

SELLING ONE'S PROPERTY AFTER AN ORDER FOR SALE IS GRANTED: A LEGAL (IM)POSSIBILITY IN MALAYSIA?

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It is quite common for a Chargor to dispose his property through a private treaty sale whilst it is in the process of being auctioned off. Such a sale, if concluded, would benefit the Chargee, Chargor and the purchaser. Not only will the purchaser obtain the property of his choice, the Chargor's debts will be also released whilst the Chargee's loan will be paid by the purchaser. Legally speaking however, such transaction(s) would be illegal since no private treaty sale can be conducted once an order for sale is granted. This principle, established by the High Court cases of *Pakiri Maideen*¹ and *Chong Bun Sun*² was subsequently confirmed by a string of cases,³ most recently in the Court of Appeal and the High Court in *Melantrans*⁴ and *Merit Aim Sdn Bhd*.⁵ respectively.

A review of the articles, books and journals on foreclosure proceedings, particularly in the area of order for sale and private treaty sales, reveal that the focus of these discussions revolve solely on or mainly around the rights of the Chargee prior to and during the foreclosure proceedings.⁶ Nothing was mentioned

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¹ *Chartered Bank v Pakiri Maideen & Anor* [1963] MLJ 276.

² *United Malayan Banking Corp Bhd v Chong Bun Sun and another application* [1994] 2 MLJ 221.

³ Other cases include *Chung Khiaw Bank Ltd v Lau Ah Yen & Anor* [1989] 2 MLJ 247 [1989] 1 CLJ 1065; *Teck Hong Development Sdn Bhd v Toh Chin Ann [CA]* [2008] MLJU 291; Supreme Court in *Mui Bank Bhd v Cheam Kim Yu* [1992] 2 MLJ 642.

⁴ *Melantrans Sdn Bhd v Carah Enterprise Sdn Bhd & Anor* [2000] 3 CLJ 127.

⁵ *Malaysia Building Society Bhd v Merit Aim Sdn Bhd & anor; Cameron Mall Sdn Bhd & anor (Intervenors)* [2012] 4 CLJ 269.

⁶ KS Teo and LT Khaw, *Land Law In Malaysia, Cases and Commentaries* (3rd edn, LexisNexis 2012), AJ Maidin, SZ Syed Abdul Kader, B Begum, F Md Noor, NA Mohamed, A Suffian and RA Rosli *Principles of Malaysian Land Law*, (LexisNexis 2008), SC Loh and PL Chew, 'A Legal Impossibility; Arming Chargees with Private Power of Sale of Charged Land Outside the Provision of the National Land Code 1965' [1990] 1 MLJ xxxvi, xlvi; RR Sethu, Challenges to Chargees: Principle and Precedent, [1993] 3 MLJ xc; LC Goh, 'Nature of Charges and Caveats under the Sarawak Land Code (Chapter 81)' [1995] 2 CLJ xliii.

about the position of the Chargors. Any discussion of the Chargor's rights in respect to the private treaty sale (if any), were merely cursory since the Chargor's rights were incidental to the rights of the Chargee.⁷ It is on this premise that this article intends to discuss the Chargor's rights in relation to private treaty sale(s) conducted after an order for sale has been granted. Is the Chargor completely prohibited by the National Land Code 1965 (hereinafter referred to as "NLC") from selling his property by private treaty once the court has ordered a sale? Are there any exceptions to this rule?

Setting the Stage - The General Principles

In *The Chartered Bank v Packiri Maideen & Anor*,⁸ the court dismissed the borrower's objection against the foreclosure proceedings on the ground that the borrower had intended to sell his property through private treaty. Applying the then Sections 149 to 154 of the Land Code,⁹ the court reasoned that the Land Code only 'contemplate[d] the sale of land by public auction. Once foreclosure proceedings commences the lands *have to be sold [emphasis]* by public auction'.¹⁰

⁷ RR Sethu (n 6).

⁸ (n 1).

⁹ *Ibid* 277. His Lordship Wan Adnan J in *Chung Khiaw Bank Ltd v Lau Ah Yen & Anor* [1989] 2 MLJ 247 [1989] 1 CLJ 1065 observed that the old sections 149 to 154 of the Land Code (Cap 138) are similar to the current provisions of sections 256 to 259 of the National Land Code (procedure in respect of lands held under Registry title), and, the provisions of sections 141 to 148 of the Land Code are similar to the provisions of sections 260 to 265 of the National Land Code (procedure in respect of lands held under Land Office Title). His Lordship agreed that the sale contemplated in Chapter 3 Part Sixteen of the National Land Code (sections 256 to 259 and sections 260 to 265) in this Chapter is a sale by public auction. The Court cannot order any sale by private treaty. See DSY Wong, *Tenure And Land Dealings in the Malay States* (Singapore University Press 1977) 180: 'Prior to the former FMS Land Code, Cap 138, charges on lands governed by the early Registration of Titles legislation had always been enforceable by sale only through the court....this past division...was retained with certain consequential procedural differences.'

¹⁰ (n 1) 77, See also *Chung Khiaw Bank Ltd v Lau Ah Yen & Anor* [1989] 2 MLJ 247.

This principle was later affirmed by Dato Visu Sinnadurai in *Chong Bun Sun*,¹¹ where His Lordship held that the NLC only provides for one method of judicial sale in a foreclosure proceeding, that is by way of public auction. Any other method of sale (viz a private treaty sale) in a foreclosure proceeding would constitute a breach of the NLC. This restricted power to only order public auction sales applies to both judicial sale and sale by land administrators.¹²

An End to Private Treaty after an Order for Sale is granted?

In spite of the decisions above, all is not lost. This paper contends that private treaty sales can still be conducted legally in certain circumstances.¹³ Listed below are four possible situations.

1. “Commencement of Proceedings” - When does it begin?

Strictly speaking, this is not an exception. Nevertheless, it is an avenue which the Chargor may utilise to dispose his property via private treaty once foreclosure proceedings commence. In *Packiri Maideen*, Justice Gill observed that ‘once such proceedings are commenced the lands have to be sold by public auction.’¹⁴

This begs the question - When does “commencement of proceedings” begin? The statement by Justice Gill seems vague as the word “commence” can be interpreted in two ways. A literal interpretation of the word “commence” would seem to imply that once the Chargee has filed the relevant foreclosure documents into court, the Chargor is prohibited from selling his property via private treaty.

¹¹ (n 2).

¹² *Ibid* 233.

¹³ KS Teo (n 6) 516.

¹⁴ (n 1).

With respect, such a conclusion (if that is what His Lordship meant) would be rather absurd because if the Chargor finds a willing buyer after the application has been filed, but before it is heard, the Chargee could on the hearing date easily request the court to withdraw his foreclosure application with liberty to file afresh. If the private treaty sale succeeds, there will be no foreclosure proceedings to begin with.¹⁵ However, if His Lordship took ‘commencement of foreclosure proceedings’ to mean the granting of an order for sale by the court, then the Chargor could still resort to the other exceptions stated hereinbelow if he intends to sell his property through private treaty.

2. Sale pursuant to Pengurusan Danaharta Nasional Berhad Act 1998¹⁶

As a private vehicle of the government constituted under section 57(1) of the Pengurusan Danaharta Nasional Berhad Act 1998 (hereinafter referred to as the “Danaharta Act”), Danaharta is expressly authorized to sell any charged property by way of private treaty, even though there exist other method(s) of sale which

¹⁵ However, there is nothing to prevent the Chargor and bank to settle the debt by private redemption agreement even though foreclosure proceedings have been commenced by the bank against the Chargor. See *Kuala Lumpur Landmark Sdn Bhd v Standard Chartered Bank* [1994] 2 MLJ 559; see RR Sethu (n 6) xcvi.

¹⁶ The purpose and intent of the incorporation of Danaharta can be seen in the preamble to the Pengurusan Danaharta Nasional Berhad Act 1998 which states as follows: ‘An Act to provide special laws for the acquisition, management, financing and disposition of assets and liabilities by the Corporation, the appointment of special administrators with powers to administer and manage persons whose assets or liabilities have been acquired by the Corporation and for matters connected there with or incidental thereto.’

Pengurusan Danaharta Nasional Berhad v Yong Wan Hoi & Anor [2007] 6 MLJ 709 [26]. *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, Intervener)* [2004] 2 MLJ 257, 286 (Augustine Paul JCA): ‘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 maximize recovery values. The appellant was thus given three principal duties. They are:

- (a) acquisition of non-performing loans and assets;
- (b) management of such assets, including by way of the appointment of Special Administrators to temporarily manage the affairs of corporate borrowers in place of their directors; and
- (c) disposition of the acquired assets.’

See AJ Dason and ER Jayaraja, ‘All Men Are Equal, But Some Are More Equal Than Others’ (2000) 3 XXVIX Insaf 52.

are prescribed by other legislations,¹⁷ (the NLC in this respect). In fact, the NLC was amended to facilitate the implementation of the Danaharta Act.¹⁸

Section 57(6) of the Danaharta Act has armed Danaharta with an additional remedy over and above those which are given to common Chargees under the NLC that is the remedy of a private treaty sale.¹⁹ This remedy is exercisable by Danaharta, irrespective whether or not an order for sale was granted by any rules of the court, the NLC, the Land Ordinance of Sabah, the Land Code of Sarawak or any other law.²⁰

It can be argued that section 57 of the Danaharta Act has effectively allowed Danaharta, acting as authorized agents of the Chargor, to sell the charged property via private treaty at any time during the foreclosure proceeding, including the period after the order for sale is granted. In such situations, it can be said that

¹⁷ Pengurusan Danaharta Nasional Berhad Act 1998, s 57(1). The section provides: 'Notwithstanding any other law and in addition to any other power the Corporation may have under any contract or any other law, the Corporation or the acquiree as holder of any security, whether as Chargee, mortgagee, assignee, lien-holder or otherwise, over any property shall be entitled -

- (a) to dispose of such property or any part of such property by way of private treaty; and
- (b) where such property consists of land, to take all steps as it deems fit to preserve the value of the land or to facilitate the disposal of the land by way of private treaty, including entering the land ... to inspect, protect, secure, maintain or repair the land ...'

Sub-section (2) provides: 'A sale by private treaty under subsection (1) may be effected by private contract, auction, tender or any other mode of sale.'

¹⁸ See National Land Code 1965, s 5C(1).

¹⁹ *Ibid* s 5(1) and Fifteenth Schedule.

²⁰ Pengurusan Danaharta Nasional Berhad Act 1998, s 57(6). The section provides:

'The Corporation's rights under subsection (1) -

- (a) may be exercised notwithstanding any order for sale made pursuant to any rules of the court, the National Land Code ... or any other law ...
- (b) be exercised without the need for any approval, confirmation or order of court ...'

See National Land Code 1965, s 10 Fifteenth Schedule which has a similar provision. See also the Court of Appeal's decision in *Ismail bin Muda v Danaharta Urus Sdn Bhd* [2007] 2 MLJ 157, [23] and the High Court's decision of *Pengurusan Danaharta Nasional Berhad v Yong Wan Hoi & Anor* [2007] 6 MLJ 709 where it was held that 'there is no 'necessity to seek recognition or confirmation by a court of law in regard to [Danaharta's] right to invoke its power to sell the said property by way of a private treaty neither is 'the sale by private treaty under s 57 of the Act [subject to any] court sanction or bound by prior court decisions or ongoing[foreclosure] proceedings.'

Danaharta is exercising a role similar to that of a Receiver and Manager representing a company.²¹ Transactions conducted under section 57 of the Danaharta Act, it is noted, remains valid and it cannot be ‘tainted, averted or nullified by any proceedings or prior judgment of a court of law relating to the charged property or the liability of the Chargor to the Chargee.’²²

3. Sections 148 and 150 of the Sarawak Land Code 1958 (Cap 81) as amended by the Land Code (Amendment) Ordinance 1994

Under the provisions of the Sarawak Land Code 1958 (hereinafter referred to as the “SLC”), Chargors in Sarawak may also sell their charged property via private treaty after an order for sale has been granted.

In terms of a judicial sale, the courts in Sarawak seem to possess wider powers in comparison to their counterparts in the Peninsular.²³ The courts in Sarawak are empowered to grant orders for sale using various methods, which include sale by private treaty and powers to alter subsequent methods of sale i.e. from public auction to private treaty and vice versa.

²¹ See the Court of Appeal decision in *Melantrans Sdn Bhd v. Carah Enterprise Sdn Bhd & Anor* [2000] 3 CLJ 127, 130 (Abdul Malek Ahmad JCA): ‘...the Administrative Receivers/Managers are the authorised agents of the company under the debenture and as such are authorised to enter into any sale and purchase agreement on the assets of the company; subject however to the obtaining of the prior consent of the debenture holders and which consent was freely given by the second defendants to the Court.’

²² *Pengurusan Danaharta Nasional Berhad v Yong Wan Hoi & Anor* [2007] 6 MLJ 709

²³ A court in the States of Malaya does not therefore have a choice as to the type of order it may make when moved by a Chargee under section 256 of the National Land Code. There is only one order that it is permitted to make, namely, an order for sale. Court of Appeal in *Century Land Resources Sdn Bhd v Alliance Bank Malaysia Bhd* [2004] 4 CLJ 793, *Malayan Banking Bhd v Marilyn Ho Siok Lin* [2006] 7 MLJ 249. See also *Maimunah bte Megat v Mayban Finance Bhd* [1996] 3 CLJ 9 where it was held that the terms or conditions in section 257 of the National Land Code are mandatory. One such term would be the method of conducting the sale, which is by public auction. For an example of the different types of orders which the court in Sarawak may grant, see *RHB Bank Berhad v Alom Industries Sdn Bhd* [2007] 3 AMR 670.

The view that the courts in Sarawak have wide powers can be supported in the following ways.

Firstly, certain provisions of the SLC are drafted differently from the NLC.²⁴ The manner of sale under section 150(1) of the SLC is one such instance. Whilst section 148(2)(c) of the SLC, is a substantive provision which ‘empowers the court to [only] make an order of sale [without specifying the method of sale]’ thus making it ‘a judicial sale,’²⁵ section 150(1) of the same act is on the other hand ‘entirely procedural in nature in the sense that it provides for the procedure for the judicial sale so ordered.’²⁶

Unlike the NLC which compels the court to sell the charge property only through one method i.e. via public auction,²⁷ the courts in Sarawak are given the option to order the sale of the property through different methods, which, may include a sale by private treaty. This view is supported by the words “such other mode of sale” appearing in section 150(1) of the SLC where the Court is empowered under the said section to grant the sale ‘... by public auction or tender

²⁴ See *Century Land Resources Sdn Bhd v Alliance Bank Malaysia Bhd* [2004] 2 MLRA 292, 295 (Gopal Sri Ram JCA): ‘They [the courts in Sarawak] must keep in the forefront of their minds that the section they are dealing with is very different from that applied by the courts in the States of Malaya.’

²⁵ *Chai Koh Shon v Public Bank Berhad* [2004] 3 MLJ 585, 589 [39].

²⁶ *Ibid*

²⁷ Section 257(1)(a) of the National Land Code provides: ‘Considering the true nature of the statutory remedy of the Chargee to apply for an order for sale under s 257 of the NLC, this court is of the view that once an order for sale has been made by the court by way of a public auction under s 257 of the NLC, the court does not have the power to make a subsequent order to vary or set aside the earlier order, and to make a new order for the charged property to be sold by way of private treaty. It is the view of this court that in an application for an order for sale under s 256, the court must make an order for sale, and such sale must be by way of a public auction and not otherwise...So strict is this requirement, that s 257(1)(a) does not provide for any other method of sale. In the face of this express provision, it would be a clear usurpation of the legislative function, if an order by way of private treaty is allowed.’ See *United Malayan Banking Corp Bhd v Chong Bun Sun and Anor Application* [1994] 2 MLJ 221, 231 and 233.

or such other mode of sale as may be directed by the court subject to such conditions of sale as shall be approved by the court...’²⁸

Furthermore, courts in Sarawak are empowered to alter the subsequent methods of judicial sale from public auction to private treaty and vice versa. It was observed by the Court of Appeal in *Chai Koh Shon v Public Bank Berhad* that the directions under section 150(1) of the SLC are consequential orders.²⁹ The view that these directions are consequential orders is significant to the expiration of a judge’s function (*functus officio*) in a foreclosure proceeding. In *Malayan United Finance Bhd v Adsonii (M) Sdn Bhd*, His Lordship Edgar Joseph Jr J (as he then was) held that the principle of *functus officio* cannot possibly apply to consequential orders.³⁰

The combined effect of section 150(1) of the SLC read together with the cases of *Chai Koh Shon* and *Malayan United Finance Bhd*, legally permits judges in Sarawak to alter subsequent modes of sale which may include a sale by private treaty. The Court of Appeal in *Chai Koh Shon v Public Bank Berhad*³¹ echoed a similar view when the court noted that ‘[in cases of] sale by the charger to a third party...after the order of sale and mode of sale are specified, it seems that the court is not *functus officio* and is competent to vary the mode of sale with the consent of the Chargor and the charge...’³²

²⁸ By virtue of Section 150(1), Sarawak lawmakers have remedied this situation when the Land Code (Amendment) Ordinance 1994 was gazetted on 23 June 1994. The amended s. 150(1) of the Land Code provides that any intended sale of any land subject to a charge may be undertaken not only by public auction but also by tender or any other mode of sale as may be directed by the Court.’ See Goh Leng Chua, ‘Nature of Charges and Caveats under the Sarawak Land Code (Chapter 81)’ [1995] 2 CLJ xliii, xlvi.

²⁹ See *Chai Koh Shon v Public Bank Berhad* [2004] 3 MLJ 585, 589 [39] (Denis Ong JCA): ‘These are directions necessary and consequential upon the order of sale granted as the opening words of s 150(1) clearly indicate and such directions are made under the additional powers of the High Court in para 3 of the Schedule to s 25(2) of the Courts of Judicature Act 1964.’

³⁰ [1990] 2 CLJ 254. See *MUI Bank Bhd v Cheah Kim Yu (Beh Sai Ming, Intervener)* [1992] 2 MLJ 642, 648 (Harun Hashim SCJ).

³¹ [2004] 3 MLJ 585.

³² *Ibid* 590 [44].

4. Sale pursuant to the Chargor's right of redemption under section 266(1) of the NLC³³

During a foreclosure proceeding, a Chargor is entitled to discharge his property at any time prior to the completion of the sale of his property pursuant to section 266(1)³⁴ of the NLC.³⁵ Using this provision, it is contended that the Chargor may legalise any private treaty sale that he may have with third parties even after an order for sale has been granted.³⁶

Unlike the Chargee's 'rights and powers to the land [which] operates as [a] security',³⁷ the Chargor's right to discharge on the other hand flows from his right

³³ See Teo (n 6) 514: '...There does not appear to be any objection to a private treaty sale even after an order for sale has been granted on the basis that the Chargor may at any time before the conclusion of the sale discharge the charge under S266(1) of the National Land Code by tendering the total amount due under the charge...'

³⁴ National Land Code 1965, s 266(1): 'Any Chargor against whom an order for sale has been made under this Chapter may, at any time before the conclusion of the sale, tender the amounts specified in subsection (2) to the Registrar of the Court or, as the case may be, Land Administrator (or, if the tender is made on the day fixed for the sale, to the officer having the direction thereof), and the order shall thereupon cease to have effect.' See also *Malaysia Building Society Bhd v Merit Aim Sdn Bhd & anor; Cameron Mall Sdn Bhd & anor (Interveners)* [2012] 4 CLJ 269, 278.

³⁵ See *Kimlin Housing Development Sdn Bhd (Appointed Receiver And Manager)(In Liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805, 819 (Edgar Joseph Jr FCJ): '...by virtue of s 266(1) of the Code, a Chargor against whom an order for sale has been made has the right, at any time before the sale has been concluded – this is to say, before the fall of the hammer – to stop the sale by tendering the total sum due under the charge, including accrued interest and the usual expenses, to the Registrar of the court – or, as the case may be, to the Land Administrator – and thereupon, the order for sale shall cease to have effect. In such a situation, the Chargor shall be entitled to a discharge of charge and return of the issue document of title.' As to when the completion of sale occurs in a public auction, see the Supreme Court case of *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor*[1994] 1 MLJ 294, 304.

³⁶ The most obvious manner in which the Chargor may tender the money owing to the Chargee is for the Chargor to repay the Chargee the outstanding loan, including interest thereon, which the Chargor had borrowed. This the Chargor may do either by obtaining the funds to repay the loan from some other independent source, or by selling the charged property to a third party. In the latter situation, the Chargor may enter into a private treaty with a third party to purchase the charged property. The Chargor, in such a situation may, from the proceeds of this sale, tender the said sum owing to the Chargee. See (n 2) 235.

³⁷ SC Loh and APL Chew, 'A Legal Impossibility; Arming Chargees with Private Power of Sale of Charged Land Outside the Provision of the National Land Code 1965' [1990] 1 MLJ xxxvi. See also SA Kam, 'Discharge of Charge After Full Settlement of Debt' [2011] 1 LNS(A) lxx; J Sihombing, *Malaysian Conveyancing* (LexisNexis 2009) , Issue 25, Division VI, para [6001].

as the lawful proprietor of the land.’³⁸ The Chargor’s right to discharge under section 266(1) of the NLC is in fact consistent with the concept of indefeasibility and the nature of Charges³⁹ found in the NLC where his right will only be abdicated after the completion of a successful public auction.⁴⁰

The Chargor’s right of discharge under section 266(1) of the NLC by way of private treaty is however subjected to various condition precedents, all of which are created by case laws. These conditions, it is argued are imposed to ensure that the Chargee’s interest is protected at all times.⁴¹ These conditions are stated as follows:

(i) Payment of the Chargee’s debt in full

In *Eng Ah Mooi & Ors v Oversea Chinese Banking Corporation*,⁴² the Chargor had agreed to sell his lands to the purchasers whilst using the purchase monies to discharge the charges. When the Chargee objected to the discharge, the purchasers applied to court for a declaration that they were entitled to discharge the charges upon payment of the amount due. Deciding in favour of the

³⁸ Section 266 is in line with the principle that the Chargor always retains a right to discharge a charge. See *Malayan United Finance Bhd v Tan Lay Soon* [1991] 1 MLJ 504, 508 (Jemuri Serjan SCJ); affirmed in *United Malayan Banking Corp Bhd v Chong Bun Sun and Anor Application* [1994] 2 MLJ 221, 235. See also *Eng Ah Mooi & Ors v Oversea Chinese Banking Corporation* [1983] 1 MLJ 209, 211. See also J Sihombing, *The National Land Code - A Commentary* (Malayan Law Journal 1998) Issue 3, 1144, [7851].

³⁹ See *M & J Frozen Food Sdn Bhd v Siland Sdn Bhd*(SC) 1994 1 MLJ 294, 308 (Wan Yahya SCJ): ‘The Chargor does not abrogate all his rights to the Chargee at the making of the order for sale. He is merely compelled to abide by the court’s order for his property to be sold in accordance with the statutory safeguards on his interest as provided under ss 257 and 258 of the NLC.’

⁴⁰ See *M & J Frozen Food Sdn Bhd v Siland Sdn Bhd* [1994] 1 MLJ 294, 308 (Wan Yahya SCJ) ‘Even after the order of sale has been made and when the auction sale is already in progress, but before a bid has been accepted, he still retains the right to tender payment of the amount which he owed (which may be less than the value of the land on sale) and call off the sale - s 266 of the NLC. The exercise of such rights does not appear to us to be consistent with a proprietor who has surrendered absolutely his rights over the land to another.’

⁴¹ So long as the Chargee’s interest is not adversely affected, there appears to be no reason as to why a Chargor does not have the right to sell the charged land before an order for sale has been made. As will be seen later, even after an order for sale has been made, the Chargor may sell the property by way of private treaty. See in *United Malayan Banking Corp Bhd v Chong Bun Sun anor Application* [1994] 2 MLJ 221, 265 (Visu Sinnadurai J).

⁴² [1983] 1 MLJ 209.

purchasers, the Federal Court held that the Chargee Bank can ‘refuse to discharge’ the charges ‘only if there are circumstances showing that [the Chargee Bank] would not receive or [it] would not be paid in full the amount of debt secured by the charges.’ According to the Federal Court, the Chargor has the right to dispose his property in any manner he likes, be it by way of ‘sale’ or ‘gift’ provided that the Chargee is fully paid. The court commented:

The benefit or lack of financial benefit or even adequacy or inadequacy of such benefit to be derived by a Chargor from his transaction with a third party should not [be the Chargee’s concern] as long as [the Chargee’s] right to collect [its] debt in full is assured.⁴³

(ii) The proceeds of sale must not be less than the amount due to the Chargee

According to His Lordship Wan Adnan J in *Chung Khiaw Bank Ltd v Lau Ah Yen & Anor*:

... the court may allow a Chargor of any land to sell the land in question by private treaty in circumstances where the court is satisfied that the proceeds of such sale are not less than the amount due to the Chargee under the charge...⁴⁴

(iii) Consent of the Chargee must be obtained

In *MUI Bank Bhd v Cheam Kim Yu*,⁴⁵ the Supreme Court speaking through His Lordship Harun Hashim SCJ (as he then was) noted that since private treaty sales, unlike public auction sales, are not regulated by the NLC, the Chargor is free to

⁴³ *Ibid* 212. See also (n 2).

⁴⁴ See *Chung Khiaw Bank Ltd v Lau Ah Yen & Anor* [1989] 2 MLJ 247, 249 (Wan Adnan J); affirmed in *United Malayan Banking Corp Bhd v Chong Bun Sun anor Application* [1994] 2 MLJ 221. This condition was criticised by Loh in his article SC Loh and APL Chew, ‘A Legal Impossibility; Arming Chargees with Private Power of Sale of Charged Land Outside the Provision of the National Land Code 1965’ [1990] 1 MLJ xxxvi, xlvi.

⁴⁵ [1992] 2 MLJ 642.

sell his property by private treaty, subject always to the Chargee's consent.⁴⁶ A similar view was also expressed in *Chong Bun Sun*.⁴⁷ This condition, it is submitted is equally crucial to ensure a successful completion of the private treaty sale. Two reasons are offered in support for this argument.

Firstly, as security for the loan, a Chargee, in addition to the entry of the charge on the Chargor's property, will almost always retain possession of the Chargor's title. If the Chargee objects to the sale for any reason whatsoever, the Chargor may find it difficult, though not impossible, to retrieve his title from the Chargee. This in turn may scuttle the completion of the private treaty sale.

Secondly, because of the indefeasible nature of the Chargee's interest under section 340(1) of the NLC, the Chargee's charge will prevail over all unregistered interests which the Chargor may intend to grant or have subsequently granted to prospective purchasers.⁴⁸ Unless and until the Chargee discharges its charge over the land, the position of subsequent purchasers will be undesirable and untenable as they have to take the Chargor's land subject to the current Chargee's charge.⁴⁹ Moreover, no prudent purchaser would buy the property subject to such an encumbrance.⁵⁰

⁴⁶ *Ibid* 647 (Harun Hashim SCJ): '...there is nothing to prevent a Chargor with the consent of the Chargee to sell the charged property by private treaty. There are no specific provisions in the Code for such a sale but if such a sale is concluded as a purely business arrangement, it is for the Chargee to discharge the charge to give full effect to the sale.'

⁴⁷ (n 2) 234 (Visu Sinnadurai J): '...[however], it is prudent for the Chargor to obtain the consent of the Chargee.'

⁴⁸ The sale by private treaty here, however, did not confer any superior interest in the land in *MUI Bank Bhd v Cheam Kim Yu* (n 45) against the indefeasible interest of the bank conferred by section 340(1) unless such interest is made defeasible on account of fraud, forgery or illegality on the part of the bank under section 340(2). See (n 45) 649.

⁴⁹ See Supreme Court decision in *Gondola Motor Credit Sdn Bhd v Almurisi Holdings Sdn Bhd* [1992] 1 CLJ 112 (Rep); [1992] 4 CLJ 2212; [1992] 2 MLJ 650, 689A (Harun Hashim SCJ): 'Any dealing subsequent to the charge and with notice of the charge, as here, cannot defeat the indefeasible interest of the registered Chargee and through him the purchaser at a judicial sale.' Affirmed in *Continental Court Sdn Bhd v Fan Fong Hee & ors* [2013] 1 LNS 275 (Su Geok Yiam J).

⁵⁰ See High Court decision in *Abric Project Management Sdn Bhd v Palmshine Palza Sdn Bhd & Anor*[2007] 3 MLJ 571, 584 (Ramly Ali J): '...(a) a Chargor may try to sell the property by

Consent of the Chargee

A significant element which is found in Heading 4 above is the consent of the Chargee.

As mentioned above, the Chargee's consent to a private treaty sale after the order for sale is granted activates in Heading 4. In cases of private treaty sales involving the Chargee, the Chargee will usually grant its consent to the sale once the Chargee is informed by the Chargor of the sale and the Chargor's intention to discharge his charge pursuant to section 266 of the NLC. Upon receipt of the full debt from the purchaser, the Chargee will proceed to discharge its charge⁵¹ and thereafter return the title to the Chargor, who will then finally transfer the title to the new purchaser, thereby completing the sale.

Whilst the transaction looks viable theoretically, it seldom turns out well in practice.⁵² To ensure that the interests of all parties to the transaction are protected i.e. the Chargee, Chargor as well as the purchaser, Sethu⁵³ proposes that certain terms be incorporated into the Sale and Purchase Agreement. These suggestions include; firstly, that the redemption sum should be paid by the purchaser to the Chargee directly, and, secondly, the purchaser should obtain an undertaking directly from the Chargee that upon payment of the redemption sum the Chargee will discharge the charge.

consulting the charge but the property subject to the registered charge can never be sold free of encumbrances. Accordingly, no right-minded purchaser would buy the property subject to such an encumbrance; (b) the charger therefore has to liaise with the charge to obtain its consent to a sale in order that the charge issues a discharge of charge to up lift the charge.'

⁵¹ National Land Code 1965, s 278(1).

⁵² RR Sethu (n 6) c: 'The suggestion by Harun Hashim SCJ [in *MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener)* [1992] 2 MLJ 64\2] that the Chargee must give effect to the sale by discharging the charge, though valid in theory, seldom works in practice. If the payment is made to the Chargor/vendor, then there is no guarantee that the payment would reach the Chargee.'

⁵³ *Ibid.*

Conclusion

The commencement of an order for sale in a foreclosure proceeding is not a death knell for the Chargor. Various methods are still available to the Chargor to dispose his property legally via private treaty – even though an Order for Sale has been granted. Depending on the circumstance(s) the Chargor falls into, the Chargor may utilize any one or more of these exception(s) to sell his property via private treaty in spite of the order for sale.