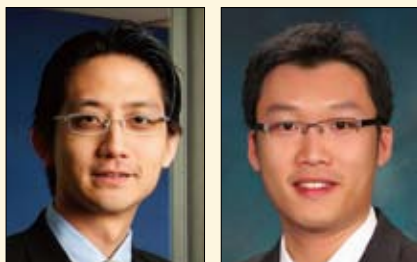


A legal inconsistency in the banking sector?



By Leonard Yeoh and Wong Weng Yew

Section 50 (3) of the *Banking and Financial Institutions Act*, 1989 (BAFIA) was enacted to facilitate the effectual transfer of the business, assets, rights and liabilities from a predecessor bank to a successor. Once an order is made, it takes effect according to its terms notwithstanding anything in any law and is binding on any person affected whether or not he is a party to or had notice of the proceedings.

However, the Federal Court's decision on 2 March 2011 in *Malayan Banking Berhad v ASM Metal Sdn Bhd [Federal Court (Civil Appeal) No. 02(f) -9-2010 (W)]* that, on vesting, a borrower's liability to a transferee is not secured by a security (containing the standard provisions, including an all monies provision) created to secure the liability of the borrower to the transferor, seems to be inconsistent with the intent and plain words of section 50, BAFIA.

In that case, Pacific Bank Berhad (PBB) granted a revolving credit facility to Kai Peng Bhd in 1999. As security for the facility, the ASM Metal Sdn Bhd created a charge in favour of PBB.

The annexure to the charge provides, inter alia, that:

- Clause 7 - The charge is intended to and shall be a continuing security for all moneys whatsoever now or hereafter from time to time owing to PBB by ASM and/or the borrower whether alone or jointly or severally with another or others and whether as principal or surety;
- Clause 36 - The security, liabilities and obligations created by the charge shall continue to be valid and binding for all purposes whatsoever notwithstanding any change by amalgamation, reconstruction or otherwise which may be made in the constitution of the PBB.

Pursuant to a vesting order made under the provisions of section 50 BAFIA, the assets and liabilities of PBB, including the revolving credit facility and charge, were vested in MBB with effect from January 1, 2001. The vesting order, inter alia, provides that where any right or liability of PBB is transferred to MBB, MBB shall have

the same rights, powers and remedies as if it had at all times been a right or liability of MBB.

At the time of the vesting order, the borrower also had a direct liability to MBB under a corporate guarantee dated 9.8.1994, executed by the borrower in favour of MBB to secure banking facilities granted by MBB to one of its subsidiary.

When the borrower defaulted under both the revolving credit facility and corporate guarantee, MBB sought to enforce the charge to recover the amount due and owing under both the revolving credit facility and corporate guarantee.

The Order for Sale was granted by the High Court but subsequently set aside by the Court of Appeal. On appeal, the Federal Court agreed with the majority view of the Court of Appeal that:

- (a) There is nothing in the vesting order that allows MBB to amalgamate their rights and the rights of PBB;
- (b) The charge was to secure the loan given by PBB to the borrower. Clause 7 of the annexure to the charge must be viewed in that context. Even though the wording of Clause 7 seems to be wide, the charge was only to secure the revolving credit facility granted by PBB to the borrower;
- (c) It was not the intention of the parties that the charge would also cover the indebtedness of the borrower under the corporate guarantee given to MBB five years earlier.

The Federal Court, in arriving at this conclusion, may have, with respect, misunderstood the intent and statutory consequence of section 50 BAFIA and the terms of the vesting order, which enable the successor bank (MBB) to step into the shoes of the predecessor bank (PBB) *notwithstanding anything in any law or in any rule of law*. Similarly, a plain reading of Clause 7 may suggest the charge secures not only all monies owing by ASM or the borrower after the creation of the charge, but also all monies owing *at the time* the charge was created.

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