judge had no power to grant a private treaty sale under the NLC. By approving a transaction which is not provided for by the NLC, the judge would be in breach of the NLC *viz.*, section 257.¹⁷

A Reprieve for the West Malaysian Chargor

In *Packiri Maideen*, Justice Gill observed that once foreclosure proceedings commences, the charge property must be sold by public auction.¹⁸ The issue then arises, when does "commencement of proceedings" begin? In the author's view, the word "commence" which was used by Justice Gill may be open to two interpretations. A literal interpretation of the word

¹¹ n6.

¹² n9.

¹³ Other cases include *Chung Khiaw Bank Ltd v Lau Ah Yen & Anor* [1989] 2 MLJ 247; [1989] 1 CLJ 1065; Court of Appeal in *Teck Hong Development Sdn Bhd v Toh Chin Ann* [2008] MLJU 29; Supreme Court in *Mui Bank Bhd v Cheam Kim Yu* [1992] 2 MLJ 642; Court of Appeal in *Teck Hong Development Sdn. Bhd. v Toh Chin Ann* [2008] 4 CLJ 756; High Court in *Commerce International Merchant Bankers Berhad v Metroplex Holdings Sdn Bhd* [2010] 1 LNS 553.

¹⁴ *Melantras Sdn Bhd v. Carah Enterprise Sdn Bhd & Anor* [2000] 3 CLJ 127.

¹⁵ *Malaysia Building Society Bhd v. Merit Aim Sdn Bhd & anor, Cameron Mall Sdn Bhd & anor (Intervenors)* [2012] 4 CLJ 269.

¹⁶ *United Malayan Banking Corporation Bhd v. Syarikat Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352b as approved by the Supreme Court in *M & J Frozen Food v. Siland Sdn Bhd* [1994] 1 MLJ 294.

¹⁷ "...the charge having been registered in breach of an explicit statutory prohibition imposed on the title to the charged land pursuant to the provisions of section 120 of the Code, the title or interest of the Chargee is defeasible since registration thereof had been obtained by means of an insufficient or void instrument (section 340(2)(b)) and also because the Registrar of Titles, in registering the charge, had acted *ultra vires* the powers conferred upon him (section 340(2)(c))" as *per* Edgar Joseph Jr J (as he then was) in *United Malayan Banking Corporation Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352b. See also *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294. The then Supreme Court held that the certificate issued by the Senior Assistant Registrar was *ultra vires* the statutory provisions of the National Land Code thus causing the title to be unlawfully acquired by the first appellants.

¹⁸ "Once such proceedings are commenced the lands have to be sold by public auction" as *per* *Packiri Maideen* n6.

“commence” would seem to imply that once the Chargee has filed the relevant foreclosure documents in court, the Chargor is prohibited from selling his property *via* private treaty.

With respect, such a conclusion (if that is what his lordship meant) would be rather absurd because if the Chargor finds a willing buyer after the application has been filed in but before it is heard, the Chargee could on the hearing date easily request the court to withdraw his foreclosure application with liberty to file afresh. If the private treaty sale succeeds, there will be no foreclosure proceedings to begin with.¹⁹ However, if his lordship took “commencement of foreclosure proceedings” to mean the granting of an order for sale by the court, then it would seem that a Chargor in West Malaysia cannot sell his property by private treaty. Nevertheless, there are other methods which the Chargor could still utilise to dispose his property *via* private treaty even after the order for sale is granted, for *e.g.* section 266 of the NLC.²⁰ However, this is beyond the scope of discussion of this article.

Position in Sarawak under Sections 148 and 150 of the Sarawak Land Code 1958 (Cap 81) as Amended by the Land Code (Amendment) Ordinance 1994 (“Sarawak Land Code”)

Unlike courts in West Malaysia, the courts in Sarawak, pursuant to the Sarawak Land Code are empowered not only to sell the charged property using various methods (which may include private treaty sales) after the commencement of foreclosure proceedings, they are also allowed to alter the subsequent methods of sale. In terms of judicial sale, the courts in Sarawak possess wider powers in comparison to their counterparts in Peninsular Malaysia.²¹ As opposed to courts in West Malaysia, where they could only make an order namely, an order for sale *via*

¹⁹ However, there is nothing to prevent the Chargor and bank to settle the debt by private redemption agreement even though foreclosure proceedings have been commenced by the bank against the Chargor. See *Kuala Lumpur Landmark Sdn. Bhd. v. Standard Chartered Bank* [1994] 2 MLJ 559 and RR Sethu, ‘Challenges to Chargees: Principle and Precedent’, [1993] 3 MLJ xc at xcvi.

²⁰ See M.W.S. Goh, ‘Selling One’s Property After An Order For Sale. A Legal (Im)Possibility in Malaysia?’, (2017) HELP Law Review 6.

²¹ “They must keep in the forefront of their minds that the section (*i.e.*, Section 143 of the Sarawak Land Code) they are dealing with is very different from that applied by the courts in the States of Malaya.” Quoted from *Century Land Resources Sdn Bhd v. Alliance Bank Malaysia Bhd* [2004] 4 CLJ 793.

public auction,²² the courts in Sarawak are empowered under section 148(2)²³ of the Sarawak Land Code to make three types of orders, which include amongst others an order “*for the sale of the charged land*” and the court after hearing the evidence may make such order as in the circumstances seems just.²⁴

It is observed that since the words “...order for the sale of the charged land...” appearing in section 148(2) did not specify the methods of sale, reading this provision with the procedural section 150(1)²⁵, it is submitted that the order which the court may grant may include a sale by private treaty. This view can be supported by the following cases and authorities.

The Court of Appeal in *Chai Koh Shon v Public Bank Berhad*²⁶ remarked that, whilst section 148(2)(c) of the Sarawak Land Code substantively empowers the court to make an order of sale without specifying the method of sale, on the other hand, section 150(1) of the same Act is entirely procedural in nature in the sense that it provides for the procedure for the judicial sale so ordered.²⁷

²² A court in the States of Malaya does not therefore have a choice as to the type of order it may make when moved by a chargee under Section 256 of the National Land Code. There is only one order that it is permitted to make, namely, an order for sale. Court of Appeal in *Century Land Resources Sdn Bhd v. Alliance Bank Malaysia Bhd* [2004] 4 CLJ 793, *Malayan Banking Bhd v Marilyn Ho Siok Lin* [2006] 7 MLJ 249. See also *Maimunah bte Megat v Maybank Finance Bhd* [1996] 3 CLJ 9 where it was held that “the terms or conditions in section 257 of the National Land Code are mandatory. One such term would be the method of conducting the sale, which is by public auction.”

²³ Section 148(2) of the National Land Code 1965. “If the Chargor fails to comply with the requirement of any notice lawfully given, the Chargee shall be at liberty to apply to the High Court -

(a) for an order entitling him to enter into possession and to be registered as proprietor of the charged land;
(b) to receive the rents and profits of the charged land; or
(c) for the sale of the charged land,

and the Court after hearing the evidence may make such order as in the circumstances seems just ...”

²⁴ For an example of the different types of orders which the court in Sarawak may grant, see *RHB Bank Berhad v Alom Industries Sdn Bhd* [2007] 3 AMR 670. “The words used in section 148(2)(c) Sarawak Land Code (Cap 81) and they are “and the court after hearing the evidence may make such order as in the circumstances seems just.” These words empower the court with the flexibility (as opposed to the imperative power in section 256 of the National Land Code) to make any order” as *per* the High Court in *Malayan Banking Bhd v Marilyn Ho Siok Lin* [2006] 7 MLJ 249.

²⁵ Section 150(1) of the Sarawak Land Code 1958 (Cap 81) “Where any competent court orders the sale of any land subject to a charge, it shall notify the Superintendent of its decision and shall serve a notice of the intended sale upon the Chargor and upon the registered Proprietor of every other estate or interest in the land. It shall also give notice of the intended sale by advertisement in the Gazette and by such other means as it may deem sufficient. The sale shall be by public auction or tender or such other mode of sale as may be directed by the Court subject to such conditions of sale as shall be approved by the Court. The Court shall also fix the date of the sale, which shall not be less than thirty days from the date of the order of sale, and shall authorise such other acts as may be necessary for the conduct of the sale. A reserve price shall be put on the land which shall be approximately equal to its estimated fair market value.” (Am Cap A17)

²⁶ *Chai Koh Shon v Public Bank Berhad* [2004] 3 MLJ 585.

²⁷ n26, para 39, p. 597.

Being a procedural provision, it is noted that the words “such other mode of sale” appearing in section 150(1)²⁸ of the Sarawak Land Code may include a sale by private treaty. This view was echoed by the authors Nasser Hamid and Salleh Buang in their book entitled *Land Law in Sarawak* where they were of the opinion that the said phrase “enables the court to approve the sale of land by private treaty...”²⁹ Furthermore, these words do not appear in the National Land Code of 1956 and was added into the Sarawak Land Code only in 1994 by the state legislators.³⁰

Approving a sale by private treaty under the Sarawak Land Code, the Court of Appeal in *Chai Koh Shon v Public Bank Berhad* had decided in para 42 of the decision that “Any sale of these lots by [the] Chargor, by way of private treaty to a third party during the currency of these charges must come under...section 143(2) and (3) of Cap 81 (Sarawak) and be governed thereby ... Such a sale may be concluded at any time before or after the respondent, as Chargee, commences proceedings in the High Court under section 148.”³¹

Sarawakian courts are also empowered to alter subsequent methods of sale after an order for sale is granted, *i.e.* from public auction to one of private treaty and *vice versa*. Thus, if the initial order for sale by public auction is unsuccessful, the courts in Sarawak are empowered to alter the subsequent sale to one of private treaty. In *Chai Koh Shon v Public Bank Berhad*, the Court of Appeal decided that the directions under Section 150(1) of the Sarawak Land Code are not the final orders but consequential orders.³² The view that these directions are consequential orders is significant as it relates to the expiration of a judge’s function (*functus officio*) in a foreclosure proceeding. In *Malayan United Finance Bhd v Adsonii (M) Sdn Bhd*, his lordship Edgar Joseph Jr J (as he then was) held that the principle of *functus officio* cannot possibly apply to consequential orders.³³ As the directions under section 150(1) are held to be

²⁸ Section 150(1) of the Sarawak Land Code 1958 (Cap 81) “...The sale shall be by public auction or tender or such other mode of sale as may be directed by the court subject to such conditions of sale as shall be approved by the court....”

²⁹ n2, p. 255.

³⁰ L.C. Goh, *Nature of Charges and Caveats under the Sarawak Land Code* (Chapter 81), [1995]2 *CLJ* xliiii at xlviii.

³¹ n26, p. 598.

³² “These are directions necessary and consequential upon the order of sale granted as the opening words of s 150(1) clearly indicate and such directions are made under the additional powers of the High Court in para 3 of the Schedule to s 25(2) of the Courts of Judicature Act 1964.” *Chai Koh Shon v Public Bank Berhad* [2004] 3 MLJ 585, para 39 p. 589.

³³ [1990] 2 CLJ 254. See also the decision of his lordship Harun Hashim SCJ in *MUI Bank Bhd v Cheah Kim Yu (Beh Sai Ming, Intervener)* [1992] 2 MLJ 642, p. 648.

consequential orders, the judge is thus legally empowered to alter the subsequent modes of sale which may include a sale by private treaty.

The Court of Appeal in *Chai Koh Shon v Public Bank Berhad*³⁴ echoed a similar view when the court noted that “[in cases of] sale by the charger to a third party...after the order of sale and mode of sale are specified, it seems that the court is not *functus officio* and is competent to vary the mode of sale with the consent of the Chargor and the Chargee ...”³⁵

Conclusion

In closing, having made a comparison between West Malaysia and Sarawak, it would seem the rule that private treaty sales are prohibited after the granting of an order for sale is only applicable in West Malaysia. The same cannot be said for Sarawak.

³⁴ [2004] 3 MLJ 585.

³⁵ *Chai Koh Shon*, n26, p. 590.