

When the bank loses your original title

DEFECTIVE?: The replacement title obtained by the bank without your involvement as chargor might be defective, argues Dr Ernest

In my Article (NST RED 24th August 2012) on "How to survive a bank foreclosure", I suggested that Malaysian borrowers have five defences against foreclosure proceedings launched against them by Malaysian banks. One of the five defences available is in a situation where the banks had actually lost the "Original Copies" of your land title documents.

Borrower's right as Chargor: When a borrower (Chargor) charges his property to the bank (Chargee), the Chargor would deposit the "Original copy" of his title with the Chargee to keep as "Trustee and Custodian" for the Chargor. As the "Trustee and Custodian", the Chargee is responsible to the Chargor for the safety of the title document.

After the Chargor has settled and paid in full his loan, the Bank returns to the Chargor a "Replacement Title" that the Bank had applied for and obtained from the Land Office after the Bank had lost the "Original Title". The Bank did not inform the Chargor and the Chargor as the Registered Proprietor was not involved in the Application for the "Replacement Title". According to the Supreme Court Judgment in *M&J Frozen Food Sdn Bhd v Siland Sdn Bhd*, the "Replacement Title" obtained by the Bank without the involvement of the Registered Proprietor is likely a "Defective Title".

This is a real nightmare scenario that is waiting to happen to many Chargors (Registered Proprietors and Borrowers) in Malaysia. They are living in blissful ignorance.

When the bank loses the Title Document: Malaysian banks had actually lost the "Original Copies" of the Chargor's title documents kept with them. I am told by Officers of many Malaysian Banks that they sometimes lose the "Original Copies" of the Chargors' title documents kept with them. I have personal knowledge of more than one incidence that the Bank had actually lost the "Original Copies" of the Chargors' title documents.

I am informed that when the banks lost the "Original Copies" of the Chargor's title document, they would

instruct their lawyers to apply to the Land Office for "Replacement Titles". I am also informed that these Banks did not inform and did not get the Chargor (registered proprietors and borrowers) to be involved in the application process. The Banks consider that as the Chargee, they have the right to apply for the "Replacement Titles" without the involvement of the Chargors.

Replacement Titles: Let us now examine the provisions in the National Land Code 1965 for the procedures to follow when making "Application for Replacement Titles" when the original titles are "reported lost".

Section 166(1)(d) of the National Land Code 1965 (NLC) provides for the "Circumstances in which title in continuation may be issued to land as a whole" and for the Application of Replacement Titles when the original issue document of title "has been lost or wholly or partially destroyed, or is being improperly or wrongfully withheld".

Section 166(2) NLC stipulates that the person or body to apply for replacement titles are as listed below:-

- a) The proprietor of the land in question; and
- b) Any person or body claiming through the proprietor

Section 166(2) NLC did not provide for the "Bank" or "Chargee" to be included in the list of person or body permitted to apply for the replacement title.

Section 168 NLC stipulates that before issuing the replacement title, the Registrar or [Land Administrator] shall:-

- (a) cause notice of his intention to do so to be published in the Gazette in Form 10D; and
- (b) cause copies of the notice to be served on every person or body having a registered interest in the land, and to be published in accordance with the provisions of Section 433

Judicial Interpretation of the Chargee bank's right: Malaysian Banks claim that as the Chargee, they have the right to apply for the "Replacement Title" when they lose the original title document without the involvement of the the Chargor.

The Statutory provisions in the relevant sections of the NLC as enunciated above make it clear that the person or body qualified to apply for replacement titles are the proprietor of the land in question and any person or body claiming through the proprietor.

In the face of Section 166(1)(d) and Section 166(2) NLC, many Malaysian Banks still insist that they have the right to apply for the "Replacement Title" without the involvement of the the Chargor.

We shall now find out what Malaysian Courts have to say about Malaysian Banks' stand.



M&J Frozen Food Sdn Bhd vs Siland Sdn Bhd: This is an Appeal to the Supreme Court of Malaysia (Supreme Court) by M&J Frozen Food Sdn Bhd (M&J Food) against an Order of the Johore Bahru High Court that had annulled an Order for Sale made by the Senior Assistant Registrar in respect of a piece of property in Johor Bahru.

Legal position between the Chargor and the Chargee: When ruling on the legal position between the Chargor and the Chargee, the Supreme Court cited the Federal Court case of *Mahadevan Mahalingam v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266 at p 289 as follows:

"Our land law does not recognise a mortgage if it means a mortgage in the sense of English land law whereby the legal estate, i.e. ownership of the land is transferred to the mortgagee and what is left with the mortgagor is only an equitable right to redeem, known as equity of redemption. But our land law certainly recognises a mortgagor in the sense of Torrens system, referred to by text written as Torrens Mortgage in which the mortgagor retains the legal ownership whilst the mortgagee acquires a statutory right to enforce his security".

From reading the Judgment of the Federal Court in *Mahadevan Mahalingam v Manilal & Sons (M) Sdn Bhd* and adopted by the Supreme Court in *M&J Food*, it is abundantly clear then the Bank as Chargee does not have the same rights over the property as the Chargor who retains the legal ownership. The Bank only has the statutory right to enforce his security

Respective interests of the Chargor and the Chargee: When ruling on the respective interests of the Chargor and Chargee, the Supreme Court in *M&J Food* cited another Supreme Court case in *Malayan United Finance*

Bhd v Tan Lay Soon [1991] 1 MLJ 504 (MUF) where the judge had elucidated the respective interests of the chargor and chargee in respect of a charged land as follows:

"Under the National Land Code, the interest in the land subject to a charge does not vest in the chargee but, upon registration of a charge, it tenses the land subject to the charge liable as a security only in accordance with the provisions of the charge, express or implied (s 243). Under s 244(1), the chargee is entitled to the custody of the issue document of title so long the liability stays under the charge. ... Since the right or interests in the charged land remains with the registered owner he has nothing to redeem"

From reading the Judgment of the Supreme Court in MUF which was adopted by the Supreme Court in *M&J Food*, it is abundantly clear that the Bank as Chargee is entitled to the custody of the issue document of title so long as the liability stays under the charge.

Failure of Purchaser to obtain good title: The Supreme Court in the *M&J Food* further ruled on the circumstances when the purchaser of the land might fail to obtain good title in two distinct ways:-

- (a) If the title of the Vendor is bad; and
- (b) Even if the Vendor has a good title, there might be some invalidating defects in the conveyance or transaction in which the purchaser attempted to obtain the title.

The Supreme Court in M&J Food further ruled that: "These transactions might be void or voidable for a variety of reasons. In the case of a defect in the vendor's title, the common law rule is that no person can give a better title than he had - *nemo dat quod non habet*".

Conclusion: In the light of the above listed Federal Court and Supreme Court Judgments and the provisions in the NLC, it is clear that the Bank's rights over the title of the charged property are as follows:-

1. The Banks do not have the right to apply for replacement titles when the original titles deposited with them are lost;
2. The Banks as custodians of the title documents deposited with them only have the statutory right to enforce their security;
3. The Banks as Chargees are only entitled to the custody of the title documents so long the liability stays under the charge; and
4. The right or interests in the charged land remains with the Chargor.

Request for copy of Title Document from chargee Bank: In the light of the Supreme Court's Judgment in *M&J Food* that the Chargor's purchaser might fail to get a good title if the Chargor's title is bad due to the non-compliance of the Bank in respect of the relevant provisions in the NLC, the Chargor might have difficulties trying to sell his property in the future after he has paid the Bank and the Bank discharged the property and returned to him a "defective title".

I advise Chargors/borrowers to immediately request from their lending Banks a photocopy of their title documents that they had deposited with the Banks. After receipt from the Banks, make sure the copies of title documents are copies of the original title and not copies of replacement titles.

If the title documents provided by the Banks are copies of replacement titles and they are sure they were not involved in the replacement titles' application, then the replacement titles are probably defective titles. Immediately get yourselves a lawyer and tell him the whole story.



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