

However, very often, the issue document of title may subsequently be issued without the knowledge of the lender and is held, for instance, by the developer who had sold the land to the assignor. The lender often only realizes this only when it is ready to enforce its rights to the land by way of a sale and further assignment of the lender's rights to the land, consequent on a default under the loan.

Thus, the issue arises as to whether the security over the subject land may be realized without the need to create a legal charge when there is a default under the loan in question and when the document of title for the security land has already been issued.

On April 2014, our Ms. Yoong Sin Min and Mr. Lau Kee Sern had appeared for Affin Bank Berhad in the Federal Court on an appeal involving the following question of law:-

“Whether a lender having an absolute assignment of rights to land may realize his security under the terms of the assignment, where document of title to the land was issued subsequently, without the need to resort to the remedies provided under the National Land Code, 1965.” (“the Issue”)

It is to be noted that the aforesaid leave question is an extension of the following issue which had been answered in the affirmative by the Federal Court some ten years ago in the case of *Phileoallied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor* [2002] 2 MLJ 513:-

“Whether a lender may, without obtaining an order of sale from the court, realize his security consisting of immovable property in respect of which there is no issue document of title and no registered charge.”

In *Bupinder Singh*, the Federal Court considered the issue of a private treaty sale (without a court order for sale) of assigned land when there was no individual title issued. The Federal Court held that the assignee bank was fully entitled to sell such assigned property without the need for a court order for sale. In *Bupinder Singh's* case, however, no document of title to the land was issued, unlike in the present case .

Our Mr. Porres Royan and Ms. Yoong Sin Min were the counsel who had represented the appellant bank in *Bupinder Singh*, which is one of the landmark decisions for the banking and finance industry).

In the present appeal, the borrower / assignor maintained that once the individual title to land was issued, the Bank could not sell its rights to the land by way of a further assignment but was obliged to procure a legal charge over the title and effect a sale pursuant to the National Land Code. This would necessarily delay the realization of the security and increase the costs involved, as well as result in further interest accruing on the loan.

The borrower / assignor succeeded before the High Court.

The lender bank engaged Messrs Shook Lin & Bok for the appeal to the Court of Appeal. The bank's appeal was allowed on 8.2.2012, which led to the further appeal by the assignor to the Federal Court, to consider the Issue.

The Federal Court heard extensive submissions in relation to the Issue and has reserved its decision on the same on April 2, 2014, to a date to be fixed. The Federal Court's decision would be a highly-anticipated one, as it will, determine the manner in which lenders will realize such security and how expeditiously or costly such manner of realization will be. An update will certainly be rendered once the decision is delivered.

Jaafar bin Mohd Khalid v. Hong Leong Bank Bhd [2013] 5 MLJ 800

In *Jaafar bin Mohd Khalid v. Hong Leong Bank Bhd* [2013] 5 MLJ 800, the firm's Partner, Mr. Tan Gian Chung, successfully defended the respondent bank against a writ action by the appellant in the High Court for negligence and malicious prosecution and also the appellant's subsequent appeal to the Court of Appeal.

In 2004, the respondent bank commenced a civil suit against the appellant as one of the guarantors in respect of a hire-purchase loan given by the respondent bank to a company. The appellant was a shareholder in the company. In April 2004, the respondent bank obtained a judgment in default of appearance against the appellant.

As the appellant failed to satisfy the default judgment, the respondent bank commenced bankruptcy proceedings against the appellant in October 2007. In December 2009, the respondent bank obtained receiving and adjudication orders against the appellant.