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ARTICLE

The Role of Danaharta in Managing and Rehabilitating Financially Troubled Companies in Malaysia – Part One

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1. The introduction of Danaharta

Since Malaysia gained independence from the British in 1957, it has slowly developed from being a third world country into a developing country, with government emphasis on becoming an industrialised nation by the year 2020.[1] In pursuit of this vision the country has achieved notable economic success evidenced by economic growth of more than 8% between 1986 and 1996.[2] By 1997 Malaysia was the 18th biggest exporting and the 17th biggest importing nation in the world.[3] But in mid-1997, the country was hit by the Asian financial crisis, which is still the worst financial crisis Malaysia has experienced since independence. As a result the country was put on the edge of recession, and the whole of the Malaysian economy registered a negative growth rate of 7.5% in 1998, the per capita income contracted by more than 1.8% in 1998, and the Kuala Lumpur Stock Exchange ('KLSE') composite index dropped by 44.9% during the period from 1 July 1997 to 31 December 1997.[4] The composite index was at a low of 262.70 on 1 September 1998 and the KLSE market capitalisation dropped by about 76% to MYR 181.5 billion between 1 July 1997 and 1 September 1998. Interest on non-performing loans ('NPLs') increased, and the cost of funds rose to a high of 20% in early 1998.[5] The impact of the financial crisis left numerous companies fighting for their survival.[6]

The serious financial problems faced by many companies led lenders to record high levels of NPLs,[7] causing banks and financial institutions to tighten their lending and switch their attention to rehabilitating the NPLs on their books.[8] As a result viable businesses were prevented from getting funds to generate economic activities which drove the Malaysian Government to address and considerably improve rescue mechanisms by targeting the rising numbers of NPLs and other effects of the crisis.[9] In 1998, the Government created the National Economic Action Council ('NEAC') to form 'concrete recommendations to the Government to arrest the worsening economic situation and revitalise the economy'.[10] The NEAC launched the National Economic Recovery Plan ('NERP') to provide a comprehensive framework for economic recovery and to counter the negative impact of the Malaysian Ringgit ('MYR') depreciation and the decline of the stock market. The NERP contained more than 580 detailed recommendations including wide-ranging proposals for economic stabilisation and structural reforms while addressing socio-economic priorities and sectors affected by the financial crisis. Under the NERP recommendations, strengthening financial markets and economic fundamentals were high on its priority list.[11] In this regard the NEAC, through the NERP, identified that corporate debt restructuring and corporate recovery was a necessary forerunner to economic recovery and, in order to

Notes

1 M. Mohammad, *The Malaysian Currency Crisis: How and Why it Happened* (Pelanduk Publications, 2000) pp. 7-10.
2 *Ibid.*
3 *Ibid.*
4 *Malaysia and Asian Turmoil* (Ming Yu Cheng and Syed Hossain) available at <www.lawnet.lk/docs/articles/international/HTML/A34.html> viewed on 7 September 2013.
5 *Ibid.*
6 As can be seen from 1,898 companies being dissolved in 1997 in contrast to just 681 companies being dissolved in 1996 and the amount of company liquidation rose to 4,800 in 1998 and the number continued increasing when another 3,778 companies were dissolved from January to September 1999. See further C. Rajandram (2000), *Debt Restructuring and Recapitalisation – Financial and Economic Implication*, paper presented at the MIER National Outlook Conference, Kuala Lumpur, 18-19 January 2000.
7 *Annual Report 1998* (Central Bank of Malaysia, Kuala Lumpur) at 72.
8 *Final Report 2005*, (Pengurusan Danaharta Nasional Berhad, Kuala Lumpur 2005) at 9.
9 *Ibid.*
10 Central Bank of Malaysia, *The Central Bank and the Financial System in Malaysia – A Decade of Change* (Central Bank, Kuala Lumpur 1999) at 596.
11 *Ibid.*

lessen the adverse impact of the Asian financial crisis and the subsequent economic downturn, new measures were therefore introduced in mid-1998 to speed up financial restructuring of both the banking and corporate sectors.[12]

This infrastructure involved setting up three complementary agencies to cope with the financial difficulties: the Corporate Debt Restructuring Committee ('CDRC') to facilitate discussions between borrowers and creditors in order to resolve the debt problems of larger corporations; an asset management company ('AMC') created through Pengurusan Danaharta Nasional Berhad ('Danaharta') to address the rise of NPLs and to seek to remove them; and a special purpose vehicle, Danamodal Nasional Berhad ('Danamodal'), to address the erosion of capital in some banking institutions.[13] Since these rescue mechanisms were initiated to speed up financial restructuring of banking and corporate sectors affected by the crisis, they were established on ad-hoc basis with a finite life span and the latter two have since ceased their operations. However, each agency performed an instrumental role in corporate rescue during its life span.

During the 1998 financial crisis, the CDRC succeeded in resolving 57 cases with a total debt outstanding of MYR 45.8 billion, helping to accelerate the country's economic recovery. It has remained as an informal corporate rescue workout since being revisited in 2009 when it was revived as a pre-emptive measure against any large increase in NPLs in the banking system. Its objective is to provide a platform for financial institutions and corporate borrowers to work out debt restructuring schemes amicably and collectively without resorting to legal proceedings and applications are done on a voluntary basis. This initiative has been put in place to ensure that all avenues are made available to assist viable corporations to restructure their debt obligations. The CDRC acts as a secretariat, which supervises and facilitates negotiations between the creditors, banks, and debtor. Its role is to mediate between the companies and their lenders in arriving at a viable debt restructuring arrangement. The arrangement is informal, has no binding legal status and can be called off by either party at any time. Notwithstanding that, the arrangement offers flexibility where no changes in power are required but the company may get a fresh injection of funds while creditors may strengthen their positions. However, CDRC is not for every company with financial difficulties. During the last financial crisis the applicant company was required to have a potentially viable business and have more than MYR 100 million worth of debts with three financial creditors. The revised criteria now requires companies to have aggregate indebtedness of MYR 30 million or more with at least two financial creditors.

In order to combat the erosion of their capital base faced by many banks during the 1998 financial crisis and to fully address the problem of improving the balance sheets of the banking institutions, Danamodal was incorporated on 10 August 1998 as a wholly owned subsidiary of the Central Bank of Malaysia ('CBOM') to undertake the recapitalisation exercise of the banking institutions. This aimed to ensure that banking institutions continued to be well-capitalised at all times, providing them with the capability to resume their lending activities to the corporate (as well as individual) sector. Therefore Danamodal provided key assistance to financially troubled companies affected by the Asian financial and economic crisis before it was wound down on 31 December 2003, five years after its incorporation in 1998. During its operation, Danamodal injected MYR 7.6 million into ten banking institutions affected by the Asian financial crisis. The timely establishment of Danamodal successfully ensured the overall resolution of the banking sector problems arising from the Asian financial crisis. Its role was important to ensure that the banking sector continued to operate as a lending instrument to corporations and individuals. Banks that had been weakened or become under-capitalised due to the burden of NPLs were recapitalised by this agency so that prudential banking regulations would not be breached. With the improved capital position, coupled with operational restructuring, banking institutions were steered into a better position to focus on providing funding to companies that could contribute to Malaysia's economic recovery.[14]

This article focuses on the third agency, Danaharta, and considers the importance of the role of Danaharta in managing and rehabilitating financially troubled companies with viable businesses. The discussions about Danaharta will be divided into two parts. Part 1 starts with the formation of Danaharta and evaluates the special powers vested to Danaharta via the Pengurusan Danaharta Act 1998. Discussion of the rehabilitation of ailing companies under Danaharta, debates as to whether Danaharta and the Danaharta Act are draconian or not, evaluation of the role of Prokhas as an agent of Danaharta once it ceased

Notes

12 *Final Report 2005*, (Danaharta, Kuala Lumpur) at 10.

13 *Ibid*. See further below.

14 See further Ruzita Azmi and Adilah Abd Razak, 'Corporate Workout: The Corporate Debt Restructuring Committee Revisited, (2011) 8 *International Corporate Rescue* 320-328; Central Bank of Malaysia, *The Central Bank and the Financial System in Malaysia – A Decade of Change* (Central Bank, Kuala Lumpur 1999) at 598; *Annual Report 2003*, Central Bank of Malaysia pp. 107-108; and P.T.N. Koh, 'Country Report For Malaysia', in *Maximising Value of Non Performing Assets, Proceedings from the Third Forum for Asian Insolvency Reform* (OECD, 2003), pp. 243-244.

operation ,and the role of Danaharta in corporate rescue, will be analysed in Part 2.

2. Formation of Danaharta

Danaharta was formed on 20 June 1998 as a national AMC[15] to tackle the NPL problem that plagued the financial system and to enable financial institutions to continue their lending activities to viable economic sectors and accelerate the overall economic recovery process. It was a pre-emptive measure to avoid the threat of a banking crisis in Malaysia.[16] The Malaysian Parliament passed the Pengurusan Danaharta Nasional Berhad Act (the 'DA 1998') on 1 September 1998 to assist financial institutions by removing impaired assets, to assist the business sector by dealing expeditiously with financially distressed enterprises, and to promote the revitalisation of the nation's economy by injecting liquidity into the financial system. These objectives were to be achieved through the acquisition, management, financing, and disposition of assets and liabilities by Danaharta, which was empowered by the Danaharta Act 1998 to implement its objectives for the public good promptly, economically and efficiently.[17] Danaharta was a unique organisation incorporated as a public company limited by shares under the CA 1965. It was wholly owned by the Minister of Finance (Incorporated) and composed of a board of nine directors appointed by the Minister of Finance, most of whom would be from the private sector, and the Government (as shareholder) had two representatives on the board. In addition, Danaharta was given statutory backing under the DA 1998 to enable it to perform its duties expeditiously. This provided Danaharta with greater flexibility regarding its financing and commercial operations, whilst having special powers to perform its function effectively.[18] This reflects the Government's desire that Danaharta operate along commercial lines with the key principle to adopt a market driven approach regardless of the fact that it was a government owned entity.[19] The DA 1998 provided the legislative framework for Danaharta to undertake its mission, conferring on Danaharta two special powers:

1. the ability to acquire NPLs via statutory vesting, whereby Danaharta was allowed to acquire assets with certainty of title and maximise value;[20] and
2. the ability to manage the company borrowers through the appointment of Special Administrators (SAs) who are independent professionals to manage the affairs of financially troubled companies.[21]

3. Amendments to the Danaharta Act (DA) 1998

In 2000, amendments to the DA 1998 were brought in by the Pengurusan Danaharta Nasional Berhad (Amendment) Act 2000 (the 'Amendment Act'), which refined existing provisions of the DA 1998 by eradicating any hesitation about its anticipated effect and to overcome practical problems that arose after Danaharta commenced operations.[22] The amendments were introduced to clarify the provisions and to solve practical difficulties related to the issue of 'statutory vesting', sale by private treaty, legal actions against Danaharta, Oversight Committee ('OC'), SA and some issues relating to the powers of the SA and moratorium when the company is under SA (however, the issues relating to SA are beyond the scope of this article).

3.1 Power to buy NPLs via statutory vesting

Danaharta's powers to buy NPLs from financial institutions allowed it to remove the NPLs and begin to manage them. Danaharta studied each company's borrowers' NPLs account in its portfolio to determine the appropriate recovery strategy in order to get the maximum recovery from its NPLs portfolio.[23] In some

Notes

15 In many countries, which have experienced a banking sector crisis where the NPL levels are unsustainably high, it has been the norm rather than the exception that the government of the day establishes an AMC. Examples have been the Resolution Trust Corporation of the US and Securum of Sweden and in fact Danaharta took cognizance of, adopted and adapted the experiences of these AMC during its establishment phase. It should be noted that prompted by the Asian financial crisis, the Malaysian Government is not alone to activate AMCs like Danaharta as there are other AMCs of the Asian region since the crisis – Korea with the establishment of Korea Asset Management Corporation (KAMCO), Indonesia with Indonesia Bank Restructuring Agency (IBRA) and Thailand set up the Thai Asset management Corporation (TAMC). See further *Final Report 2005*, Danaharta at 11.

16 See further *Final Report 2005*, Danaharta at 11.

17 *Final Report 2005*, (Danaharta, Kuala Lumpur) at 12. See below on the 'Amendments to Danaharta Act'.

18 P.T.N. Koh, 'Country Report For Malaysia', in *Maximising Value of Non Performing Assets, Proceedings from the Third Forum for Asian Insolvency Reform* (OECD, 2003), p. 243.

19 A. Bidin, 'Insolvency and Corporate Rescues in Malaysia' (2004) *International Company and Commercial Law Review* 344-355.

20 S. 13 & s. 14 of the DA 1998.

21 S. 23 & s. 24 of the DA 1998.

22 A. Bidin,' Insolvency and Corporate Rescues in Malaysia' (2004).

23 *Final Report 2005*, (Danaharta, Kuala Lumpur) at 23-25. Other recovery methods contributed to corporate rescue will be discussed further under 'Rehabilitation of ailing companies under Danaharta'.

cases recovery was by way of rehabilitating the NPLs where the company borrower loan could be restructured, for example by involving an extension of the loan repayment period or rescheduling of loan payments.[24] Danaharta's ability to purchase NPLs from the banks led to the rescue of banks' NPLs, which differed from the rescue of a company's NPL. Working in parallel with Danaharta, Danamodal injected fresh capital into the financial institutions, providing funds to financial institutions which required additional capital to meet their capital adequacy requirements but were unable to do so.

Before Danaharta came into existence the problem of the NPLs was sorted out between the company borrower and its bank creditor. After its establishment, Danaharta took up the role of the selling bank by buying the bank's NPLs, which was authorised under DA 1998 (statutory vesting). Primarily, Danaharta would purchase the NPLs from the banks and manage the recovery of these debts, as well as the recovery of affected companies.[25] The banks were not forced to sell their NPLs to Danaharta but some incentives were given to encourage them to do so.[26] Danaharta concentrated on NPLs with a gross value of at least MYR 5 million;[27] those NPLs below MYR 5 million were left to the banks to be sorted out between them and the company. Indeed Danaharta was of the view that small consumer NPLs would be best handled by the financial institutions themselves. Moreover, the sheer number of accounts relating to small loans made it cost and time ineffective to be dealt with by a centralised AMC like Danaharta.[28]

Danaharta's NPL portfolios consisted of acquired NPL and managed NPL. Acquired NPLs were those bought from financial institutions nationwide, while managed NPLs were those obtained from Sime Bank Group and Bank Bumiputra Malaysia Berhad ('BBMB') to manage on the Government's behalf.[29] The main differences between Danaharta acquired NPLs and managed NPLs were the cost, mode of payment and surplus sharing agreement.[30] For managed NPLs there was no cost to Danaharta since the NPLs belonged to the government and there was no surplus sharing agreement, while in the case of acquired NPLs Danaharta bought from the financial institutions, the profit sharing agreement basically stipulated that any excess in recovery values over and above Danaharta's initial cost of acquisition plus directly attributable cost would be 80% for financial institutions and 20% for Danaharta.[31] Danaharta commenced making payments to financial institutions in respect of such realised surpluses and, if Danaharta recovered less than its cost of acquisition, the loss was borne solely by Danaharta;[32] this was one of the incentives encouraging financial institutions to sell their NPLs to the agency. It should be noted that acquired and managed NPLs were dealt with by the same approach to extract maximum recovery value. Before Danaharta wanted to buy a NPL submitted by the selling bank, both had to agree to the terms and conditions of the acquisition. As such, all the NPLs had to be purchased on 'a willing-buyer-willing-seller basis'.[33] The DA 1998 also afforded Danaharta the power to step into the shoes of the selling bank, whereby it then managed to take the same interest and enjoy the same priority as the selling bank. The *status quo* of Danaharta was thus that of the selling bank enjoying the same title and interest in the assets,[34] subject to registered interests and disclosed claims.[35] In Malaysia there is broad range of security that the lenders or bankers or financial institutions may take from borrowers, however, the most popular among the lenders is taking land as security.[36]

Notes

24 *Ibid.*

25 Danaharta received its initial capital of MYR 3 billion from government contribution. For its working capital, MYR 2 billion drawdown was available through loan from Employee Provident Fund (EPF) and Khazanah Nasional Berhad. To acquire NPLs, MYR 15 billion zero-coupon bonds were issued to the selling financial institutions. See further *Final Report 2005*, (Danaharta, Kuala Lumpur) at 18-20.

26 S. Abeyratne, 'Corporate Insolvency in Malaysia' (2000) *Int. Insol. Rev.* 177-189.

27 This threshold limit was raised because NPLs in Malaysia tend to be concentrated, with around 70% of the NPLs in the systems above MYR 5 million in gross value. This translated to approximately two to three thousand accounts, a manageable number for Danaharta to resolve the NPLs on a case by case basis. By focusing on this segment, Danaharta would maximise its efficiency and effectiveness in removing NPLs from the system. See further *Annual Report 1998*, (Pengurusan Danaharta Nasional Berhad, Kuala Lumpur 1998) pp. 13-14 and *Final Report 2005*, (Danaharta, Kuala Lumpur) at 16.

28 *Final Report 2005* (Danaharta, Kuala Lumpur) at 16.

29 Danaharta stopped accepting acquired NPLs from 30 June 1999 and managed NPLs after 31 August 2001. The total number of accounts for acquired NPLs is 804 and managed NPLs 2101. See further *Annual Report 2002*, (Pengurusan Danaharta Nasional Berhad, Kuala Lumpur 2002) at 76.

30 *Final Report 2005*, (Danaharta, Kuala Lumpur) at pp. 20-22.

31 *Ibid.*

32 *Ibid.* See also *Annual Report 2000*, (Pengurusan Danaharta Nasional Berhad, Kuala Lumpur 2000) pp. 20-22.

33 *Final Report 2005*, Danaharta at p. 16.

34 Section 14(3) of DA 1998.

35 Therefore if for example the selling bank had the first chargee over land as security for the NPL, Danaharta would enjoy the same interest as the first chargee of the land and likewise if any caveats registered over the land remained, Danaharta had to deal with existing registered interests should it wish to sell the land. See further *Final Report 2005*, Danaharta at pp. 12-13.

36 Chen Kah Leng, *Country Report for Malaysia,* paper presented at the Asian Development Bank Symposium on Legal Issues in Debt Recovery, Credit and Security (Unpublished) Manila, 1993, pp. 16-17.

Despite Danaharta's loan buying powers, the ownership of the security or collateral attached with such loans did not change. The legal ownership of the collateral property continued with the borrower and in a case involving land, Danaharta's rights were as a chargee while the ownership stayed with the chargor (who will always be the borrower). Danaharta only foreclosed on the collateral to recover from the loan if the borrower did not comply with his loan repayment.[37] In the event that a chargor defaulted payment, the National Land Code of 1965 ('NLC') provided the chargee with remedies via the judicial sale or possession,[38] but, in order to allow Danaharta to maximise recovery value, provisions of the NLC were amended in 1998 by the National Land Code (Amendment) Act 1998 ('NLC Amendment'), wherein a new 15th Schedule was introduced to facilitate the implementation of the DA 1988. The NLC Amendment accommodated, among other things, the acquisition of assets by Danaharta, and clarified that the 'vesting certificate' would be conclusive evidence of the transfer of the NPLs to Danaharta. Clause 5(4) of the Fifteenth Schedule provided Danaharta with the power to dispose of immovable property assets by way of private treaty. Under Clause 5(4)(b) of the 15th Schedule, Danaharta was only required to issue 30 days' notice to the borrower of its intention for the property collateral to be foreclosed or disposed of if a company borrower failed to repay his loan within one month of the date of a foreclosure notice from Danaharta requiring the company to do so. Clause 5(2)(b) of the fifteenth Schedule defined 'private treaty' as negotiations between the chargee and the purchaser leading up to a contract of sale and purchase. On the other hand, the amendments of DA 1998 clarified that the modes of sale of private treaty include auction, tender and private contract under s.57(2). Then the amendments under s.57(1) of the DA 1998 gave additional rights to Danaharta as a chargee over any land to dispose of such land by way of private treaty. While s.57(1)(b) authorised Danaharta to take appropriate steps to preserve the value of properties charged to it and to facilitate the sale of the property,[39] it was also stated under s.57(2) that for the purpose of subsection (1), Danaharta shall be deemed to be authorised by the chargor of the land to affect the transfer of ownership to the purchaser.[40] Therefore the requirements for Danaharta were less onerous than the normal requirements for a chargee. Crucially, both the DA 1998 and the 15th Schedule of the NLC authorised Danaharta, in a case where the chargor defaults payment, to sell the land via private treaty to recover the loan thereby avoiding the judicial sale procedure.[41] The property collateral would be sold by way of private treaty sales, which include sale via open tender, private contract or auction. This contrasts with the banks or financial institutions which were allowed to do so only through public auction. However, it is claimed that Danaharta preferred to dispose of the foreclosed properties through an open tender approach.[42]

3.2 Power to prohibit an injunction against Danaharta

In the course of Danaharta's loan management efforts, some NPL borrowers applied for legal proceedings against it. Section 72 was incorporated into the DA 1998 to prohibit injunctions against Danaharta (as well as OC, SA and Independent Advisors).[43] According to s.72(a) of the DA 1998, the court is prohibited from granting an injunction order against Danaharta as a corporation. Section 72 of the DA 1998 provides as follows:

> '*Limit on the grant of orders of court*
>
> 72. Notwithstanding any law, an order of a court cannot be granted –
>
> (a) which stays, restrains or affects the powers of the Corporation, Oversight Committee, Special Administrator or Independent Advisor under this Act;
>
> (b) which stays, restrains or affects any action taken, or proposed to be taken, by the Corporation, Oversight Committee, Special Administrator or Independent Advisor under this Act;
>
> (c) which compels the Corporation, Oversight Committee, Special Administrator or Independent Advisor to do or perform any act,
>
> and any such order if granted, shall be void and unenforceable and shall not be the subject of any

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37 *Annual Report 2002*, (Danaharta,, Kuala Lumpur) p. 115.

38 S. Abeyratne, 'Corporate Insolvency' at 182.

39 It is said the amendment was intended to overcome the practical problems that Danaharta faced over acts of vandalism and malicious damage, whereby Danaharta may be able to appoint guards to protect the property against such acts. See *Annual Report 2002*, (Danaharta, Kuala Lumpur) at 126.

40 See further *Annual Report 2002*, (Danaharta, Kuala Lumpur) at 124-127.

41 Danaharta was given power to sell charged lands without going through the court process, unlike the banks and other secured lenders who are obliged to obtain the time consuming court's orders to sell charged properties under the NLC. See also *Final Report 2005*, (Danaharta, Kuala Lumpur) at p. 14.

42 *Annual Report 2002*, (Danaharta, Kuala Lumpur) at .83 and *Final Report 2005*, (Danaharta, Kuala Lumpur) at 13.

43 Such provision also applied to the Oversight Committee (OC), Special Administrator or Independent Advisors.

process of execution whether for the purpose of compelling obedience of the order or otherwise.'

It has been pointed out that such a provision was permissible for Danaharta as some borrowers sought to bring legal proceedings against Danaharta (even if they did not have a sound legal basis) simply as a delay tactic.[44] The greater the number of legal actions, the longer Danaharta needed to complete its mission.[45] Accordingly, s.72 was justified given Danaharta's function and mission which was to maximise recovery values,[46] and protection was required to avoid any petty actions from delaying Danaharta's effort in expediting the resolution of the NPLs situations. Furthermore, the delays involved in litigation would reduce the recovery values of NPLs and it was important to ensure that taxpayers did not have to bear the costs of lengthy and expensive litigation.[47]

However, s.72 was challenged in court in the case of *Kekatong Sdn. Bhd v Danaharta Urus Sdn Bhd*.[48] In this case a company named Kekatong defied the constitutionality of s.72 of the DA 1998 to stop Danaharta from selling a land that it charged to Danaharta as security for a loan. Bank Bumiputera Malaysia Ltd ('BBMB') originally extended the loan, secured by Kekatong's land to a company called Kredin Sdn Bhd. Kredin and Kekatong had common directors; however even though Kredin took the land, Kekatong had agreed to repay and to charge its land as a security.[49] Kredin failed to repay the loan when it was due in 1984 and subsequent attempts by BBMB to recover the loan proved fruitless. BBMB later sold the NPL to Danaharta in 1999. Kredin and Kekatong failed to repay the NPL to Danaharta and, three years after acquiring the NPL, Danaharta offered the land for sale by open tender in 2002 to reduce the debt. Kekatong's application for injunction was first heard in the High Court but was rejected.

Kekatong then appealed to the Court of Appeal ('COA'), and the COA overturned the decision of High Court. The COA was of the opinion that s.72 was void and unconstitutional because it breached Article 8 of the Federal Constitution of Malaysia that says that all persons are equal before the law and entitled to the equal protection of the law. The COA felt that s.72 discriminated against Kekatong because Danaharta had a right to get an injunction against Kekatong, but Kekatong could not get injunction against Danaharta. The COA also concluded that s.72 denied Kekatong access to justice.[50] The COA emphasised that the provision elevated Danaharta above the law, and therefore was unconstitutional. In the words of judgment by Gopal Sri Ram JCA:[51]

'We would sum up our views on this part of the case as follows: (i) the expression 'law' in art 8(1) refers to a system of law that incorporates the fundamental principles of natural justice of the common law: *Ong Ah Chuan v Public Prosecutor*;[52] (ii) the doctrine of the rule of law which forms part of the common law demands minimum standards of substantive and procedural fairness: *Pierson v Secretary of State for the Home Department*;[53] (iii) access to justice is part and parcel of the common law: *R v Secretary of State for the Home Department, ex parte Leech*;[54] (iv) the expression 'law' in art 8(1), by definition (contained in art 160(2)) includes the common law. Therefore, access to justice is an integral part of art 8(1). Before leaving this part of the case, it is, we think; appropriate to say a word or two about constitutional interpretation. This is because the constitutional provision that is being relied upon to support the right of access to justice is one of those fundamental liberties guaranteed under Part II of the Federal Constitution. In our judgment, the fundamental liberties guaranteed by Part II, including art 8(1) should receive a broad, liberal and purposive construction.'

The learned judge continued:

'Section 72 by its terms prohibits a court from, inter alia, granting an injunction against the second defendant. But it does not prevent the issuing of an injunction in the second defendant's favour. The section therefore seeks to immunise the second

Notes

44 *Annual Report 2002*, (Danaharta, Kuala Lumpur) at 116.
45 See further below.
46 *Annual Report 2002*, (Danaharta, Kuala Lumpur) at 116.
47 *Ibid.*
48 (2003) 3 MLJ 354.
49 *Ibid.*
50 *Ibid.* See further Gopal Sri Ram's judgment below.
51 *Kekatong Sdn. Bhd v Danaharta Urus Sdn Bhd* (2003) 3 MLJ 354. It has been pointed out that the interpretation of article 8(1) of Malaysian Federal Constitution in Kekatong's case is consistent with international rights norms which stipulate that not only should there be ready access to the courts but also that effective remedies must be available as a means to securing justice. It is also said an affirmation of the Court of Appeal decision was a good opportunity of our times to display a real revival of the Judiciary. See further 'The God-provision' Nik Nazmi Nik Ahmad, Fahri Azzat, Amer Hamzah and Edmund Bon, 'Malaysian Bar', 18 May 2005, also can be found at <www.malaysianbar.org.my/constitutional_law/the_god_provision.html> viewed on 1 March 2014.
52 [1980] SGPC 6.
53 [1996] 3 W.L.R 547.
54 [1994] QB 198.

defendant, which is a private limited company from being restrained in any manner whatsoever, however illegal its acts may be. In other words, the second defendant enjoys blanket immunity from injunctive relief. In our judgment, adopting the principle stated by Lord Steyn in *Pierson v Secretary of State for the Home Department*, s 72 is contrary to the rule of law housed within art 8(1) of the Federal Constitution in that it fails to meet the minimum standards of fairness both substantive and procedural by denying to an adversely affected litigant the right to obtain injunctive relief against the second defendant under any circumstances, including circumstances in which the Act may not apply.'

Disappointed with the decision, Danaharta went on to appeal to the Federal Court against the decision of the COA in *Danaharta Urus Sdn Bhd v Kekatong Sdn. Bhd.*[55] The Federal Court allowed the appeal. The court's verdict was that the Malaysian Parliament's clear intention in enacting the DA 1998 was to ensure that the acquisition of NPLs by the appellant (Danaharta) would ease the pressure upon banks and other financial institutions with the appellant being entrusted with the task, as the nation's AMC, to take over these bad loans (together with securities, where available) in order to maximise recovery values.[56] The court also decided that in order to accomplish these objectives the appellant was given sufficiently wide and broad statutory powers to acquire loans and credit facilities by way of statutory vesting, to manage the affairs of corporate borrowers through special administrators appointed to formulate workout plans in order to repay debts owing to creditors, and finally to dispose of charged assets. Thus insofar as disposition of assets was concerned, the appellant was given additional power to sell charged lands by private treaty without securing the usual court order as banks and other secured lenders are obliged to do so under the National Land Code ('NLC').[57] That clearly was the purpose of s.72 that applies to all persons in the same position as the respondent: this was a reference to all persons whose assets and liabilities had been acquired by the appellant pursuant to the DA 1998. The court argued that there would be a violation of Article 8(1) of the Federal Constitution of Malaysia only if legislation did not apply to a person who is similarly circumstanced to the other persons in the classification – and not to someone like the appellant outside it. The conclusion of the COA was therefore wholly unsustainable as it was a total deviation from the law-regulating Article 8(1) of Federal Constitution. It was therefore the Federal Court judges' unanimous view that there was a rational basis between the classification in s.72 and its object in relation to the Act. Section 72 therefore satisfied the requirements of the reasonable classification test and is not unconstitutional.[58] The detailed judgment of the case as follows:[59]

'(1)Parliament's clear intention in enacting the Act was to ensure that the acquisition of non-performing loans by the appellant would ease the pressure upon banks and other financial institutions with the appellant being entrusted with the task, as the nation's Asset Management Company, to take over these bad loans (together with securities, where available) with a view to maximise recovery values.'

'(2) In order to accomplish these objectives the appellant was given sufficiently wide and broad statutory powers to acquire loans and credit facility by way of statutory vesting; to manage the affairs of corporate borrowers through special administrators appointed to formulate workout plans in order to repay debts owing to creditors, and finally to dispose of charged assets. Thus insofar as disposition of assets was concerned the appellant was given additional power to sell charged lands by private treaty, without securing the usual court order as banks and other secured lenders are obliged to do so under National Land Code.'

'(4)The conclusion of the Court of Appeal was therefore wholly unsustainable as it was a total deviation from the law regulating art 8(1). It was therefore the Federal Court Judges' unanimous view that there was a rational basis between the classification in s 72 and its object in relation to the Act. Section 72 therefore satisfied the requirements of the reasonable classification test and is not unconstitutional'.

It can be seen from the above judgment that the Federal Court reversed the decision of COA and agreed that under Article 8 of the Federal Constitution all persons are equal before the law with equal protection of the law, but argued that there nothing was wrong with s.72 since any discrimination was based on reasonable classification – law can discriminate between different groups of people so long as those in the same group are treated equally.[60] In this case all NPL borrowers and not only Kekatong are prevented from obtaining an

Notes

55 (2004) 2 MLJ 257. Also see further *Annual Report 2003*, Danaharta at 108-110.
56 (2004) 2 MLJ 257.
57 *Ibid.*
58 *Ibid.*
59 *Ibid.*
60 *Annual Report 2003*, (Pengurusan Danaharta Nasional Berhad, Kuala Lumpur 2003) pp. 108-110.

injunction against Danaharta.[61] Therefore s.72 of Danaharta Act is valid and constitutional. This decision was very important for Danaharta to ensure a smooth running in its administration.[62]

Interestingly, the Federal Court judgment in *Danaharta Urus Sdn Bhd v Kekatong Sdn. Bhd* was followed in the case of *Pengurusan Danaharta Nasional Bhd. v Tang Kwor Ham & Ors and Another.*[63] The primary issue for determination before the Federal Court was whether s. 72 of the Pengurusan Danaharta Nasional Berhad Act 1998 ousted the jurisdiction of the court in application for judicial review against the first appellant (Pengurusan Danaharta Nasional Bhd). Abdul Hamid Mohamad FCJ, Alauddin Mohd Sheriff FCJ, Abdul Aziz Mohamad FCJ in allowing the appeals held as follows:

> 'Although the authorities dealt with applications for injunction, the principles therein were equally applicable to *certiorari* and *mandamus* applications. Therefore, in the present case judicial review by way of *certiorari* was not available by reason of s. 72 of the Act. Section 72 clearly prohibits an order of court, which stays, restrains or affects the powers and any action taken or proposed to be taken by Danaharta, the Special Administrators or Independent Advisors under the Act. Following the Federal Court decision in *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd*, s. 72 is valid and constitutional and any order that denies the quick and efficient disposal of property within the framework of the Act is void. Hence, the orders of the Court of Appeal ran foul of s. 72 of the Act and were unsustainable.'

It can be seen that s.72 of the DA 1998 clearly prohibits an order of court, which stays, restrains or affects the powers and any action taken or proposed to be taken by Danaharta, the Special Administrators or Independent Advisors under the Act.

4. Conclusion

Danaharta was formed as an AMC in Malaysia with objectives to remove the NPL distraction from financial institutions and extract the maximum recovery value from the NPLs (as well as managing the affairs of the ailing company borrower through the appointment of an SA). In order to meet its objectives in the most effective and efficient manner, the DA 1998 gave Danaharta special powers to undertake its unique mission. Danaharta managed to help the banking industries effectively manage their NPL problems by purchasing and taking over NPLs from the banks at a discount. Even though the banks would make a loss on those NPLs, they were then able to concentrate on their business of lending new loans. Danaharta's expertise and powers under the DA 1998 thus enabled it to perform a better job of managing NPLs than the bank itself. To complement the role of Danaharta, Danamodal injected fresh capital into the financial institutions. Furthermore, protection was afforded to the agency by the s.72 DA 1998 prohibition of injunctions against Danaharta. In further analysing the role of Danaharta in corporate rescue, Part 2 of this article will consider the methods employed by to rehabilitate and restructure NPLs; whether the powers bestowed on Danaharta were extreme; and finally, the extent of Danaharta's role in the corporate rescue of Malaysia.

Notes

61 *Ibid* at 109.
62 *Ibid.*
63 [2007] 4 CLJ 513.

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