ASSESSING THE LEGALITY OF SELLING LANDED PROPERTIES USING A DEBENTURE DESPITE A NATIONAL LAND CODE CHARGE

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ABSTRACT

Debentures are commonly required by financial institutions as security for loans given to companies. In most cases, these debentures will take the form of a fixed and/or floating charge on all the company's assets; which may comprise either wholly of movable or immovable properties or a combination of both. Where immovable properties are secured, the financier may either sell the company's land as the agent of the company via the debenture or it may proceed with a judicial sale under the National Land Code 2020 (NLC). Between both these options, the financier will almost always opt for the faster route, which is to sell the charge property through a Receiver and Manager appointed under the debenture. Although the earlier method may seem an easier route and one which is also approved by the Federal Court in *Melatrans Sdn. Bhd. v Carah Enterprise Sdn.Bhd.& Anor[2003] 2 MLJ 193*, it is argued that the legality of this process is questionable and is fraught with various legal issues, in particular the possibility of the sale breaching S24(b) and S24(e) of the Contracts Act 1950. This article explores and analyses the possible breaches which a debenture holder may commit if he proceeds to sell a charged property through the Receiver and Manager (even as attorneys for the company) despite the existence of a NLC charge and the consequences thereof. The approach taken by this article is a doctrinal analysis of judicial decisions, qualitative and legal doctrine approach.

Keywords: debenture, Receivers and Managers, illegality, public policy

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INTRODUCTION

The nature and purpose of a "security document" were clearly described by the Court of Appeal in *Malayan Banking Berhad v Worthy Builders Sdn Bhd & Ors*[1] in the following manner:

> "…a security document means a document that provides a security interest in the property or asset (whether tangible or intangible) that is pledged as collateral. In the event the borrower defaults, then the security document is acted upon at the discretion of the lender to salvage whatever losses incurred. In essence, the security document does not form the primary contractual relationship between the lender and the borrower. It only comes into effect when there is a default."

In short, a creditor is assured of some (or in certain situations the whole) payment of this money if he holds a security document of the debtor.[1]

Companies (unlike individuals) are privileged to obtain loans by issuing debentures. They may issue various types of debentures which are secured through various means. The securities include (but are not limited to mortgages, charge(s) over the company's assets, liens, and pledges.[2] Although a debenture, is nothing more than an express acknowledgment of a debt made by the company towards its

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1 [2015] 3 MLJ 791 at para 11

1 "Speaking generally, security is anything that makes the money more assured in its payment or more readily recoverable as distinguished from eg. a mere IOU which is only evidence of a debt. The word is not confined to a document that gives a charge on specific property but includes personal securities for money." *Chetumal v Noorbhoy* 107 IC 213, AIR 1928 Sind 89.

2 "The types of debentures include debenture stock, convertible debentures, or the appointment of trustees (in cases where debentures are issued to the public),… In the context of company law, the term "charge has a broader meaning…it includes a mortgage or any agreement to give or execute a charge or mortgage and it also extends to other securities such as lien and pledges." Krishnan Arjunan and Low Chee Keong, Lipton & Herzberg's *Understanding Company Law In Malaysia* (LBC Information Services 1995) 176-178, 181-182.

creditors (what we would call an 'IOU' in common parlance), it is also recognised as a security document.[3]

Although section 2[4](the definition section) of the Companies Act 2016 broadly defines a 'debenture' to include,

> "debenture stock, bonds, sukuk, notes and any other securities of a corporation whether constituting a charge on the assets of the corporation or not.."

nowhere in the Companies Act 2016 is the word 'debenture' clearly defined.

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[3] "It is my considered opinion that the debenture is not a disposal of Chi Liung's undertaking or property as contemplated under s 132C(1). It is nothing more than a security for the repayment of the loan by Chi Liung which is a valid form of security within the realm of commercial transaction pertaining to loans granted by financial institutions to their borrowers." *Liwa Holdings Sdn. Bhd v Chi Liung Holdings Sdn. Bhd & Ors* [1998] 4 MLJ 465 at 472. See also Nasser Hamid, *Company Directors & The Law* (CLJ Publication 2013) 191.

[4] Companies Act 2016, s2 defines "debenture to include debenture stock, bonds, sukuk, notes and any other securities of a corporation whether constituting a charge on the assets of the corporation or not." The term "Debenture" is defined more extensively in s 2(1) of the Capital Markets and Services Act 2007 (CMSA) as follows: "debenture includes debenture stock, bonds, notes and any other evidence of indebtedness of a corporation for borrowed monies, whether or not constituting a charge on the assets of the corporation, but shall not be construed as applying to any of the following: (a) any instrument acknowledging or creating indebtedness for, or for money borrowed to defray the consideration payable under, a contract for sale or supply of goods, property or services or any contract of hire in the ordinary course of business;(b) a cheque, banker's draft or any other bill of exchange or a letter of credit;(c) a banknote, guarantee or an insurance policy;(d) a statement, passbook or other document showing any balance in a current, deposit or savings account; (e) any agreement for a loan where the lender and borrower are signatories to the agreement and where the lending of money is in the ordinary course of business of the lender, and any promissory note issued under the terms of such an agreement; or (f) any instrument or product or class of instruments or products as the Minister may, on the recommendation of the Commission, prescribed by order published in the Gazette."

The exact definition of the term ‘debenture’ has eluded even the judges themselves. In *Bensa Sdn. Bhd. (In Liquidation) v Malayan Banking Bhd. & Anor.,* [5] the then Justice James Foong, observed that:

> “As early as the 19th century, the English judges have found difficulty in defining this term 'debenture'. As observed by Lindley J in British India, etc Co v IRC 1, '… what the correct meaning of ‘debenture’ is I do not know. I do not find anywhere any precise definition of it. We know that there are various kinds of instruments commonly called debentures.” [6]

Again, in *Levy v Abercorris Slate and Slab Co*, Chitty, J. expressed a similar view in the following manner:

> “I cannot find any precise legal definition of the term, it is not either in law or commerce a strictly technical term, or what is called a term of art.” [7]

In *Bensa Sdn. Bhd. (In Liquidation) v Malayan Banking Bhd. & Anor.,*[8] his lordship Justice James Foong quoted Chitty J in the case of Edmonds v Blaina Co,[9] who had described a 'debenture' in the following manner:

> “The term itself imports a debt – an acknowledgment of a debt – and speaking of the numerous and various forms of instruments which have been called debentures without anyone being able to say the term is incorrectly used. I find that generally, if not always, the instrument imports an obligation or covenant to pay. This obligation or covenant is in most cases at the present day accompanied by some charge or security.”

The same view was also held in the case of *Levy v. Abercorris Slate and Slab Company*[10] where the judge said,

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5 *Bensa Sdn. Bhd. (In Liquidation) v Malayan Banking Bhd & Anor* [1993] 1 MLJ 119.

6 *Bensa Sdn. Bhd. (In Liquidation)*(n 6) 124 para E.

7 *Levy v Abercorris Slate and Slab Co.* (1887) 37 Ch D 260, 264.

8 *Bensa Sdn. Bhd. (In Liquidation)(*n6), 124.

9 *Edmonds v Blaina Co* (1887) 36 Ch D 215.

10 Levy(n 8).

> "In my opinion, a debenture means a document which either creates a debt or acknowledges it, and any document which fulfils either of these conditions is a debenture."[11]

The term 'debenture' was extended by his lordship Justice James Foong in Bensa

> "…[to] also include besides debt, any obligation, covenant, undertaking or guarantee to pay or any acknowledgment thereof."[12]

Although the term 'debenture' is incapable of a precise definition, nevertheless, the courts have been able to identify the essential characteristics of a 'debenture.'

Besides creating a 'debt' or 'an obligation to pay, the debenture must also possess any one of these characteristics. They include the following:

a) that the debt was acknowledged under seal;

b) an instrument was utilised as security to charge the company's property;

c) the instrument restricts the company from providing any further charges.[13]

Looking at a debenture in totality, one can safely conclude that a debenture is essentially a type of security[14] that only companies may

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11 Levy(n 8) at 264.

12 *Bensa Sdn. Bhd. (In Liquidation)*(n 6) at 124 para H.

13 *English and Scottish Mercantile Investment Co Ltd v Brunton* (1892) 2 B1; *Brown, Shipley & Co. v. Commissioners of Inland Revenue* [1895] 2 Q.B. 240 1895 May 24, 245. See also *Levy v. Aberorris Slate and Slab Company* [1886 L. 2528.] 1887 Nov. 2, 3, 264 where it was held that the debenture can be "…secured on 'the goods, chattels and effects' of the company."

14 "A debenture has been broadly defined as 'a document issued by a company containing an acknowledgment of indebtedness on the part of the company." PN Pillai, *Sourcebook of Singapore and Malaysian Company Law* (2nd ed, Butterworths, Singapore, 1986), 734.

create. This view finds its support in *Brown, Shipley & Co. v. Commissioners of Inland Revenue*, [15]where the court thought that

> "In each of those cases… a debenture is the security for the money advanced, and is the evidence of title by which the holder is enabled to go upon the assets of the company at large."[16]

The same sentiment was expressed by the High Court in Bensa[17] which was affirmed by the decision of *NGV Tech Sdn. Bhd. (Receiver and Manager appointed) (in liquidation) v Ramsstech Ltd*.[18] The essence of a debenture was succinctly defined by SY Kok in the following words: "Debentures are, like any other form of securities, documents issued or to be issued in favour of lenders."[19]

Whilst the company's acknowledgment of debt towards its creditors with an obligation to pay creates a debenture, the debenture is always secured against various types of securities or a combination of securities.[20] Depending on the assets the company owns, the

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15 *Brown, Shipley & Co. v. Commissioners of Inland Revenue* [1895] 2 Q.B. 240.

16 Brown, Shipley & Co. (n 16), 244.

17 "In this respect, I find that LKC6 is a debenture. It contains the elements of an obligation, covenant, undertaking or guarantee to pay. It is a security granted by the company to the insurance company and as such is properly registered as a charge under para (a) of s 108(3) of the Act." *Bensa Sdn. Bhd. (In Liquidation)*(n 6),125.

18 *NGV Tech Sdn. Bhd. (receiver and manager appointed) (in liquidation) v Ramsstech Ltd* [2015] MLJU 671.

19 SY Kok, 'A Review of the Federal Court Case of Kimlin Housing Development Sdn. Bhd.' [1997] 3 MLJ ci, cxix.

20 "Debentures are, like any other form of securities, documents issued or to be issued in favour of lenders. Such contractual documents are, therefore, nothing more than just documentary evidence of the indebtedness of the company and to inform the world at large that that particular lender is a secured creditor over certain assets of the company, both moveable and immovable, present and future, which have been offered by the company as securities in return for loans. This statutory notification is achieved the moment the company's Forms 35 or 36 has been ritually filed with the Registrar of Companies within the time frame specified in s 108 of the Companies Act. The forms so filed in the Companies Registry will become public documents and are accessible for inspection by payment of a small search fee. They would then serve

securities may be secured against a company's charge (be it fix and/or floating), a charge created under the National Land Code (Act 828) or it could be found within the terms of the debenture itself; which is usually a clause which authorises a receiver and manager to be appointed.[21] In the article entitled "Automatic Crystallization And Reflotation Clauses: The Advent of a New 'Pouncing' Security?" [22] the term 'debenture' was described in the following manner:

> "While it is not necessarily always the case, securitization of a loan is normally embodied in a debenture under which the company creates a charge over its property in favour of the creditor. The transaction essentially allows the borrower or chargor to retain ownership of the property subject to such restrictions as may be imposed by the lender or chargee. The former provides the borrower with some degree of freedom in dealing with the charged assets while the latter protects the security of the lender."

CREATING A SECURITY FOR A COMPANY

Unlike individuals, a company's typical security will comprise of, amongst others, a fixed and/or floating charge on all the company's assets, a debenture, and a charge created under the National Land

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as written notices of such loan transactions to the world at large or, in particular, to any company searcher who, subsequently, may wish to do business with or lend money to the company notwithstanding the creations of such securities." SY Kok (n 20) cxx.

21 "The securities that have been created may take after the form of either Torrens registered charges or first fixed and floating charges over the moveable and immovable properties, both present and future, of the company." SY Kok (n 20), cxx. See also *Handevel Pty Ltd v Comptroller of Stamps (Vic)* (1985) 157 CLR 177 where it was held that "This definition echoes the common law definition of a debenture as an instrument which creates or acknowledge an obligation to pay a sum of money that may or may not be secured on property of the company." See also Robert P. Austin, Ian M. Ramsay, *Ford's Principles of Corporations Law* (15th edn, LexisNexis Butterworths, 2013), 1127–1128.

22 Low Chee Keong, 'Automatic Crystallization and Reflotation Clauses: The Advent of A New 'Pouncing' Security?' [1995] 3 MLJ xcvii, xcix.

Code (Act 828) ('NLC') , if the company's assets include land.[23] If the chargor company defaults on the loan, the lender (usually the financier) may either sell the chargor company's land via debenture or proceed with the process of enforcing the charge under the NLC. Between both these options, the financier will almost always take the easier route of selling the charged property through the lender's appointed Receiver and Manager rather than struggling through the cumbersome procedures of the NLC.

By choosing the easier path of selling the property through a Receiver and Manager, the legality of the financier's action comes into question. The remaining part of this article explores the issue of whether a debenture holder will be in breach of section 10 read together with section 24 of the Contracts Act 1950 if the debenture holder decides to sell the charged property through the Receiver and Manager (even as attorneys for the company) despite the existence of a charge under the NLC .

WHETHER A DEBENTURE IS AN AGREEMENT THAT DEFEATS THE LAW?

A debenture is essentially a contract between the borrower and the debenture holder (lender)[24] and is therefore regulated by the Contracts

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[23] "The "charge to secure any issue of debentures" is registrable under section 108 (1) of the Companies Act, 1965 read with section 108 (3)(a) thereof. It is a requirement of the law that a National Land Code charge must be registered in accordance with the provisions of the National Land Code while the debenture is to be registered, like the present case, in accordance with the provisions of the Companies Act, 1965. Thus, when a charge is created by virtue of a debenture, it only has to be registered under the provisions of the Companies Act, 1965. A statutory charge under the National Land Code takes effect as a security only, enforceable by proceedings in a court of law by obtaining a judicial sale (Kimlin Housing Development Sdn Bhd [1998] MLJU 477 (Appointed receiver and manager) (In Liquidation) v. Bank Bumiputra (M) Bhd & Ors [1997] 2 MLJ 805 F.C.)." *Malaysian International Merchant Bankers Bhd ["No: 2"] v Highland Chocolate And Confectionery Sdn Bhd & Anor* [1998] MLJU 477 (HCt) 60-61.

[24] "…a debenture is a contract…" Federal Court in *Ali bin Tan Sri Abdul Kadir & Ors v Simpang Empat Plantation Sdn Bhd* [2008] 4 MLJ 813, 824 and the High Court in *See Teow Koon v Kian Joo Can Factory*

Act 1950. Under section 24 of the Contracts Act 1950,[25] there are five (5) objects or considerations that will make an agreement illegal. Out of these five (5) objects listed in section 24, only two (2) are relevant to this article. They are section 24(b)(agreements where the consideration or object of the agreement is of such a nature that, if permitted, would defeat any law) and section 24(e)(agreements where the courts regard the consideration or object of the agreement is one which opposes public policy).

SECTION 24(B) OF THE CONTRACTS ACT 1950: AGREEMENTS WITH OBJECT THAT WOULD DEFEAT ANY LAW

Various case laws[26] have decided that agreements that aim to circumvent the law are illegal agreements under section 24(b) of the Contracts Act 1950 and are therefore void.

The meaning of the word 'circumvent' was considered by the Court of Appeal in *BK Fleet Management Sdn. Bhd. v Stanson Marketing Sdn Bhd*.[27] Here, the court referred to the Cambridge

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Berhad & Ors [2016] MLJU 367 para 77. "Debentures are, like any other form of securities, documents issued or to be issued in favour of lenders. Such contractual documents are, therefore, nothing more than just documentary evidence of the indebtedness of the company and to inform the world at large that that particular lender is a secured creditor over certain assets of the company, both moveable and immovable,.." SY Kok (n 20) cxx.

25 Under s.24 of the Contracts Act, the object or consideration of an agreement is considered unlawful and therefore void if amongst others it is prohibited by law, or if allowed, will circumvent any law or if it contravenes public policy. In each of the above cases, the consideration or object of an agreement is said to be unlawful.

26 See for example *Merong Mahawangsa Sdn. Bhd & Anor v Dato' Shazryl Eskay Bin Abdullah* [2015] 5 MLJ 619 (FCt), *Hee Cheng v Krishnan* [1955] 1 MLJ 103, *Menaka v Lum Kum Chum* [1977] 1 MLJ 91, *Chai Sau Yin v Liew Kwee Sam* [1960] MLJ 122;[1962] MLJ 152, *Hashim bin Adam v Daya Utama Sdn Bhd* [1980]1 MLJ 125; [1982] 1 MLJ 255; *Manang Lim Native Sdn. Bhd. v Manag Selaman* [1986] 1 MLJ 379, *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356(SCt).

27 [2017] 5 MLJ 1145.

Dictionary and applied the literal meaning of the word "circumvent" to mean avoiding doing something, especially cleverly or illegally.[28]

The Supreme Court in *Lim Kar Bee v Duofortis Properties (M) Sdn Bhd*,[29] had developed a test to determine how an agreement can defeat the law. The test is this: "…in any given transaction, what was the primary purpose of the transaction?"[30] The Supreme Court in *Lim Kar Bee* decided that the scheme was unlawful because the main aim of the scheme was to circumvent the payment of estate duty.

In *Malayan Banking Bhd v Neway Development Sdn Bhd & Ors*,[31] the Federal Court through his Lordship Richard Malanjum (the then Chief Justice of Sabah &Sarawak) declared the purchase of the native land which was made through the native nominee illegal because the purchase was done, applying the words of the court "in order to circumvent a clear statutory prohibition."[32]

The Indian Supreme Court in Firm, *Pratapchand v Firm, Kotrike*[33] issued a warning that the court will not be sympathetic to a party who intentionally uses a contract to avoid the law. This view was referred by the Supreme Court in *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor*.[34]

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28 *BK Fleet Management Sdn. Bhd.* (n 28) at para 29 "Now, what is circumvention? The CVLB Act does not define what is meant by circumvention. Indeed, there was no need for that as that word does not appear anywhere in the 1987 itself. Circumvention is a common word, but a word of significant ramifications, given the context it is being used. According to the Cambridge Dictionary, to circumvent means to avoid doing something, especially cleverly or illegally. As an illustration, it gave as an example, where ships were registered abroad to circumvent employment and safety regulations."

29 [1992] 2 MLJ 281.

30 See Lim Kar Bee (n 30) 291 para B.

31 [2017] 5 MLJ 180.

32 Malayan Banking Bhd (n 32) 189 para 22.

33 AIR 1975 SC 1223.

34 [1990] 1 MLJ 356, 364 para C-D.

In relation to the legality of the sale of immovable properties which are secured by a NLC charge, the first point of reference is the Supreme Court's decision in the case of *Kimlin*.[35]

One of the many issues which the Supreme Court in *Kimlin* had to consider was this: [Was] the scheme provided by the NLC concerning the powers of the statutory chargee 'exhaustive and exclusive'?[36] After listing out the rights of the chargee found in the NLC, the Supreme Court affirmatively answered the question and concluded that the

> "relevant portions of the Code to wit 254-265 (charge actions) conferring the rights upon the chargors…[were] designed for [the chargor's] protection"[37]

In *Melatrans Sdn. Bhd. v Carah Enterprise Sdn.Bhd.& Anor*. [38] Carah Enterprise provided a debenture as security for banking facilities granted by the second respondent. An NLC charge was subsequently registered over the lease in favour of the second respondent. Upon default, the second respondent appointed a Receiver and Manager over all the assets, including Carah's land[39] pursuant to the debenture. The law report was silent on the reason for the appointment; presumably, it was triggered by an event of default caused by the chargor (Carah.)[40] The appellant challenged the sale on

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35 *Kimlin Housing Development Sdn. Bhd. (Appointed Receiver and Manager)(In liquidation) v Bank Bumiputra (M) Bhd v Ors* [1997] 2 MLJ 805 (SCt)

36 *Kimlin Housing Development Sdn. Bhd*. (n 37) 818 para A.

37 *Kimlin Housing Development Sdn. Bhd*. (n 37) 820 para B.

38 *Melatrans Sdn. Bhd. v Carah Enterprise Sdn.Bhd.& Anor* [2003] 2 MLJ 193 (FCt).

39 *Melatrans Sdn. Bhd.* (n 40) 197 para C-F.

40 "What amounts to an act of default will always be spelt out in great detail in the loan documents, either in the articulately worded charge annexure or in the loan agreement (including a debenture) or both. Legislature does not, in such a loan transaction, interfere with the contractual parties' freedom to contract as they please so long as public policy will not be infringed. Therefore, it is up to the parties to the loan transaction to decide what events will amount to defaults. The most obvious and common event of default will be the non-payment by the borrower of the principal sum plus accrued interest on due date." SY Kok, 'A Review of the Federal Court Case of *Kimlin Housing Development Sdn. Bhd*.' [1997] 3 MLJ ci, cxxiv.

grounds that the Receiver & Manager (R&M) was not empowered to sell the said lease by private treaty. It failed in the Federal Court. Distinguishing *Kimlin*, the Federal Court in Melatrans was of the opinion that since

> "the sale was undertaken by the R&M on behalf of … the chargor of the said lease…the provisions of the NLC prescribing for judicial sale could not apply…in the instant appeal because the R&M was acting as agent[emphasis mine] of the chargor."[41]

The Federal Court also rejected the argument that the

> "debenture was an attempt to avoid the effect of and was… a means to contract out of the provisions of the NLC and [it] was therefore void."[42]

On the contrary, the Federal Court was "satisfied [that] the said power of attorney [had] complied with ss 3(2) and 4(1) of the Powers of Attorney Act 1949"; therefore "the Receiver & Manager could act and exercise the power under the debenture."[43] Based on this reasoning above, the Federal Court rejected the argument "that the power of attorney was a means to contract out of the provision of the NLC." [44]

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41 *Melatrans Sdn. Bhd.* (n 40) 201 para F. The same view was held by Dr. Samsar Kamar Bin Hj Ab Latif, 'Power of Sales by Receivers and Managers over Land under a Debenture.' [1998] 1 MLJ cxxix, cxliii.

42 *Melatrans Sdn. Bhd*. (n 40) 201 para G. "This would mean, however, that there would be no distinction at all between illegal and void contracts in Malaysia." Suhana, Sharifah, 'The Doctrine of Illegality Under Section 24 of the Malaysian Contracts Act, 1950. Laying A Spirit to Rest, *Journal of Malaysian and Comparative Law*, [S.l.], v. 18, 99. https://ejournal.um.edu.my/index.php/JMCL/article/view/16036 accessed 28 May 2022. See also Cheong May Fong, *Contract Law in Malaysia* (Sweet and Maxwell Asia 2010) 293-294.

43 *Melatrans Sdn. Bhd*. (n 40) 201 para G-H.

44 The Federal Court's view was followed in *Suncast Sdn. Bhd. v Padang Indah Sdn.Bhd.* [2007] MLJU 640; *Chon Ah Jee @ Chuan Teck Chun & Ors v Lim Tian Huat (as the receiver and manager appointed for Bigraise Telipok Sdn.Bhd.) & Anor* [2010] 4 MLJ 270; *Lim Eng Chuan Sdn. Bhd. v United Malayan Banking Corp & Anor* [2011] 1 MLJ 486. See also Kuek Chee Ying, 'Receiver and Manager's Power of Sale over

With respect, it is argued that the view of the Federal Court in *Melatrans* was misguided, probably because the argument was centered on the wrong issue of "contracting out of the NLC."[45] It is humbly submitted that the debenture is unlawful under the Contracts Act 1950 because what the lender essentially intended to do was to utilise the debenture as an instrument to circumvent and defeat the laborious foreclosure procedures which were set up by the NLC. This view can be supported by the following explanation.

Depending on the assets of the company, a lender may secure its loans granted to the company against a company charge (be it fix and/or floating), a NLC charge and/or the security may be found within the terms of the debenture itself; which usually authorises the appointment of a Receiver and Manager.

In *K Balasubramaniam, Liquidator for Kosmopolitan Credit & Leasing Sdn. Bhd (In Liquidation) v MBF Finance Bhd. & Anor*., [46] one of the issues which the Federal Court had to consider was this:

> "was the principle enunciated by the Supreme Court in Kimlin restricted only to the powers of a Receiver and Manager appointed under a power contained in an instrument, to dispose of a parcel of land on which a legal charge was created under the National Land Code 1965 or does the principle apply to all the assets of the company, be it movable or immovable that is under liquidation where a liquidator had been appointed?"

Charged Land: Development after the Kimlin Decision' [2012] 3 MLJ lxxxix.

45 "Mr. Ng Chew Hor, for the appellant, also submitted that the power of attorney given to the R&M under the debenture was an attempt to avoid the effect of and was but a means to contract out of the provisions of the NLC and was therefore void. Looking at the debenture in the appeal record, we are satisfied the said power of attorney complied with ss 3(2)and 4(1) of the Powers of Attorney Act 1949. In our view, the R&M could act and exercise the power under the debenture. We therefore find no merit in counsel's contention that the power of attorney was a means to contract out of the provision of the NLC." Melatrans Sdn. Bhd. (n 40) 201 para G-H.

46 K Balasubramaniam, Liquidator for *Kosmopolitan Credit & Leasing Sdn. Bhd (In Liquidation) v MBF Finance Bhd. & Anor* [2005] 2 MLJ 201 (FCt)

Her ladyship Siti Norma Yaakob FCJ, speaking on behalf of the Federal Court distinguished *Kimlin* on grounds that the Federal Court in *K Balasubramaniam* was dealing with "an equitable charge over movable property (emphasis mine) which [was] entirely different from subject matter from *Kimlin*"[47] which was related to a land charged under the NLC.[48]

Based on the Federal Court's decision in *K Balasubramaniam* it can be concluded that if the security that the borrower company provides comprises wholly or even partly of land, a NLC charge must be entered and it cannot be circumvented by any means whatsoever.

PRIORITY OF A CHARGE UNDER THE NLC

Since a debenture that is secured against the immovable property of the company via a NLC charge must be realised through a sale under the NLC following the Federal Court's decisions of *Kimlin* and *K Balasubramaniam*, selling the property through any other method (including those by a Receiver and Manager) will contravene the NLC and is illegal under S24(b) of the Contracts Act 1950.

The law on this issue should remain the same even though the Receivers and Managers were duly appointed under a valid power of attorney according to the debenture.[49] In *Lim Eng Chuan*, the sale of

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47 *K Balasubramaniam* (n 48), para 35.

48 *K Balasubramaniam* (n 48), para 34.

49 "The crucial point is whether that 'agency theory' offends the system of land law in our country when it comes to the sale of charged land otherwise than by following the governing provisions of the NLC. With further respect, for the purpose of the NLC, it does not matter one bit that the receiver and manager is styled as or is deemed to be the agent of the chargor company when he sells the charged land comprised in a debenture by way of private treaty pursuant to the terms of a debenture. The sting in the indirect means is the deemed contractual 'agency' of a receiver and manager. Testing the principle laterally, would it make any difference if the chargor was a natural person instead of a company? Could such a chargor contract with a chargee that, in the event of default, a third party would be automatically empowered to sell the charged land by private treaty and in so doing, be deemed to be the agent of the individual chargor? The agency of a receiver and manager may be 'real' in relation to land mortgages under the common law and equity in other jurisdictions. However, in our country, one is dealing with the law

the property by the Receivers and Managers was validated by the Court of Appeal on grounds that the Receivers and Managers were acting for and on behalf of the chargor under the power of attorney.[50] It is humbly submitted that the Federal Court in *Melatrans* and Court of Appeal in *Lim Eng Chuan* should not have examined the validity of the power of attorney superficially in relation to the Power of Attorney Act 1949 and independently of the debenture.[51] Instead, the Federal Court in Melatrans and Court of Appeal in *Lim Eng Chuan* should have read the power of attorney in a deeper context i.e. it should have applied the equitable principle that "equity looks at the intent rather than the form" and read the power of attorney following the spirit and intent of the debenture as a whole.[52] Although the debenture usually provides that the Receiver and Managers are "exercising the power on the company's behalf and the appointment is considered as having been made by the company itself," in reality, the Receivers and Managers are acting for the debenture holder's benefit (i.e financial institution).[53] In his article entitled,

as set out in the NLC and the effect of s 24 of the Contracts Act. It will, with respect, be quite inappropriate to temper our statutory land system with the law of mortgages and equity relating to land as applied elsewhere, or corrupt our statutory land system dealing with land charges with those principles." Loh Siew Cheang, 'Eyes For Us To See: The Kimlin Decision [1998]' 2 MLJ xxxix, xli.

50 See (n 46)

51 "Looking at the debenture in the appeal record, we are satisfied the said power of attorney complied with ss 3(2)and 4(1) of the Powers of Attorney Act 1949. In our view, the R&M could act and exercise the power under the debenture. We therefore find no merit in counsel's contention that the power of attorney was a means to contract out of the provision of the NLC." *Melatrans Sdn. Bhd.* (n 40), 201.

52 Also known as "Equity looks to the substance rather than the form, this maxim looks at the form of the subject matter, rather than allowing the intention to dissolve in favour of caveats(or provisions) that work against common law; and obstruct a proper outcome" The Black Letter Law <https://theblackletter.co.uk/tag/equity-looks-to-the-substance-rather-than-the-form> (accessed 2 June 2022).

53 See Rigby LJ in *Gaskell v Gosling* [1896] 1 QB 669, 692. This dissenting judgment was later approved by the House of Lords allowing the appeal: *Gosling v Gaskell* [1897] AC 575. See also *United Malayan Banking Corporation Bhd v Roland Choong* (1991) 1MSCLC 90,697. 'The company gets the loan on terms that the lenders shall be entitled, for the purpose of making their security effective, to appoint a receiver

"Receivership, Liquidation, and Torrens Land: Mapping the Boundaries. *Kimlin Housing Development Sdn. Bhd. v Bank Bumiputra' Malaysia Bhd*." published in the *Singapore Academy of Law Journal*, Lee Eng Beng asserts that:

> "the Receiver and Manager is not an ordinary agent [as] his 'primary duty is owed to the debenture holder…and this duty is to realize the company's assets, to distribute the proceeds to the debenture holders in satisfaction of their claims and to return any surplus assets to the company."[54]

It is respectfully submitted that if both the Federal Court in *Melatrans* and Court of Appeal in *Lim Eng Chuan* had applied the cases and opinions mentioned above and had looked at the context and purpose in which the power of attorney was used equitably instead of merely looking at the procedural requirement of the power of attorney, the Federal Court in *Melatrans* and Court of Appeal in *Lim Eng Chuan* would have concluded that the power of attorney was inserted in the debenture to circumvent the procedures of the NLC.

As Loh Siew Cheang has rightly concluded in his article entitled "Eyes For Us To See: The Kimlin Decision":

> "…arming receivers and managers with private contractual powers to sell charged lands under the terms of a debenture by private treaty is an indirect means employed to achieve

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and manager; the company thus agrees to commit, for valuable consideration, the management of its property to an attorney whose appointment it cannot interfere with.' Lee Eng Beng, 'Receivership, Liquidation and Torrens Land: Mapping the Boundaries. *Kimlin Housing Development Sdn. Bhd. v Bank Bumiputra Malaysia Bhd.*' (1997) 9 S.Ac.L.J. 1, 417.

54 "Thus, the receiver and manager has all of the powers of an agent of the company, including the power to carry on business and enter into obligations on behalf of the company, but is under very few of the usual obligations of such an agent,17 as the company has irrevocably undertaken to allow its own interests to be subordinated to those of the debenture holder. He is a peculiar creature whose legal status as an agent of the company bears little resemblance to his real function.'' Lee Eng Beng (n 55), 417-418.

> something which is contrary to the very legal idea of a system of land law which is exclusive and exhaustive."[55]

It is irrelevant that a power of attorney was created following the Power of Attorney Act 1949.[56] The legality of a debenture cannot and should not be separated from the power of attorney that is linked to or embodied in the debenture. The legal effect of both these documents should be taken in totality. In *Malayan Banking Bhd v Neway Development Sdn Bhd & Ors*[57] the Federal Court declared that "subsequent instruments and documents, including the third party first legal charge" security for the term loan which was linked to or had arisen out of a sale that was found to be illegal, was "tainted with illegality" as well.[58] The decision of *Neway Development Sdn Bhd* was reaffirmed by the High Court in *Dr. HK Fong Brain Builder Pte Ltd v SG-Maths Sdn Bhd &Ors*[59] where the court decided the three separate documents as constituting 'a single composite transaction.' The High Court's decision was later affirmed by the Court of Appeal.[60] In *Firm Pratapchand v Firm Kotrike,*[61]Justice Beg, J. had decided that:

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55 See Loh Siew Cheang, 'Eyes For Us To See: The Kimlin Decision' [1998] 2 MLJ xxxix at xli.

56 Act 424.

57 *Malayan Banking Bhd* (n 32).

58 See *Malayan Banking Bhd)v Neway Development Sdn.Bhd.& Ors* [2017] 5 MLJ 180 where it was held in para 22 that "…As such the purchase the native land itself was illegal ab initio. Section 24(a) and (b) [CA] is clear. In our view no amount of gymnastic argument could remedy the default. Thus, any subsequent instrument and documentation that linked to or arose out of the purchase would have been tainted with such illegality. Hence, even the third party first legal charge security for the term loan given by the appellant was also tainted with illegality." This view was followed by the High Court in Dr. H K Fong Brainbuilder Pte Ltd v Sg-Maths Sdn.Bhd.& Ors [2018] MLJU 682.

59 *Neway Development Sdn Bhd* was reaffirmed by the High Court in *Dr. HK Fong Brain Builder Pte Ltd v SG-Maths Sdn. Bhd.&Ors* [2018] 11 MLJ 701, para 42.

60 'We are of the view that the finding of the learned judge that the three documents 'form a single composite transaction' falls within the purview of the ratio of the Federal Court in *Malayan Banking* that ' ... any subsequent and documentation that linked to or arose out of the purchase would have been tainted with such illegality'. Thus, we agree

> "If an agreement is merely collateral to another or constitutes an aid facilitating the carrying out of the object of the other agreement which though void, is not in itself prohibited within the meaning of s 23 of the Contract Act, it may be enforced as a collateral agreement. If on the other hand, it is part of a mechanism meant to defeat what the law has actually prohibited, [emphasis mine] the courts will not countenance a claim based upon the agreement because it will be tainted with an illegality of the object sought to be achieved which is hit by s 23 of the Contract Act. It is well established that the object of an agreement cannot be said to be forbidden or unlawful merely because the agreement results in what is known as a 'void contract.' A void agreement, when coupled with other facts, may become part of a transaction which creates legal rights, but this is not so if the object is prohibited or '*mala in se*."

Based on the cases above, it is argued that the debenture and the power of attorney should be considered as a 'single composite transaction' or security in this case. Once the debenture is found to be illegal, all instruments and documents that are linked to or which arise out of the debenture (including the power of attorney in this case) should also be void since it is tainted with illegality.

BREACHING SECTION 24(E) OF THE CONTRACTS ACT: AGREEMENTS WITH OBJECT WHICH THE COURT REGARD AS OPPOSED TO PUBLIC POLICY

In *Kimlin*, the Supreme Court decided that the sale by the Receiver and Manager contravened public policy and was therefore void because the parties intended to contract out of the procedures in the

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with the learned judge's finding that the illegality of the MLA 2013 will consequently taint the guarantee and the power of attorney. Further, by parity of reasoning, we also agreed the guarantee and the power of attorney will likewise be void in their entirety under s 24(a) and/or 24(b) of the CA 1950.' Court of Appeal in *Dr. HK Fong Brainbuilder Pte Ltd v SG-Maths Sdn. Bhd. & Ors* [2021] 1 MLJ 549 at 573.

61 *Firm Pratapchand v Firm Kotrike* AIR 1975 SC 1223, 1228.

NLC 1965.[62] *Kimlin*'s decision was subsequently distinguished by the Federal Court in *Melatrans*[63] and *Lim Eng Chuan*[64] for the reason that provisions of the NLC are inapplicable to Receivers and Managers who had sold the chargor's land under a duly constituted power of attorney since the Receivers and Managers were effectively selling the chargor's property as agents of the chargor.[65]

It is respectfully submitted that besides 'contracting out,' the Supreme Court in *Kimlin* could have also applied two (2) stronger arguments: they are (a) "unconscionability" and (b) that the terms of the contract had "effectively ousted the jurisdiction of the courts." Had the Supreme Court in *Kimlin* applied these reasonings, it is argued that the decision of *Melatrans* and *Lim Eng Chuan* may be decided per incuram because it will be caught by *Kimlin*'s decision. This means that Receivers and Managers will still be in breach of public policy even if they had sold the chargor's land under a properly constituted power of attorney.

UNCONSCIONABILITY:THE CONCEPT AND TEST OF "UNCONSCIONABILITY"

The terms "unconscionable", "unconscionable bargain", "unconscionable conduct" and their similar variations are not defined in the Contracts Act 1950. However, one could argue that the concept

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62 *Kimlin Housing Development Sdn. Bhd.* (n37), 824 para D, "In our view, the provisions of the Code setting out the rights and remedies of parties under a statutory charge over land comprised in Pt XVI are exhaustive and exclusive and any attempt at contracting out of those rights – unless expressly provided for in the Code – would be void as being contrary to public policy." See also Rabindra S Nathan, 'Company Receiver Can Now Sell Land by Private Treaty' where the author stated that "In *Kimlin*, the Supreme Court also held that a debenture holder could not contract out of the provisions of the code by means of a power of attorney conferred on itself or the receivers" at https://www.lexology.com/commentary/insolvency-restructuring/malaysia/shearn-delamore-co/company-receiver-can-now-sell-land-by-private-treaty (accessed 4 July 2022).

63 *Melatrans Sdn. Bhd.* (n 40), 201 para H.

64 *Lim Eng Chuan Sdn. Bhd. v United Malayan Banking Corp & Anor* [2011] 503 para 40.

65 *Melatrans Sdn. Bhd.* (n 40), 201 para G-H.

of "unconscionability" is implicit in section 10 of the Contracts Act 1950 which states that "all contracts must be made with the free consent of the parties, (emphasis mine) besides having a lawful consideration and object."[66] There may arise different circumstances (which will be explained later), that may impede the consent of the weaker party. Due to these circumstances, the weaker party is forced to accept any terms (including unconscionable terms) which are imposed by the stronger party.

As the Contracts Act 1950 is silent on the definition of an 'unconscionable' term in a contract, case laws have proven to be helpful in defining the concept of 'unconscionability'[67] and stipulating the principles which govern it.

According to the Privy Council case of *Hart v O'Connor*,[68]a contact may be 'unconscionable'[69] in two ways. Firstly, the contract may be unconscionable in the manner in which it was brought into existence.[70] For example, the contract may be induced by undue influence or a party may be suffering from a 'bargaining impairment' or 'serious disadvantage' which affects the relative bargaining strength of the parties.[71] The unfairness of this sort is categorised as

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66 "Contracts must be made by the free consent of competent parties, for a lawful consideration and with a lawful object." Contracts Act 1950, s10(1).

67 On a discussion of this doctrine in Singapore, see Rick Bigwood, 'Knocking Down the Straw Man: Reflections on Bom v Bok and the Court of Appeal's "Middle-Ground" Narrow Doctrine of Unconscionability for Singapore' (2019) *Sing. J. Legal Stud*. 29.

68 *Hart v O'Connor* 1985 AC 1000.

69 In *Hart's* case (n 70) his lordship Lord Brightman used the term 'unfair' at p. 1017. It is submitted that the effect is identical to the word 'unconscionable'.

70 Hart (n 70) 1017.

71 "The crucial term, 'unconscionable,' is not defined, but the law has clearly established that the term has both a procedural and a substantive element. The former takes into consideration the parties' relative bargaining strength and the extent to which a provision is 'hidden' or unexpected, while the substantive element requires terms that 'shock the conscience' or at the least may be described as 'harsh or oppressive.'" *Trend Homes, Inc. v. Superior Court of Fresno County* 131 Cal.App.4th 950; 32 Cal.Rptr.3d 411,951.(US).

'procedural unfairness'[72] which was referred to by the Singapore Court of Appeal as the 'narrow doctrine of unconscionability.'[73] What amounts to a 'bargaining impairment' or a 'serious disadvantage' is potentially varied.[74] There is no pre-determined categorisation.[75] In *BOM v BOK* the Court of Appeal of Singapore included the impairment (or 'infirmities' in the court's words) to encompass physical, mental, and/or emotional infirmities.[76] The degree of impairment that makes a contract 'unconscionable' in specific cases is by and large contingent upon the material facts of each case.[77] The circumstances which impair the party may include poverty, sickness, ignorance, lack of assistance, lack of advice, or need of any kind.[78] In *Cresswell v Potter*[79] the High Court presented "three requirements" which must be considered before deciding whether such unconscionability exists. They are "whether the plaintiff is poor and ignorant"; secondly, "whether the sale was at a considerable

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72 Hart (n 70) 1017.

73 BOM v BOK [2018] SGCA 83 (CA), [para 130]. The CA in BOM v BOK cited Cresswell v Potter [1978] 1 WLR 255 (HC)as indicative of the contemporary form of the narrow doctrine of unconscionability.

74 Hugh Beale, ed., Chitty on Contracts (30th ed. London: Sweet & Maxwell, 2008) 662-663; Mindy Chen-Wishart, *Contract Law* (2nd ed. Oxford: Oxford University Press, 2008) 370-371.

75 See *Dauphin Offshore Engineering and Trading Pte Ltd v The Private Office of HRH Sheikh Sultan bin Khadifa bin Zayed Al-Nahyan* [2000] 1 SLR (R) 117; Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia [2010] 2 SLR 329 referred to by the CA in *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd* (Civil Appeal No W–02 (IM)(NCC)–3223 of 2010)and affirmed by the Federal Court in *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd* [2012] 4 MLJ 1 at p11.

76 BOM (n 75) para 141.

77 Court of Appeal in *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd* (Civil Appeal No W–02 (IM)(NCC)–3223 of 2010) and affirmed by the Federal Court in *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd* [2012] 4 MLJ 1,11.

78 *Blomley v. Ryan* (1956), 99 C.L.R. 362, 405 (H.C.A.); *Alec Lobb Ltd. v. Total Oil (Great Britain) Ltd.[*1983] 1 All E.R. 944, 961, affirmed on this point but reversed on a different point in [1985] 1 All E.R. 303 (CA).

79 Cresswell v Potter [1978] 1 WLR 255 (Ch)

undervalue"; and thirdly, "whether the vendor had independent advice." [80]

The second type of 'unfairness' (or 'unconscionability') which is described as 'contractual imbalance'[81] relates to the terms of the contract. This 'unconscionability' was referred to by the Court of Appeal in Singapore as the 'broad doctrine of unconscionability.[82] Where contractual terms largely favours one party, it may also produce an 'unfair' or 'unconscionable' contract. Unlike 'procedural unfairness', challenges against contractual imbalances are harder to prove. This is because the courts are tasked with the duty to achieve a delicate balance between the contractual freedom of the parties on one hand and keeping a vigilant eye in protecting the rights of the weaker party on the other. To succeed in proving the unconscionability of the latter type, the party must prove that the terms "shock the conscience" or at the least, the terms were 'harsh or oppressive.'[83] In *BOM v BOK* the Court of Appeal of Singapore thought that to determine the existence of broad unconscionability, the following conditions must be present. They are as follows:

> "(i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that disability was sufficiently evident to the stronger party to make it prima facie unfair or 'unconscientious' that he had procured, or accept, the weaker party's assent to the impugned transaction in the circumstances in which he procured or accepted it." [84]

It is common for both these types of 'unconscionability' to overlap.[85] Sometimes, contractual imbalances are so extreme that the

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80 Cresswell (n 81) 255, 257.

81 Hart (n 70) 1017.

82 BOM (n 75) para 132.

83 *Trend Homes, Inc. v. Superior Court of Fresno County* 131 Cal.App.4th 950; 32 Cal.Rptr.3d 411,951.

84 BOM (n 75) para 132.

85 The overlap was highlighted by the CA in BOM v BOK (n75) at para 179 of the judgment. "Put simply, the legal criteria just mentioned could not, ex hypothesi, be utilised as legal criteria for the broad doctrine of unconscionability; these legal criteria, if applied to the broad doctrine of unconscionability, would, instead, cause the broad doctrine of

presumption of "procedural unfairness is triggered, such as undue inference or some other form of victimisation",[86] hence making the contract 'unconscionable.' Due to the many common factors which appear in both these types of 'unconscionability', the Singapore Court of Appeal's attempt to create a third category of 'unconscionability'[87] in *BOM v BOK* was unsuccessful. The attempt resulted instead in a broad type of 'unconscionability.'[88]

Where unconscionability is discovered, it is often hard to pinpoint the specific wrong that the defendant has committed and why the claimant requires special protection. In contrast, the extreme injustice that the claimant suffers is usually obvious.[89] Nevertheless, whichever type of unconscionability is raised, it would seem that an unconscionable bargain essentially requires one party to be under a bargaining impairment that puts him at a serious disadvantage and this is then "exploited by the other party in a morally culpable

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unconscionability to collapse back into the narrow doctrine of unconscionability."

86 Hart (n 70) 1017.

87 "In BOM v BOK, the Singapore Court of Appeal settled a three-pronged test for unconscionable transactions… is intended to represent a 'middle-ground' doctrine of unconscionability, in the sense that it is broader than the original 'narrow doctrine' of unconscionability from such cases as Fry v Lane and Cresswell v Potter in England, but 'much narrower' than the 'broad doctrine' of unconscionability in such cases as Commercial Bank of Australia Ltd v Amadio in Australia." Rick Bigwood, 'Knocking Down the Straw Man: Reflections on Bom v Bok and the Court of Appeal's "Middle-Ground" Narrow Doctrine of Unconscionability for Singapore', 2019 *Sing. J. Legal Stud*. 29.

88 "Indeed, I would go even further and suggest that the Amadio formulation, both in its form and in its actual applications in subsequent cases, is narrower than the Court's (modified) 'narrow' formulation of unconscionability in BOK (CA). What is described as being a 'broad doctrine' of unconscionability is actually, at least on closer inspection, a rather 'narrow doctrine' of unconscionability, and what has been formulated as a 'middle-ground narrow doctrine' of unconscionability is actually a rather broad doctrine of unconscionability. In my opinion, the distance between the Amadio and BOK (CA) formulations of unconscionability is much smaller than their Honors' judgment implies." see Rick Bigwood (n 69), 40.

89 Mindy Chen-Wishart, 'Consideration and Serious Intention', 2009 *Sing. J. Legal Stud*. 434, Dec 2009, 448.

manner; all of which results in a manifestly unfair transaction." [90] 'Unconscionable' contracts encompass all cases where a stronger party has gained an unfair advantage by using unethical ways against a weaker side.[91]

Because unconscionability is "fact-specific", the courts must examine each claim based on its own facts by assessing the surrounding circumstances in totality, bearing in mind that the underlying principle in the doctrine of unconscionability aims to prevent hardship and inequitable conduct. [92] In the Singaporean case of *Min Thai Holdings Pte Ltd v Suniable Pte Ltd & Anor*,[93] (a case cited with approval at both the Federal Court and Court of Appeal in *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd[94])* his lordship Lai Kew Chai, J. believed that:

> "the concept of unconscionability involves unfairness [emphasis mine], as distinct from dishonesty or fraud, or conduct so reprehensible or lacking in good faith that a court of conscience would either restrain the party or refuse to assist the party."

A useful guide in deciding whether 'unconscionability' exists in a contract can be taken from the Singapore case of BOM v BOK.[95] In this case, the Court of Appeal provided a 3-pronged test to determine "unconscionable transactions". They are:

> "(1) the plaintiff's 'infirmity', (2) the defendant's 'exploitation' of the plaintiff's infirmity, and (3) the

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90 Hugh Beale, (ed), *Chitty on Contracts* (30th edn. Sweet & Maxwell: London 2008), 662-663; Mindy Chen-Wishart, *Contract Law* (2nd ed. Oxford University Press: Oxford 2008), 370-371.

91 *Halsbury's Laws of England*, (3rd edn, 1956), vol 17 p 682. Referred to by the Court of Appeal in *Sumatec* (n 79) 10.

92 High Court's view in *Focal Asia Sdn. Bhd. & Anor v Raja Noraini Bt Raja Datuk Nong Chik & Anor* [2009] MLJU 1688; [2009] 1 LNS 913 which was endorsed in *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd* [2012] 4 MLJ 1 [FCt], 18.

93 *Min Thai Holdings Pte Ltd v Suniable Pte Ltd & Anor* [1999] 2 SLR 368.

94 *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn. Bhd*. [2012] 4 MLJ 1 [FCt],

95 BOM (n 75).

> evidential burden on the defendant to show the challenged transaction to be fair, just, and reasonable."[96]

In *Hart v O'Connor*[97] the Privy Council, speaking through Lord Brightman had decided that:

> "…Contractual imbalance may be so extreme [that]… [e]quity will [be compelled to] relieve a party from a contract which he has been induced to make as a result of victimisation. Equity will not relieve a party from a contract on the ground only that there is contractual imbalance not amounting to unconscionable dealing."[98]

ARE STANDARD FORM CONTRACTS UNCONSCIONABLE?

Unconscionable contracts which affect the freedom of choice or consent of the contracting parties violate public policy. This is particularly true concerning Standard Form Contracts which are found in commercial contracts[99] but not those which are imposed by the legislature as these contracts are drafted to protect the weaker party. [100]

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96 BOM (n 75) para 142. See Rick Bigwood (n 83) 29.

97 [1985] 1 AC 1000.

98 Hart (n 70) 1017.

99 In *Chairman, Sarawak Housing Developers' s Association v Malayan Banking Berhad* [2009] MLJU 259 his lordship Justice David Wong Dak Wah observed that 'standard form contracts… have practically become the norm in most commercial transactions.'

100 Examples include standard form contracts under the Housing Developers (Control and Licensing) Act 1966 or the PAM 2006 for Standard Form of Building Contracts and contracts imposed by the Construction Industry Payment And Adjudication Act 2012. In *PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and other appeals* [2021] 2 MLJ 60, 62 the Federal Court held that "The HDA and its subsidiary legislation were social legislation enacted for the protection of buyers. In interpreting social legislation, the State having statutorily intervened, the courts had to give effect to the intention of Parliament and not to the intention of the parties. Otherwise, the Legislature's attempt to level the playing field by mitigating the inequality in bargaining power would be rendered nugatory and illusory."

Standard Form Contracts may seem to embody the principles of freedom of contract outwardly since the individual can still decide whether he wants to enter into the contract or not.[101] On the contrary, however, one can argue that Standard Form Contracts (which include loan agreements and debentures) have essentially taken that freedom away from the weaker party. Standard Form Contracts (sometimes known as 'contracts of adhesion') are different from the ubiquitous contracts which are negotiated in one important aspect- "they are offered on a take-it-or-leave-it basis."[102] Hence, the weaker party almost always "enters into [these contracts] without knowing and [voluntarily consenting] to all their terms."[103] Critics have argued that the terms in Standard Form Contracts are objectionable because it undermines the individual autonomy of the contracting party in the sense that the party is compelled to accept the terms to which that party did not voluntarily agree.[104] This will result in a case where the stronger party (the financial institution in this case) can push the weaker party (borrower) against the wall by imposing unconscionable terms on the borrower.

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101 "Modern iterations of libertarianism view 'freedom of contract' as the expression of a 'minimal state', in which people pursue their interests by themselves only. In some sense, SFCs are the fullest embodiment of this expression, in one sense, with 'the ceremony necessary to vouch for the deliberate nature of a transaction' effectively 'reduced to the absolute minimum' to oblige the business community and efficient transactional activity." Cornelius, Kristin, 'Smart Contracts and the Freedom of Contract Doctrine' (2018), *Journal of Internet Law* 2.

102 "In a contract of adhesion, the contract is drawn up by the seller and the purchaser, who merely 'adheres' to it, has little choice as to its terms." Todd D. Rakoff, 'Contracts of Adhesion: An Essay in Reconstruction' 96 Harv. L. Rev. (1983) 1173.

103 Andrew Tutt, 'On the Invalidation of Terms in Contracts of Adhesion', 30 Yale J. on Reg. (2013) <http://digitalcommons.law.yale.edu/yjreg/vol30/iss2/5> accessed 9 August 2019. See also Todd D. Rakoff (n 98) 1173, 1179-80.

104 "Freedom of contract demands freedom from contract, and just as no party has the ability to force another into a contract, no party should have the ability to force another party to accept specific terms." Russell Korobkin, 'Bounded Rationality, Standard Form Contracts, and Unconscionability', *University of Chicago Law Review* Vol. 70 (2003), Issue. 4, 1203, 1205.

DEBENTURES AS STANDARD FORM CONTRACTS

A debenture (with a power of attorney) is arguably a particular type of Standard Form Contract.[105] Borrowers are generally unable to dictate the terms in the loan agreements and debentures. Since consistency, predictability, and certainty are essential elements in Standard Form Contracts,[106] the borrower company is forced to accept the 'terms and conditions of the loan agreements and debentures' which have been set by the financial institutions, failing which the company will not be able to obtain the loan from the financial institution. These 'standard' terms which are found in the debentures will almost always favour the financial institutions.[107]

Common terms which are found in the loan agreements and debentures include terms where the borrower has expressly agreed to grant the financier the right to sell its property via the power of attorney in the event the borrower fails to repay the loan or where the borrower goes into liquidation. These terms effectively eliminate the statutory protection which is given to the borrower by the NLC. If the

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105 "There is no hard and fast rule about what constitutes a contract of adhesion. Courts generally use a variety of criteria for determining when a contract possesses adhesive qualities. Even if there is ambiguity at the edges, however, there is consensus that insurance policies, real estate contracts, cell phone contracts, cable contracts, consumer products contracts, software licenses, and 'clickwrap' and 'browsewrap' agreements are firmly in the 'adhesion' category." See Robert L. Oakley, 'Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts', 42 Hous. L. Rev. 1041, 1053 (2005) and sources cited therein which describe the characteristics of contracts of adhesion, for example; presentation in a standard form, its application in consumer transactions, where the terms of the contract is of a general application instead of a specific commercial agreement and whether it is presented on a "take-it-or-leave-it basis".

106 *LSREF III Wight Ltd v Millvalley Ltd*, [2016] EWHC 466 (Comm) para 42.

107 "The company gets the loan on terms that the lenders shall be entitled, for the purpose of making their security effective, to appoint a receiver with powers of sale and of management pending sale, and with full discretion as to the exercise and mode of exercising those powers." Per Evershed M.R. in the Court of Appeal decision of *In re B. Johnson & Co. (Builders) LD.* [Manchester, 1948 B. No. 2. Liverpool, 1948 B. No. 5710.], [1955] Ch. 634, 661.

borrowers disagree with the terms of the debenture, they will be told that their loan application will be rejected by the financial institution. The argument that the borrowers can always apply for their loan from another financial institution if they are unhappy with the terms which are offered by the present financial institution does not hold water because all the other financial institutions will impose identical or similar terms in their contracts. This has resulted in an unconscionable bargaining position that favours the financial institution on one hand whilst the borrower is pushed into a 'take it-or-leave-it' corner[108] i.e., the borrower either accepts the unconscionable terms in the loan and debenture or the borrower goes without obtaining any loan.

This view was supported in the Federal Court in *CIMB Bank Berhad v. Anthony Lawrence Bourke & Anor*[109] where the court decided that borrowers who had entered into loan agreements with financial institutions have unequal bargaining power.[110] Agreeing with the House of Lords in Suisse Atlantique,[111] the Federal Court in *CIMB Bank Berhad* proceeded to quote the decision which states as follows:

> "In an ordinary way the customer has no time to read them, and if he did read them he would probably not understand them. And if he did understand and object to any of them, he would generally be told he could take it or leave it. And if he

[108] Denning LJ in *John Lee & Son (Grantham) Ltd and Others v Railway Executive* [1949] 2 All ER 581, 584 decided that "Above all, there is the vigilance of the common law while allowing for freedom of contract, watches to see that it is not abused."

[109] *CIMB Bank Berhad v. Anthony Lawrence Bourke & Anor* [2019] 1 MLRA 599 (FCt).

[110] "Clause 12 may typically be found in most banking agreements. In reality, the bargaining powers of the parties to that agreement are different and never equal. The parties seldom deal on equal terms. In today's commercial world, the reality is that if a customer wishes to buy a product or obtain services, he has to accept the terms and condition of a standard contract prepared by the other party. The plaintiffs, as borrowers in the instant case, are no different. They have unequal bargaining powers with the defendant." CIMB Bank Berhad (n 111), para 65.

[111] *Suisse Atlantique Societe D'armement Maritime SA v. NV Rotterdamsche Kolen Centrale* [1966] 2 All ER 61.

> then went to another supplier the result would be the same. Freedom of contract must surely imply some choice or room for bargaining."[112]

It is argued that though this statement was made in reference to exclusion clauses that were inserted by the bank in the loan agreement the decision equally applies to all clauses in loan agreements and/or debentures particularly clauses that aim to nullify the statutory protection which is given to the borrower by the NLC.

CONTRACTS SEEKING TO REMOVE THE COURT'S JURISDICTION

Unlike common law,[113] S24 of the Contracts Act 1950 does not seek to differentiate between illegal and void contacts.[114] Both these types of contracts (including contracts that are against public policy) are considered illegal contracts and are therefore void.[115]

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112 *CIMB Bank Berhad* (n 111), para 65.

113 "The common law has divided contracts into illegal contracts and void contracts and the law treats illegal contracts stricter than they do void contracts." See A.G. Guest (ed), Anson's Law of Contract (26th edn, Oxford University Press 1984), 292. See also M. P. Furmston, *Cheshire, Fifoot & Furmston's Law of Contract* (11th edn, Butterworths 1986), 342.

114 See Contracts Act 1950, s24 which states: "The consideration or object of an agreement is lawful, unless—
(a) it is forbidden by a law; (b) it is of such a nature that, if permitted, it would defeat any law; (c) it is fraudulent; (d) it involves or implies injury to the person or property of another; or (e) the court regards it as immoral, or opposed to public policy. In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

115 "What about the second category of contracts which are void at common law on grounds of public policy? Upon a reading of section 24, it would appear that section 24, in particular section 24(e) is wide enough to encompass these contracts. It may be argued quite easily that a contract to oust the jurisdiction of the courts, a contract that tends to prejudice the status of marriage and a contract in restraint of trade are all against public policy and are therefore void." Sharifah Suhana Ahmad, (n44), 99.

In *CIMB Bank Bhd v Anthony Lawrence Bourke & Anor*.[116] the Federal Court quoting from the Halsbury's Law of England[117] decided that the concept of "public policy is not static and that the question of whether a particular agreement is contrary to public policy is a question of law." The court also noted that although:

> "new heads of public policy will not be invented by the courts for the following reasons, nevertheless, the application of any particular ground of public policy may vary from time to time and the courts will not shrink from properly applying the principle of an existing ground to any new case that may arise."

The Federal Court decided that "[though] the rule of public policy remains, its application, however, varies with the principles which for the time being [is] guide public opinion."

In *Anthony Lawrence Bourke & Anor*, the Federal Court also distinguished between a contractual term that seeks to limit or restrict access to justice as opposed to a term that seeks to prohibit or prevent access to the courts[118] (which it is argued effectively ousts the courts' jurisdiction). Warning that the courts have always been vigilant to protect the right of access to themselves under the common law, the Federal Court in Anthony Lawrence Burke affirmed the principle that clauses which seek to prevent the courts from hearing the case are void.[119]

The same view was also expressed by the Federal Court in *Safety Insurance Company Sdn Bhd v Chow Soon Tat*[120] where it was held that whilst the parties can agree that:

> "no right of action shall accrue in respect of any differences which may arise between them until such differences have

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116 CIMB Bank Berhad (n 111), para 42, quoting and confirming the decision of the Federal Court in *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619.

117 *Halsbury's Laws of England*, (5th edn, Vol 22 at para 430).

118 *CIMB Bank Berhad* (n 111), para 70 and para 71.

119 Citing R. A. Buckley, *Illegality and Public Policy* (3rd ed, Sweet & Maxwell 2013) at para 8.02 and para 68 of the judgment.

120 [1975] 1 MLJ 193 (FC).

> been adjudicated upon by an arbitrator, they cannot by contract oust the jurisdiction of the courts." [121]

In *Baker v Jones & Ors*[122] Lynskey, J. held that:

> "…although parties to a contract may in general, make any contract they like, there are certain limitations imposed by public policy and one of those limitations may be that parties cannot, by contract, oust the ordinary courts from their jurisdiction." [123]

In *Sababumi (Sandakan) v Datuk Yap Pak Leong*,[124] the Federal Court through his lordship Peh Swee Chin FCJ held that contracts against public policy encompass contracts that interfere with the administration of justice.[125]

Based on the cases above, it can be argued that the power of attorney in the debenture which allows the lender to sell the chargor's property without going through the proper procedures under the NLC interferes with the administration of justice because not only does it prevent the Chargor from exercising his right of access to justice, the court is also prevented from hearing and determining the rights of the Chargor.

The House of Lords in *Johnson and another v Moreton*[126] clearly describes why contracting out of a legislation contravenes public policy. According to the House of Lords:

> "…The truth is that it can no longer be treated as axiomatic that, in the absence of explicit language, the courts will permit contracting out of the provisions of an Act of Parliament where that Act, though silent as to the possibility of contracting out, nevertheless is manifestly passed for the

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121 Other cases which have expressed the same view include the Court of Appeals' decision in *Dancom Telecommunication (M) Sdn Bhd v Uniasia General Insurance Bhd* [2008] 6 MLJ 52 (CA); *Inter Maritime Management Sdn Bhd v Kai Tai Timber Co Ltd, Hong Kong* [1995] 1 MLJ 329.

122 [1954] 2 All ER 553, QBD.

123 [1954] 2 All ER 553 at 558.

124 [1998] 3 MLJ 151 (FCt).

125 Sababumi (Sandakan)(n 126), 175.

126 [1978] 3 All ER 37, 49.

> protection of a class of persons who do not negotiate from a position of equal strength, but in whose well-being there is a public as well as a private interest. Such acts are not necessarily to be treated as simply 'jus pro se introductum', a 'private remedy and a private right' which an individual member of the class may simply bargain away because of this freedom of contract. It is precisely his weakness as a negotiating party from which Parliament wishes to protect him."

In respect of the charge, it is submitted that the NLC was passed to protect the interest of the chargor. This view is backed by the Supreme Court in *Kimlin*.[127] In most cases, the chargor will not be negotiating from a position of equal bargaining power vis a vis the lender (usually the bank) but a weaker position. In these situations, the lender can dictate the terms of the contract, thus causing the borrower and/or chargor, to 'bargain away' his rights. Since the NLC was passed to prevent the lender from taking advantage of the borrower, it is argued that the lender should not be allowed to contract out of the NLC.

THE EFFECT OF AN UNCONSCIONABLE TERM AND A TERM WHICH SEEKS TO OUST THE JURISDICTION OF THE COURTS: WHAT APPROACH SHOULD THE COURT TAKE?

Once it is proven that the power of attorney contravenes public policy, the courts, it is argued, should not declare the entire debenture to be unlawful and void. Instead, the courts should only declare the said power of attorney and any clauses which effectively allow the chargee to circumvent the provisions of the NLC to be unlawful and void under S24(b) of the Contracts Act 1950.

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[127] "It is obvious that the relevant portions of the Code – to wit, ss 254–265 – conferring the rights upon chargors aforesaid are designed for their protection. In the case of land held under a Land Office title, the form of title corresponding to Land Office title or subsidiary title, the chargee makes his application for order for sale to the Land Administrator in accordance with the procedure laid down in s 260…of the Code and these are also designed for the protection of the chargor." Kimlin (n 37), 820 at para B.

This is because by declaring the entire debenture void, the chargor will be unjustly enriched since its property will be effectively free from encumbrances.[128] The result of such declarations will likely "deter potential lenders from lending money on security which might be held to contravene the Act." [129] To avoid the negative effect of the court's declaration, the courts should apply the doctrine of severance (found in section 29 of the Contracts Act 1950) by severing the unlawful provisions from the remaining provisions of the debenture. The said provision states as follows:

> "Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent (emphasis mine)."[130]

The courts should take into account two conditions before it proceeds to sever the unlawful provisions: first, they should deal with each case following the particular facts of the case. There are no standard rules which apply to all cases. At some point in time, each

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128 See *Selangor United Rubber v Craddock (No 3*) (1968) 2 All ER 1073, 1154 where the court held as follows: "This is a common well-recognized consequence accepted by the courts in cases of transactions being made unlawful and participants being subjected to relatively light criminal punishment. That such provisions might prove a positive boon to the principal offenders has been similarly accepted on the well-accepted ground of public policy that the courts will not aid unlawful transactions but let the consequences fall where they lie…"

129 *Heald v O'Connor* [1971] 2 All ER 1105, 1109 per Fisher J "The apparent injustice which is the common result of the statutory prohibition of these particular kinds of transaction is not sufficient warranty for declining to apply the well-settled principle of law. The application of this principle in such circumstances as the present is likely to deter potential lenders from lending money on security which might be held to contravene the Act …"

130 "The legal effect of this provision [s 29] is similar to section 28, that is, the entire agreement is not void ab initio; it is void only 'to that extent.' Further section 29 applies to an agreement whereby a party is 'restricted absolutely' from enforcing his rights. Therefore, the provision itself inherently provides the exception where an agreement to oust the jurisdiction of the court may be valid." Sharifah Suhana Ahmad (n 20), 100.

case will have to rely on its own situation and the type of illegality that is suitable to its own facts. Public policy is also an important factor that the court must consider.[131]

ASSESSING THE COMMON LAW POSITION IN LIGHT OF SECTION 375(2)(A) OF THE COMPANIES ACT 2016

Section 375(2)(a) of the Companies Act 2016, inter alia, states that:

> "Unless the instrument [which confers on the debenture holder the power to appoint a Receiver or Receiver and Manager] expressly provides otherwise- (a) a Receiver or Receiver and Manager is the agent of the company."[132]

This section is a codification of the decision of the Federal Court in Melatrans where the Federal Court had decided that

> "….the provisions of the NLC prescribing for judicial sale could not apply to the facts in the instant appeal because the R&M was acting as an agent of the chargor."[133]

It can be argued that as a general provision governing the position of Receivers and Managers in relation to debentures, S375(2)(a) of the Companies Act 2016 must be read subject to the NLC if the security which the lender holds consists solely or partially of real property. In such situations, the borrower company is required to register 2 types of charges: they are charges under the Companies Act 2016 and the NLC. Three reasons are provided in support of this opinion.

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131 Chung Khiaw Bank Ltd (n 35), 363 para E.

132 Companies Act 2016, s 375(2) "Unless the instrument expressly provides otherwise— (a) a receiver or receiver and manager is the agent of the company; (b) a person appointed as a receiver may act as receiver and manager; or (c) a power conferred to appoint a receiver or receiver and manager includes the power to appoint— (i) two or more receivers or receiver and managers; (ii) a receiver or receiver and manager additional to a receiver or receiver and manager in office; and (iii) a receiver or receiver and manager to replace a receiver or receiver and manager whose office has become vacant."

133 *Melatrans* (n 40), 210.

Firstly, in *Abdul Samad Bin Hj Alias v The Government of Malaysia & Ors,*[134] the Federal Court held that:

> "where there are two conflicting provisions of the legislature and the question arises which of the two should govern the case, the court must see which terms of the provisions are more appropriate to apply in the circumstance of the case."

The Federal Court in *Abdul Samad* applied the principles of statutory interpretation, particularly the maxim of 'generalia specialibus non-derogant' – general statements or provisions do not derogate from special statements or provisions, or conversely, 'specialia derogant generalibus' – special provisions derogate from the general.

In *Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn. Bhd, In Liquidation),*[135] the Supreme Court had to consider "whether the sales tax had priority of payment over preferential payments and the claims of the debentures holders," under the relevant provisions in the (then) Companies Act 1965, the Sales Tax Act 1972[136] and the Government Proceedings Act 1956.[137] Applying the maxim of specialia generalibus derogant the Federal Court decided that the (then) Companies Act of 1965 which specifically dealt with companies prevailed over the general provisions of the Government Proceedings Act 1956.[138]

Applying the rationale of the Supreme Court in *Ler Cheng Chye* above, it can be argued that where the security of the debenture consists of land, the specific legislation of the NLC should prevail over s.375 (2)(a) of the Companies Act 2016 which is a section which governs the position of Receivers and Managers concerning debentures generally.

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134 *Abdul Samad Bin Hj Alias v The Government of Malaysia & Ors* [1996] 3 MLJ 581, 590.

135 *Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn. Bhd, In Liquidation)* [1995] 2 MLJ 600 (FCt)

136 Sales Tax Act 1972ss 6(a), s22(2),s23, s69(1) and 70.

137 Government Proceedings Act 1956 s 10(1),(2).

138 "s 292(1) of the Companies Act 1965 must be read as an exception to the general provision of s 10(1) of the Government Proceedings Act 1956." *Director of Customs, Federal Territory* (n 137), 611.

Secondly, this opinion also finds its support in the Federal Court decision of *K Balasubramaniam*.[139] The Federal Court in K Balasubramaniam distinguished *Kimlin* on grounds that Kimlin was dealing with land that was charged under the then National Land Code 1965 ('the Code') whereas the security in K Balasubramaniam only had movable property.[140] Following the ratio of *K Balasubramaniam*, it is argued that if the security involve includes immovable property, the sale should be conducted by way of the NLC.

This view was reiterated by the Court of Appeal *in Lim Eng Chuan Sdn Bhd v United Malayan Banking Corp & Anor*.[141] where his lordship Justice Low Hop Bing decided that the sale which was conducted by the Chargee via the power of attorney in the debenture was invalid because it did not go through a judicial sale which was mandated by the NLC. To quote his lordship:

> "In the present case the power of attorney is a security and the donee/chargee, as agent, had used the authority under the power of attorney not for the benefit of their principal, the donor/chargor, but for their own benefit to achieve the objective of the debenture arrangement between the donor/chargor and the donee/chargee. Therefore, in fact, and in law the sale must be deemed to have been effected or undertaken by the chargee rather than by the chargor. It was only a legal formality that the chargor was named as the vendor in the sale and purchase agreement as the sale was made pursuant to the power of attorney. Since the sale was undertaken or effected by the chargee and not by the chargor then legally it should have been effected in accordance with the provisions of the National Land Code pertaining to the charges. In other words, there should have been a judicial

139 [2005] 2 MLJ 201 (FCt).

140 "Kimlin did not consider the effect of ss 233(1) and 277(5) of the Act and there was no necessity for Kimlin to do so, as the subject matter was land charged under the Code and which the then Supreme Court held could only be sold by the receiver and manager under the provisions of the Code by way of a judicial sale." *K Balasubramaniam* (n 48),para 36

141 *Lim Eng Chuan Sdn Bhd* (n 46).

> sale. Since the sale was not a judicial sale under the Code, therefore, the sale was invalid."[142]

The final argument in support of this opinion is found in the rules of construction, particularly the rule on harmonious constructions of statutes which requires, amongst others, different statutes which relate to the same issue to be interpreted harmoniously.

In *Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)*,[143] the Court of Appeal held that:

> "This concept of harmonious construction of statutes has two parts, one is harmonious construction in relation to the various provisions of the statute itself and the other part is in relation to other statutes."[144]

This doctrine, according to the Court of Appeal is invoked when a conflict arises between the parts or provisions of the statute or between two or more statutes.(emphasis mine) The Court of Appeal in *Tebin bin Mostapa* imposed a caveat on the application of harmonious construction, saying that "a construction that reduces one of the provisions to a 'useless lumber' or 'dead letter' is not harmonious construction."[145]

According to the Federal Court in *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi Mukhtar*,[146] the doctrine of harmonious construction requires legislation to be construed in a way that would achieve a harmonious result, which method should result in coherence in the law.

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142 *Lim Eng Chuan* (n 46), 521.

143 *Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor* (as joint administrators of the estate of Balia bin Munir, deceased) [2017] 5 MLJ 771 (CA)

144 *Tebin bin Mostapa* (n145) 796.

145 *Tebin bin Mostapa* (n145) 797.

146 *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi Mukhtar* [2020] 1 CLJ 123,para 79. This principle was affirmed by the subsequent Federal Court decision in *Majlis Perbandaran Seremban v Tenaga Nasional Berhad* [2020] MLJU 1680.

Applying the rule of harmonious construction on both s.375 (2)(a) of the Companies Act 2016 and the NLC, it is submitted that the provisions of the NLC (including the requirement of judicial sale) should apply only where the security of the lender involves land. Any other interpretation will make the NLC a 'useless lumber' or 'dead letter', to quote the Court of Appeal decision in *Tebin bin Mustapha*.

CONCLUSION

This article has revealed that a debenture holder who fails to follow the provisions of the NLC may be in breach of section 10 read with section 24 of the Contracts Act 1950 which, if proven will nullify any sale of any landed property that the Receiver and Manager may have conducted on behalf of the chargee. When it comes to the sale of landed properties via debentures, it is argued that the decision of *Kimlin* should be the guiding light for courts and litigants alike. *Kimlin's* decision has rightly struck a proper balance between the interest of debenture holders and chargors. Any attempt to tilt this balance would be inequitable.

Debenture holders are therefore advised sell their landed security through a judicial sale according to the NLC, lest they risk exposing themselves to the various possible challenges that have been raised in this article. It is better to adopt a longer but safer method, particularly for lenders who are financial institutions.