

DP02

Law on Banking and Finance

9 OCTOBER 2001

1. Time allowed : Three (3) hours
2. Total number of questions : Five (5) questions
3. Number of questions to be answered : Four (4) questions [25 marks each]
4. Answers should be supported by references to cases and/or statutes.
5. Begin each answer to a new question on a fresh page.
6. Answer **all** questions in **English**.
7. A blank page is provided at the end of the question paper for rough work.

ANSWER FOUR (4) QUESTIONS ONLY

1. (a) In relation to Bank Negara Malaysia (BNM), answer the following questions:
- (i) What are the main functions of BNM? [5]
 - (ii) Name **ten** statutes that vest legal powers in BNM to enable BNM to carry out its functions. [5]
- (b) Mary, Dora and Elsie have just registered a private limited company, MDE Sdn Bhd. These three ladies, who are the directors and shareholders of MDE Sdn Bhd, wish to open a current account with Bank Baru Bhd.
- Describe the documents and procedure required for the opening of the current account for MDE Sdn Bhd. [10]
- (c) Is the duration of time (i.e. the time taken to make a person a customer of the bank), a crucial factor in deciding whether a banker-customer relationship has been established? [5]
(Total:25 marks)
2. (a) Describe **ten** instances when the bank has no authority to pay or when the bank's authority to pay on a customer's regularly drawn cheque is revoked. [10]
- (b) (i) In relation to cheques, describe what "general crossings" and "special crossings" are. [3]
- (ii) State the main differences between a "general crossing" and a "special crossing". [2]
- (c) Bank ABC Bhd receives many cheques each day for credit of its customers' accounts and acts as a collecting banker. In this context, answer the following questions:
- (i) State the **two** main duties of Bank ABC Bhd as a collecting banker. [5]
 - (ii) Describe and elaborate on the protection and requirements thereto given in the Bills of Exchange Act 1949 to Bank ABC Bhd as a collecting banker. [5]
(Total:25 marks)
3. (a) Mr Loo Bee Sing retired from Bank Cekap Bhd on 3 January 2001. Prior to his retirement, Mr Loo Bee Sing was an officer in charge of current accounts.
- Mrs Kandar was a current account holder of Bank Cekap Bhd. Mrs Kandar did not conduct her current account satisfactorily and she closed the account on her own accord on 2 February 2001. Soon after that, Mrs Kandar was contemplating to be nominated as the city mayor.
- On 1 March 2001, Mr Loo Bee Sing disclosed to the local newspapers on the conduct of Mrs Kandar's current account whilst she was a customer of Bank Cekap Bhd.
- Has Mr Loo Bee Sing committed a breach of his duty of secrecy, notwithstanding his prior retirement? Give reasons for your answer. [10]
- (b) Inspector Holmes is investigating a crime involving forgery of the signature of one of the customers who maintains an account with Bank Cekap Bhd. Inspector Holmes approaches the officer-in-charge at Bank Cekap Bhd for some personal details of the said customer.
- Can the officer-in-charge at Bank Cekap Bhd disclose information about the customer to Inspector Holmes? [5]
- (c) Mr and Mrs Wong Ah Soh maintain a joint savings account with Bank XYZ Bhd. The mandate for the operation of the joint savings account is "either to operate". On 21 September 2001 at 12.00 noon, Mr Wong Ah Soh had a heart attack and died in the premises of Bank XYZ Bhd.
- One week after Mr Wong Ah Soh's death, Mrs Wong Ah Soh wants to withdraw the entire sum standing in the credit of the joint savings account.

Advise Bank XYZ Bhd on what to do with regard to the joint savings account in the following scenarios, treating each separately:

(i) The credit balance in the joint savings account is RM100. [5]

(ii) The credit balance in the joint savings account is RM100,000. [5]

(Total:25 marks)

4. (a) Bank EC Bhd granted a term loan facility to Mr Stevie Bong. His wife, Mrs Sally Bong, charged a piece of land to Bank EC Bhd as security.

State and describe the nature of the **two** main remedies provided under the National Land Code 1965 which are available to Bank EC Bhd, as the chargee, in the event that Mr Stevie Bong defaults in the repayment of the term loan. [15]

- (b) State the advantages and disadvantages of taking fixed charges and floating charges as security. [10]

(Total:25 marks)

5. (a) Mr Ting is a millionaire and he requires a personal loan of RM500,000 for two months. He owns unencumbered land in Kuala Lumpur upon which a 28-storey building, called "Wisma Ting", was built. He wants to use the land as security for the personal loan but he does not want to create a charge over that land.

Advise Mr Ting on the following:

(i) The type of security he can create by making use of the land title without creating a charge. [5]

(ii) The type of legal documentation and procedure involved in the creation of the security mentioned in (i) above. [5]

(iii) The remedies available to the lender in case of default in repayment of the loan. [5]

- (b) Does the Banking and Financial Institutions Act 1989 prohibit unsecured lending? Discuss. [10]
(Total:25 marks)

- END OF QUESTION PAPER -

OUTLINE ANSWERS

Question 1

- Most candidates could state the main functions of Bank Negara Malaysia (BNM) but were unable to list the statutes that vest legal powers in BNM that enable BNM to carry out its functions.
- Many did not understand that a company is “incorporated” under the Companies Act and not “registered” as a business.
- The question on the duration of time to establish a banker-customer relationship was well answered with supporting cases.

1. (a) (i) The main functions of Bank Negara Malaysia (BNM) are:
- BNM issues currency and keeps reserves by safeguarding the value of that currency;
 - BNM acts as banker and financial adviser to the Government;
 - BNM promotes monetary stability and a sound financial structure;
 - BNM influences the credit situation to the advantage of the country; and
 - BNM is the main regulatory and licensing body for financial institutions in Malaysia.
- (ii) **Ten** statutes that vest legal powers in BNM to enable BNM to carry out its functions include:
- Central Bank of Malaysia Act 1958;
 - Banking and Financial Institutions Act 1989;
 - Exchange Control Act 1953;
 - Islamic Banking Act 1983;
 - Insurance Act 1996;
 - Takaful Act 1984;
 - Emergency (Essential Powers) Act 1979;
 - Essential (Protection of Depositors) Regulations 1986;
 - Treasury Bills (Local) Act 1946; and
 - Government Investment Act 1983.
- [Marks will be given for statutes not listed in the Manual such as the six Offshore Banking legislation, etc]
- (b) The documents required for the opening of the account for MDE Sdn Bhd are:
- certificate of incorporation;
 - memorandum and articles of association;
 - certified copies of Form 24 (particulars of shareholders) and Form 49 (particulars of directors); and
 - resolution of the board of directors appointing the bank (Bank Baru Bhd) as bankers of the company (MDE Sdn Bhd).
- The procedure required is:
- a search with the Registry of Companies;
 - specimen signatures of authorised signatories as given in the resolution; and
 - specimen of company’s rubber stamp.

- (c) The duration of time required to establish a banker-customer relationship (i.e. the time taken to make a person a customer of the bank) is not the essence of the banker-customer relationship. In other words, the duration of time to establish a banker-customer relationship is not fixed or specified.

In *Commissioners of Taxation v English, Scottish and Australian Bank Ltd* where a person paid in a cheque stolen from the plaintiff into a bank account shortly after it was opened; and the plaintiff sued the bank, alleging that since the thief was not a customer, the bank was not entitled to protection under the Bills of Exchange Act, the Court held that the thief was the bank's customer as duration was not the essence of the relationship.

In *Oriental Bank of Malaya v Rubber Industry (Replanting Board)*, it was held that a single transaction would suffice to make a person a customer of the bank.

Thus, the duration of time for a banker-customer relationship to be established is not important.

Question 2

- Some candidates gave irrelevant answers to the question on regularly drawn cheques, e.g. giving answers on "irregularly drawn cheques" instead of what is required.
- all candidates have poor understanding of "special crossings" cheques.
- Some candidates listed protection given to the "paying" bankers instead of "collecting" bankers, as provided for in the Bills of Exchange Act 1949. Some wasted time writing on other protection/defences available that were not given in the Bills of Exchange Act 1949, e.g. estoppel, etc.

2. (a) **Ten** instances when the bank authority to pay on a customer's cheque (which is regularly drawn) is revoked are:

- notice of death of the customer (s.75 Bills of Exchange Act 1949);
- mental incapacity of the customer;
- bankruptcy or insolvency of the customer;
- when a garnishee or other court order affecting the customer's account is served on the bank;
- when the customer assigns the balance to the credit of the account to a third party;
- countermand (s.75, Bills of Exchange Act 1949);
- where there is insufficient funds in the account;
- where the account is closed;
- where there is notice of breach of trust committed in relation to the account; and
- when there is defect in the presenter's title.

- (b) (i) A general crossing is constituted by the addition across the face of the cheque of the words "and company" (or the abbreviation thereof) between two parallel transverse lines with or without the words "not negotiable".

On the other hand, a special crossing is constituted by the addition across the face of the cheque the name of a banker, with or without the words "not negotiable" – s.76, Bills of Exchange Act 1949.

- (ii) Thus, the main differences are:

- A general crossing would consist of two parallel transverse lines whilst a special crossing may not; and
- A special crossing has the name of a banker whilst a general crossing does not.

- (c) (i) **Two** main duties of bank ABC Bhd as the collecting banker are:
- to use reasonable care and diligence when presenting and securing payment of cheques; and
 - to give prompt notice to its customers if the cheques that they have deposited are dishonoured.
- (ii) The protection given in the Bills of Exchange Act 1949 to Bank ABC Bhd as a collecting banker is provided in section 85 of the said Act. Section 85 provides that if the banker has acted in good faith and without negligence, the banker will not incur any liability to the true owner. The requirement of ‘good faith’ does not pose any difficulty, unless the bank acted dishonestly. It may be difficult for the banker to prove that it had acted ‘without negligence’ when opening the account (for example, a banker is negligent if it does not obtain a reference – *Ladbroke v Todd* – or where a banker does not make searches – *The Rubber Industry (Replanting) Board v Hongkong and Shanghai Banking Corporation*); and in collecting cheques especially when it failed to make the necessary enquiries despite the existence of factors which should have aroused its suspicions.

Question 3

- Most of the candidates answered the question on breach of secrecy well.
- Many candidates did not know about disclosure to the police about the affairs of the customers.
- Candidates lacked knowledge to answer the part on handling of deceased accounts, i.e. what to do with the balance in the account if the account holder dies and notice thereof was received by the bank.

3. (a) Yes, Mr Loo has committed a breach of his duty of secrecy notwithstanding his prior retirement. The duty of secrecy is a duty owed to customers of the bank such as Mrs Kandar. Section 97 of the Banking and Financial Institutions Act 1989 (BAFIA) provides to the effect that this duty is binding on “officers” (such as Mr Loo) and the word “officer” is defined in section 2 of BAFIA as including all employees of the bank.

The duty is binding upon Mr Loo during his employment and “thereafter” – s.97, BAFIA. This means that Mr. Loo is still bound to this duty after his retirement.

Although Mrs Kandar closed her account before the disclosure by Mr. Loo, Mr Loo still cannot breach his duty, as a banker is still bound to keep the affairs and in particular, the accounts of the customer secret even after such accounts are closed.

- (b) No, the officer of Bank Cekap Bhd cannot disclose information about the customer to Inspector Holmes as the officer is bound by the duty of secrecy under section 97 of the Banking and Financial Institutions Act 1989 [BAFIA]. If Inspector Holmes wants the information, he has to obtain Bank Negara Malaysia’s written approval for the Bank to make the disclosure – s.99 (1)(i), BAFIA.
- (c) Death of a customer may have the effect of terminating the banker-customer relationship. The death of a customer terminates the authority given to the banker and therefore has the effect of terminating the relationship.
- (i) Normally when the banker has notice of the customer’s death, it would freeze the customer’s account. Any credit balance in the customer’s account vests in his or her personal representatives. In this case, since the credit balance is nominal, the bank may decide to pay Mrs Wong, the survivor, the RM100. The bank may, however, require that Mrs Wong sign an Indemnity just in case there is a claim from the deceased’s personal representatives.

- (ii) However, where the credit balance in the joint account is substantial, such as RM100,000, then the bank is advised to freeze the account. Payment may only be made to the executor (if a Grant of Probate is produced in case of Mr Wong dying testate) or the administrator (if Letters of Administration is produced in case of Mr Wong dying intestate).

Question 4

- Many candidates failed this question on remedies under the National Land Code 1965 (NLC), probably because they misread the question. Candidates should know that commencement of legal suits as a remedy is not under the NLC.
- The answers for the part of this question on fixed and floating charges were on the average. Some mistakenly thought that fixed charges can only be taken over fixtures.

4. (a) The **two** main remedies provided under the National Land Code 1965 which are available to Bank EC Bhd as chargee, in event Mr. Stevie Bong defaults in the repayment of the term loan, are:

- **Right to possession**

The chargee has the right to possession when the chargor is in breach of any agreement, expressed or implied – s.271(1) NLC. However, this right is limited to charges held under a Land Office title, or in the case of any other town or village land, if the land is not occupied by the chargor – s.270(1) NLC. This remedy is available only to the first chargee, unless the Minister, on the recommendation of the National Land Council, makes an order allowing subsequent chargees to exercise this power.

This remedy may either take the form of going into physical possession or, where the property is subject to a lease or tenancy, by taking the rent – s.271, NLC.

- **Power of sale**

The more common remedy is to exercise the chargee's power of sale. The right to sell arises when the chargor has defaulted in payment of interest and principal, and when the chargor has breached the agreement – s.253, NLC.

In case of charged land held under Registry title, the chargee may apply to the High Court. In the case of charged land held under Land Office title, the chargee has to apply to the Collector of Land Revenue for an order for sale by public auction. The court will order the sale of the charged land unless it is satisfied "of the existence of cause to the contrary" – *Kheng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Ors*.

Upon a successful bid at the auction, a certificate of sale in favour of the purchaser will be made and this certificate has the same effect as an instrument of transfer.

- (b) The advantages of taking fixed charges as security are:

- the chargee's security is good as the chargor cannot deal with the charged assets without the chargee's consent;
- the assets covered are also certain and specified so that recovery prospects are better and can be easily traced if disposed by the chargor to a third party; and
- such security may afford priority to the chargee.

The disadvantages of taking fixed charges as security are:

- the chargor cannot deal with the charged assets without the consent of the chargee – this is cumbersome to the chargor.

The advantages of taking a floating charge as security are:

- the chargor can deal with the assets subject to the charge as long as the charge has not crystallised. Otherwise, it would be cumbersome if the chargor had to get the assets released as security whenever it wants to deal with them;

The disadvantages of taking a floating charge as security are:

- on the winding-up of the company, the preferential creditors will be paid ahead of the debenture holder (chargee); and
- floating charges created within 6 months of the commencement of winding up of the company may be invalid unless it can be proved that the company was solvent immediately after creating the charge.

Question 5

- This was a poorly-answered question as many candidates were mixed up with taking security over land without title. The answers for the documentation and remedies were also mostly wrong. Candidates displayed a lack of knowledge in this area.
- Candidates also lacked knowledge in the BAFIA 1989 (Section 60) provision on unsecured lending.

5. (a) (i) Mr. Ting can create a lien (in favour of the bank) over the land upon which the building is situate as security without creating a charge. A lien is a non-registrable interest in land – s.206, National Land Code (NLC). The lender should lodge a lien-holder's caveat over that land.
- (ii) The type of legal documentation and procedure which is involved in the creation of such security are:
- Memorandum of Deposit of Title which sets out the terms and conditions under which the document is held by the lender;
 - Deposit of the issue document of title or duplicate lease; and
 - The lender must enter a lien-holder's caveat in order that a valid statutory lien be created – *Mercantile Bank Ltd v The Official Assignee of the Property of How Han Teh*.
- (iii) The remedies available to the lender in case of default in the repayment of the loan are:
- judicial sale after obtaining judgement – s.281(2), NLC.
- (b) As a general rule, s.60(1) of the Banking and Financial Institutions Act 1989 [BAFIA] provides that a licensed institution cannot give any credit facility without security unless it comes under the exceptions stated in s.60(3), BAFIA:
- it is a credit facility given to another licensed institution or any other person engaged in the provision of finance approved by BNM; and
 - it is a bank or merchant bank.

Therefore, banks and merchant banks may lend unsecured. By virtue of s.60(2), BNM may by order permit any particular institution or class of institutions to provide unsecured facilities up to a specified limit. For example, finance companies may grant unsecured loans of up to RM10,000. Licensed finance companies may extend credit without security for commercial purpose up to an aggregate amount of RM500,000 and up to RM150,000 for unsecured portion of facilities guaranteed by the Credit Guarantee Corporation (CGC).

Where the value of the security falls below the amount of the facility, additional security may be required to be furnished by the borrower or else it is deemed a breach of contract.