

in the present case. This brings the sum within the charge but relief was available under Sch. 6 Para. 15. The relief in the present case allowed the whole sum to go untaxed, but there may be other cases where only a portion of the sum received would escape tax. It is respectfully submitted that the better test for determining whether or not a sum is compensation for loss of employment is the Romer L.J. test in *Henry v. Foster* rather than the Rowlatt J. test in *Cibbett v. Robinson* as it is so much more precise and easier to apply.³

Jaginder Singh.

THE NATIONAL LAND CODE
FORM 16D v. FORM 16E
JACOB v. OVERSEAS-CHINESE BANKING CORPORATION¹

The recent Federal Court decision of *Jacob v. Overseas-Chinese Banking Corporation, Ipoh* should come as a boon to practitioners. It seems to have laid to rest the continuing battle between the question of whether to use Form 16D or Form 16E in the First Schedule of the National Land Code Act 56 of 1965 to set in motion the machinery for foreclosing a charge payable on demand. In this case the appellant (hereinafter called "the chargor") had charged his land to the respondent bank (hereinafter called "the chargee") to secure the repayment of an overdraft up to a maximum of \$6,000 "and for interest". The charge was executed on the 16th August 1966. From the time of the execution of the charge to the 2nd of December 1971, the chargor withdrew up to the limit of \$6,000 and consequently caused interest to accumulate so that the actual amount owing to the chargee well exceeded \$6,000. The chargee wrote to the chargor on several occasions requesting him to pay the excess overdrawings. The chargor made no attempt to reimburse the chargee for interest and on the 5th April 1972 the chargee served on the chargor a notice to begin the machinery for sale of the chargor's land. The notice took the form of Form 16D. Later, the chargee applied for an order of sale and this was granted by the late Sharma J. in the High Court. The chargor²

³See further Jaginder Singh, *Income Tax Liability of Terminal Payments* [1974] JMCL 72, pp. 78 to 89, for a more elaborate discussion of the scope of this test.

¹[1974] 2 M.L.J. 1

²The word "chargee" at p. 162 r.h.c. para C of the report should read "chargor".

appealed to the Federal Court against this order on two main grounds, (i) that the correct notice to be given should be Form 16E rather than Form 16D, (ii) that the chargee was unlawfully claiming the amount due under the charge. For the purposes of this case-note, the writer proposes to confine himself to a discussion of the first ground of appeal.

In support of the first ground of appeal, the chargor's basic argument was that since the charge was a charge payable on demand, the prescribed form to use was Form 16E pursuant to s. 255(1) of the National Land Code.³ This the chargee did not use and therefore the notice was inoperative. But the Court held that even though the charge was payable on demand, "it would be all right if [the chargee] used only Form 16D" (per Suffian L.P. at p. 163) as s. 255(1) of the National Land Code is susceptible to such an interpretation. The Court invoked the so-called "object rule of interpretation" to say that the object of the legislation was to see that sufficient notice is given to the chargor before the chargee applies for an order of sale. In addition, the Court relied on s. 62 of the Interpretation Act No. 23 of 1967 to conclude that even if Form 16E is the correct form to use, what the chargee had done was to deviate from Form 16E and since this deviation was of no substantial effect, s. 62 of the Interpretation Act would save this deviation.⁴

The overall result of this case therefore seems to be this: in the case of a charge payable on demand, it is now legally effective to use either Form 16E or Form 16D.

It may be said that the point in issue, to use or not to use Forms 16E or 16D, is a small issue and should never have been brought to Court, let alone the Federal Court. But such a statement would be unfair to our practising lawyers as the cause of the numerous litigation on this matter seems to lie solely on the ambiguity of s. 255(1) of the National Land Code together with the words in the heading of Form 16E.

In the course of argument of the present case, counsel for the chargee said that Form 16D was used because this was a demand for principal sum

³S. 255(1) reads: "Where the principal sum secured by any charge is payable by the chargor on demand, the chargee may make the demand by a notice in Form 16E, and in that event, if the sum in question is not paid to him within one month of the date on which the notice is served, may apply forthwith for an order for sale without being required to serve a notice in Form 16D under sub-section (1) of section 254.

⁴S. 62 reads: "Any written law prescribing a form shall be deemed to provide that an instrument or other document purporting to be in that form shall not be invalidated by reason of any deviation from the form if the deviation has no substantial effect and is not calculated to mislead." Strictly, it is section 7 of the Interpretation and General Clauses Ordinance, 1948, which is applicable. The words in s. 7 are not in *pari materia* with s. 62 but it is doubtful whether this fact would have any material bearing to their Lordships' findings.

and interest whereas Form 16E was appropriate only where there was a demand for principal only (p. 163). In other words Form 16E cannot be used to claim interest but only principal. Previous arguments of counsel and dicta of some judges in other cases seemed to have compelled him to take this view.⁵ The dictum of Lee Hun Hoe C.J. (Borneo) clearly highlighted this problem when he commented in the present case:

" I do not agree that if one is demanding principal and interest one would have to use Form 16D but if principal only is demanded then Form 16E must be used. I see no reason why the words 'AND INTEREST' cannot be added to the heading of Form 16E with the appropriate amount of interest inserted" (at p. 164).

So happily, it would now seem that our conveyancers have at least one doubt cleared away for them in the thickets of the National Land Code. It is envisaged that in the light of the present finding by the Federal Court, practitioners would now gravitate towards using Form 16E in demanding a loan payable on demand without fear of being estopped, as it were, from claiming interest.⁶ The use of Form 16E confers two distinct advantages as compared to Form 16D. Firstly, there appears to be no necessity to wait for a breach of the terms, express or implied, of a charge to occur before the chargee can take action to realise the charge. Indeed, in some charges payable on demand, it may be difficult at times to pinpoint precisely a particular breach by the chargor. For instance, if the charge allows the chargor overdraft "up to a limit of \$6,000" and the chargor overdraws on this charge up to say \$7,000, and his last cheque was honoured by the chargee bank, can the chargor be said to be in breach of the agreement to stick to the limit of \$6,000? It is submitted that the fact that the chargee bank honoured the last cheque of the chargor exceeding the limit may well estop the bank from alleging that it has not consented to a variation of the original agreement, which variation the chargee may have acted upon to his detriment. However, happily again, *Jacob's* case would seem to

⁵For instance, see counsel's argument in *V.A.M. Hussain v. B.P. Malaysia Sdn. Bhd.* [1970] 2 M.L.J. 69 at p. 70-71; the dictum of Sharma J. in *Eliathamby v. Sbeik Mobamed Bin Said* [1970] 2 M.L.J. 194 at p. 195 the effect of which seems clearly to indicate that Form 16E can only be used to claim the principal sum but not interest; the dictum of Azmi L.P. in *Mary Michael v. United Malayan Banking Corp. Bhd.* [1971] 1 M.L.J. 172 at 173 where it was said, "In the present case, although the principal sum was payable on demand, the chargee was seeking to recover also the interest which had become due and payable, so that a notice in Form 16D was the appropriate notice." See also the dictum of Gill F.J. in the same case at 173-174.

⁶It is of some historical interest to note that the provision for making a charge payable on demand was enacted in the F.M.S. Land Code only in 1926. In the Registration of Titles Enactment 1911, no such provision was available and a charge payable on demand has been held to be not registrable: see *R.M.S.T. Somasudram Chetty v. Ng Sin Yan* (1923) 3 F.M.S.L.R. 205.

have rendered this a point of academic interest only. It would now seem that the chargee bank can recall its overdraft anytime it wishes by using Form 16E.⁷ The second advantage in the use of Form 16E follows from the first. Since the chargee bank can recall its overdraft at any time by invoking s. 255(1), it would be spared the period of waiting for two months in some cases before it can apply for an Order for Sale. In the absence of provisions to the contrary in the charge, the taking of action under s. 254(1) requires a breach of at least one month plus another month's notice as required by s. 254(1)(b). But s. 255(1) does not speak in terms of the period of breach allowed or of any breach at all. It only requires the chargor to repay the debt within one month from receipt of Form 16E.

*When this casenote was in the press, the writer's attention was drawn to the subsequent decision of Hashim Yeop Abdullah Sani J. in *Central Malaysian Finance Berhad v. Loke Kok Lai* (unreported O.S. No. 191/1974) delivered on the 18th September 1974. The Plaintiffs applied for an order for sale under s.256 of the National Land Code upon default by the defendant in keeping up his instalment payments for an overdraft payable on demand. The Plaintiffs served the notice for sale in Form 16E. The Defendant contested the order for sale on three grounds. The first ground, which is directly relevant to this casenote, was "that . . . the applicant had used the wrong notice under the National Land Code, as not only the principal but also the interest were due and payable." (p. 2 Unreported judgment). His Lordship agreed with the defendant's objection and concluded thus after discussing the *V.A.M. Hussain's Case* and the *Mary Michael's Case*:

"Because the facts in *V.A.M. Hussain's case* are distinguishable from the instant case *Mary Michael's case* would apply. In the instant case the sum sought to be satisfied is the aggregate sum consisting of the balance of the principal together with interests accumulated as at that date. Therefore Form 16D should have been used by the applicant and not Form 16E."

His Lordship held against the Plaintiff also on an alternative ground, namely, that the exact amount claimed was not specified in the Plaintiff's application. Without questioning this second part of the decision, it seems crystal clear that the first part of the decision was to the effect that Form 16E cannot be used to claim principal and interest. With the greatest of respect, it is submitted that this part of the decision can no longer stand against the weight of *Jacob's case*. *Jacob's case* now points the way clearly for the use of Form 16E to claim both principal and interest.

M.H.K. Lim

⁷ c.f. *V.A.M. Hussain v. B.P. Malaysia Sdn. Bhd.* [1970] 2 M.L.J. at 70.

TRANSFER OF A PART ONLY OF LAND

PETER LAI KHEE – CHIN & ANOR.

v.

COLLECTOR OF STAMP DUTIES¹

The National Land Code, 1965, provides in Section 214(1)(a) that "the whole, but not a part only, of any alienated land" shall be capable of being transferred under the Act. After the 1st day of January, 1966, the date of coming into force of the Act, the proprietor of any alienated land, attempting to transfer an undivided share only in the land comprised in his document of title, had the discomfiture of having his transfer rejected by the Registrar on the ground that such a transfer contravened the provisions of Section 214(1)(a) as being an attempt to transfer not the whole, but a part only, of the land.

For many years, this decision of the Registrar was tacitly accepted by practitioners and no attempt was made to have it tested in Court. Proprietors, however, could not long be restrained from transferring an undivided share only in their land as this method of dealing with land had for more than twenty years been the accepted practice under the repealed F.M.S. Land Code, 1926, and the various Land Enactments of the Malay States. Recourse was accordingly had by practitioners to an indirect method of circumventing the restrictive effect of the Registrar's decision. The device employed was disarming in its simplicity. Instead of transferring out from his land merely an undivided share therein to a transferee, the proprietor executed a transfer of his land to the transferee and himself as co-proprietors in undivided shares, thus ostensibly transferring the whole of his land. This method of by-passing the prohibition was apparently received by the Registrar without objection for it soon became the accepted practice. The transfer was stamped with a stamp duty only in respect of the value of the undivided share actually passing to the other transferee and not on the value of the whole of the land and this was also apparently accepted by the Collector of Stamp Duties without disapproval.

It was some eight years after the coming into force of the Act before both the validity of such a transfer and the liability for stamp duty thereon first came up for consideration by the Court. In the case of *Peter Lai Khee-Chin & Anor. v. Collector of Stamp Duties*.¹ A, desiring to

¹[1973] 2 M.L.J. 33.