

# THE ROLE OF RECEIVERS AND MANAGERS AND THE PRIORITY OF CHARGES IN MALAYSIAN LAND LAW: RECONCILING S375(2)(A) OF THE COMPANIES ACT 2016, S24(B) CONTRACTS ACT 1950 AND FORECLOSURE PROVISIONS UNDER THE NATIONAL LAND CODE 2020

*Mark Goh Wah Seng\**

## I. Introduction

Instead of following the strict procedures outlined in the *National Land Code 2020*, a chargee holding land as security for a loan in a debenture can now legally dispose of this security privately. This method, which was endorsed by the Federal Court in the case of *Melatrans Sdn Bhd v Carah Enterprise Sdn. Bhd & Anor*<sup>1</sup> is only available to chargees if the chargor is a company, but not individual chargors. The decision of *Melatrans*, which was subsequently codified in *section 375(2)(a) of the Companies Act 2016*<sup>2</sup>, had legally allowed chargees to sell the company's land via private treaty. As a result of this provision, lenders, usually financial institutions, can now sell their secured properties, bypassing the more complex and stringent requirements of the *National Land Code 2020*. This raises a significant concern: As foreclosure proceedings under the *National Land Code 2020* are created to safeguard the interests of chargors<sup>3</sup>, allowing chargees to circumvent the foreclosure procedures in the *National Land Code 2020* would undermine the foreclosure process, leaving chargors unprotected.

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\*Senior Lecturer, Department of Law, Faculty of Law and Government, HELP University

<sup>1</sup> *Melatrans Sdn Bhd v Carah Enterprise Sdn. Bhd & Anor* [2003] 2 MLJ 193 (FCt).

<sup>2</sup> 'Unless the instrument expressly provides otherwise— (a) a receiver or receiver and manager is the agent of the company...' Companies Act 2016 (Malaysia), s 375(2)(a)

<sup>3</sup> "The provisions of the NLC as to the rights of chargors are designed for their protection and could not be waived nor could the chargor contract himself out of the NLC. It follows, therefore, that no power of sale could be conferred by a chargor under the NLC on a chargee himself by way of a debenture or power of attorney or otherwise, but proceedings must be brought by the chargee to obtain a judicial sale in accordance with the procedure laid down in the NLC. In such circumstances, any power of sale which purports to be conferred on a chargee himself, omitting all mention of notice and periods of default, by a debenture or power of attorney and the necessity for obtaining a judicial sale, would be invalid and ineffective to entitle a purchaser to be regarded as owner" *Kimlin Housing Development Sdn Bhd (Appointed Receiver and Manager) (in liquidation) v Bank Bumiputra (Malaysia) Bhd and Others* [1997] 2 MLJ 805 (SC) [23A]

This article aims to address this issue by adopting the theoretical and doctrinal approach. Applying the methods described above, this article seeks to investigate the relationship between *Section 372(2)(a) of the Companies Act 2016* and the *National Land Code 2020*, particularly provisions governing the order for sale. It seeks to answer the following issue:

Can Receivers and Managers who sell a company's landed property as agents of the company circumvent the requirements of the *National Land Code 2020*, or are they still obliged to follow the provisions of the *National Land Code 2020*?

## II The Significance of Receivers and Managers (R&M) In Corporate Insolvency

Unlike liquidators who are appointed during the winding-up process of a company, Receivers and Managers<sup>4</sup> (R&M) are appointed by the creditors when a breach of the provisions of the debenture or loan agreement occurs. The appointment of R&M is triggered upon the borrower's default, irrespective of the commencement of the company's liquidation.<sup>5</sup>

It is important to appreciate that the right of the debenture holder to appoint a R&M is independent of the company's liquidation and is not dissolved when the winding-up order is made, nor is it dissolved upon the passing of a resolution of winding up.<sup>6</sup> Even after winding-up proceedings have started, a receiver or manager may continue to act, however, subject always to the liquidator's or the court's consent to carry on the business.<sup>7</sup> This position was entrenched in *S386(1)(c)*<sup>8</sup> as amended by *S11 of the Companies (Amendment) Act 2019*. In his article entitled 'Receivership and Liquidation: Interrelationship', Dr Samsar Kamar describes a 'receiver' as a person who is expected to take possession of the assets subject to the mortgage debenture and to manage and realise those assets with a view to recovering the debt due to the debenture holders.<sup>9</sup>

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<sup>4</sup> The difference between a 'receiver' and 'manager' is perhaps best encapsulated in the English case of *Re Manchester and Milford Rly Co, Re, ex p Cambrian Rly Co* (1880) 14 Ch D 645,653, wherein Jessel MR clarified that a 'receiver' means a person who merely takes the income and pays necessary outgoings, whereas a 'receiver and manager' has all the powers of a receiver and additionally, has the authority to carry on the trade or business of the company.

<sup>5</sup> Receivers & Managers: A 101 by Jason Yong Kok Yew <https://www.thomasphilip.com.my/articles/receivers-managers-a-101/> (date accessed 10-7-2025)

<sup>6</sup> Hubert Picarda, *Law Relating to Receivers, Managers and Administrators* (2nd Ed, 1990) (Butterworths, London) 195.

<sup>7</sup> *Ler Cheng Chye & Anor v Wong Ching Yong & Ors* [2020] MLJU 1565 [41]

<sup>8</sup> Companies Act 2016 (Malaysia), s 386(1) (as amended by Companies (Amendment) Act 2019, s 11).

After the commencement of winding up of a company—

(a) a receiver may continue to act as a receiver and exercise all the powers of a receiver in respect of property or assets secured under the debenture appointing the receiver; and

(b) a receiver and manager may continue to act as a receiver as referred to in paragraph (a); and

(c) a receiver and manager may continue to exercise all the powers of a receiver and manager for the purpose of carrying on the business of the company provided that the receiver and manager obtains consent from the liquidator or if the liquidator withholds his consent, the consent of the Court.

<sup>9</sup> Dr Samsar Kamar bin Hj Ab Latif, 'Receivership And Liquidation: Interrelationship'[1995] 1 MLJ liii

Irrespective of whether the R & M is appointed by the court or the secured creditor, their core duty remains the same; i.e. to take control of the defaulting companies' assets and to arrange and realise the lender's security through various methods such as public auction, private sale, or tender.<sup>10</sup> The purpose and desirability of appointing a R & M is best summarised by Lord Lindley as follows:

The object of having a receiver appointed by the court is to place the partnership under the protection of the court, and to prevent everybody, except the officer of the court, from any way intermeddling with them. The object of having a manager is to have the partnership business carried on under the direction of the court; a receiver, unless he is also appointed a manager, has no power to carry on the business."<sup>11</sup>

Although Lord Lindley was referring to a court-appointed R&M, it is argued that this fundamental purpose remains the same even for a creditor-appointed R&M. Another crucial purpose of appointing R&M is found in the High Court case of *Matang Holdings Bhd & Ors v Dato Lee San Choon & Ors*<sup>12</sup> where the court held that the purpose of appointing a R&M was to prevent the property of the company from being dissipated, which will in turn result in the applicants being in a worse off situation if the appointment of a receiver was not made. R&M are also appointed by creditors as a practical mechanism to protect their secured interest by ensuring that the charged assets are controlled and realised efficiently.<sup>13</sup>

To fulfil its primary responsibilities of taking control of company assets, preserving the value of the assets and selling the assets to maximise the recovery, the R & M is given various powers to achieve this.

### III Powers of the Receivers and Managers

The powers of the R&M are typically found in the debenture and the Court order (if the appointment is made by the court).<sup>14</sup> In addition to this, R&Ms are also invested with all the

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<sup>10</sup> "Before the CA 2016, the powers of the receiver, or receiver and manager, were typically spelled out in the privately negotiated debenture. The CA 2016 has for the first time introduced a statutory list of powers of a receiver or receiver and manager. These are contained in the Sixth Schedule to the CA 2016, and comprise the typical powers of a receiver or receiver and manager." Current Status of Malaysian Insolvency Law Rabindra S Nathan Shearn Delamore & Co chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.shearnanddelamore.com/pdfs/Law-Business-Research-The-Asia-Pacific-Restructuring-Review-2017.pdf (date accessed 20-2 2025)

<sup>11</sup> Lindley & Banks, *Lindley & Banks on Partnership* (17th edn, Sweet & Maxwell 1995) para 23-149, 666.

<sup>12</sup> [1985] 2 MLJ 406, 407

<sup>13</sup> Samsar Kamar Bin Hj Abd Latif, "Duties of Receiver and Manager" (2013) 21(1) Journal of Malaysian and Comparative Law (JMCL) 64.

<sup>14</sup> Companies Act 2016 (Malaysia), s 374: 'A receiver or receiver and manager may be appointed— (a) under any instrument that confers on a debenture holder or charge holder the power to appoint a receiver or receiver and manager; (b) under any

powers specified in the Sixth Schedule of the *Companies Act 2016*, although any/all of these powers can be specifically excluded by the instrument or by the Order of Court (whichever applicable) in appointing the R&M.<sup>15</sup>

The status of the R&M as an agent was codified in *S375(2)(a)*<sup>16</sup> of the *Companies Act 2016*, not long ago. What this essentially means is that instead of acting as an independent principal in his own right, the R&M is acting for and on behalf of the company.

It is argued that this statutory provision, which codifies the Federal Court's decision in *Melantrans*, has raised significant legal issues when the R&M sells charged land under the *National Land Code 2020* as an agent of the lender, usually the financial institution.

#### **IV Potential Conflicts When a Receiver & Manager Sells a Charged Property Under the National Land Code 2020 as Agent under the Companies Act 2016**

Various conflicts may arise when the R&M sells a property that is charged under the *National Land Code 2020* as an agent under the *Companies Act 2016*.<sup>17</sup>

For purposes of this article, only 3 possible conflicts will be identified and evaluated.

##### A) Lack of Authority

To reiterate, under *S375(2)(a) of the Companies Act 2016*, a R&M is presumed to be the agent

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instrument that creates a charge in respect of property and undertaking of a company that confers on the charge holder the power to appoint a receiver or a receiver and manager; or (c) by the Court.' "...the 2016 Act has codified many of the rights and procedures making it easier to carry out a receivership process. Examples would include the clear provisions on the appointment of a receiver or receiver and manager..." Lee Shih, 'The Companies Act 2016' (2020) 44(1) *Journal of Malaysian and Comparative Law* 21, 27.

<sup>15</sup> See para 2 of the Sixth Schedule which expressly states that 'Without limiting the generality of paragraph 1, but subject to any provision of the Court order by which, or the instrument under which, the receiver was appointed, being a provision that limits the receiver or receiver and manager's powers in any way, a receiver or receiver and manager of the property of the company has, in addition to any powers conferred by that order or instrument, as the case may be, or by any other law, power for the purpose of attaining the objectives for which the receiver or receiver and manager was appointed—...'

<sup>16</sup> *Companies Act 2016*, s 375(2)(a): 'Unless the instrument expressly provides otherwise— (a) a receiver or receiver and manager is the agent of the company;'

<sup>17</sup> Listed here are some of the potential conflicts which may arise a) The Scope of Authority: PAs under the debenture may grant broad powers, whilst the requirement for the power of attorney under the *National Land Code 2020* is more regulated. Different Standard of Care c) Personal Interest vs Professional Duty of the R&M;d) Valuation and Sale Price Disputes: Whilst the NLC requires market valuation, this may conflict with corporate law's acceptance of lower offers for quick realization e) Proceeds Distribution Conflicts: Priority for payment under NLC may differ from corporate law creditor payment hierarchies; f) If the R&M fails to follow the strict regulation under the NLC, this may affect the legitimacy of the title of subsequent purchasers.

of the chargor company<sup>18</sup> unless the instrument states otherwise.<sup>19</sup> It is interesting to note that S375(2)(a) of the *Companies Act 2016* does not differentiate between the types of the company's assets that are secured, ie whether it is movable or immovable properties. Hence, as an agent of the chargor company, the R&M is empowered to take effective control and management over *all* (emphasis mine) of the company's assets that are secured under the debenture,<sup>20</sup> be it movable or immovable property, without any need for court approval.<sup>21</sup>

It should, however, be pointed out that if the security of the debenture includes immovable property, the mere creation of the statutory agency under S375(2)(a) of the *Companies Act 2016* itself is insufficient to empower the agent to deal with the charge property, as it still does not satisfy the formalities under the *National Land Code 2020*.<sup>22</sup> In such cases, unless and until the R&M is made the registered proprietor (which they are not), or the R&M holds a duly registered power of attorney following the procedures of the *National Land Code 2020*, the R&M cannot execute a transfer, charge, lease or conduct any dealing of the charge property even though he is an agent under the *Companies Act 2016*.<sup>23</sup> Any actions taken by the R&M in this regard will invalidate any dealings conducted on the charged property. To ensure the protection of immovable properties, lenders would need to additionally register and formally appoint the R&M as attorney of the Chargor company, following the process provided under the *National Land Code 2020*. Possession or control is insufficient to authorise the R&M to transfer or confer title in land to a third party. Until the formalities in the *National Land Code 2020* are satisfied, the R&M will not be able to deal with the chargor company's property.<sup>24</sup>

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<sup>18</sup> The legal position that a receiver is an agent of the company (chargor) and not the debenture holder (chargee) is well-established, as held in *United Malayan Banking Corp. Bhd. v. Roland Choong Shin Cheong* [1991] 4 CLJ Rep 157; [1991] 2 MLRH 611 and *Bank Bumiputera (Malaysia) Berhad v Senhong Electrical Sdn. Bhd. & Anor* [1999] MLJU 741 ; [1999] 7 MLRH 78 and *Abu Bakar Rajudin (from Abu Bakar Rajudin & Co acting as receiver and manager for Sykt Usahasama Km-Ldah Sdn Bhd) v Sykt Perumahan Negara Bhd* [2017] 1 MLJ 115 including the Federal Court decision of *Melatrans*.(n1). See also *Company Receivers and Administrators* (2nd Ed, 2000) by J O'Donovan, at para [8.20]

<sup>19</sup> *Exsim Suria Sdn Bhd v Southern Perk Sdn Bhd & Ors* [2024] MLJU 375.

<sup>20</sup> "...an appointment of a receiver and manager only allows control over those assets over which the lender has security. This will therefore depend on the extent of the security..." Court of Appeal in *Abu Bakar Rajudin (from Abu Bakar Rajudin & Co acting as receiver and manager for Sykt Usahasama Km-Ldah Sdn Bhd) v Sykt Perumahan Negara Bhd* [2017] 1 MLJ 115 [60]

<sup>21</sup> "The mainstream perception is that receivers and their appointers hold 'too much' power in relation to insolvent companies" Ooi Zi Jie, 'The Role of Receivership in Malaysian Corporate Insolvency Framework' (2021) 3 CLI 32, 37.

<sup>22</sup> "It follows that no power of sale can be conferred by a chargor under the Code on a chargee himself by way of a debenture or power of attorney or otherwise, but proceedings must be brought by the chargee to obtain a judicial sale in accordance with the rigid procedure laid down in the Code." Federal Court in *Kimlin Housing Development Sdn Bhd (Appointed Receiver and Manager) (In Liquidation) v Bank Bumiputra (M) Bhd and Others* [1997] 2 MLJ 805, 823.

<sup>23</sup> See S309-S311 National Land Code 2020 (Act 828) for the procedures to be followed to create a valid power of attorney. It was argued that in spite of these additional procedures under the NLC, it is still insufficient to prevent fraudulent transfers of land. For a detailed discussion on this issue, please see Noraida Harun, Nazli Ismail Nawang and Jady Zaidi Hassim, 'Land Scams Involving the Power of Attorney in Land Dealings in Malaysia' (2015) 23(S) *Pertanika Journal of Social Sciences and Humanities* 97.

<sup>24</sup> In emphasising the mandatory effect of the NLC charge the Federal Court in *Ambank (M) Bhd v AIM Edition Sdn Bhd* [2022] 1 MLJ 357,370 observed that 'Such statutory rights which are available under s 256 of the National Land Code read with O 83 of the Rules of Court 2012 are mandatory and not permissive.' Although the decision refers to the procedures of an

B) Potential Conflict Between a Registered Power of Attorney Under the *National Land Code 2020* and *S24(b) Contracts Act 1950*<sup>25</sup>.

Even if the power of attorney was properly registered in accordance with the provisions of the *National Land Code 2020*, can the R&M now sell the charged land as lawful attorneys for the chargor company? In other words, is the sale of the charge property valid simply because the power of attorney of the R&M complies with the *National Land Code 2020*, even though (emphasis mine) the transaction effectively circumvents the foreclosure process in the *National Land Code 2020*, thereby breaching *S24(b) of the Contracts Act 1950*?

To answer this question, we will need to examine the Federal Court's decision of *Melatrans Sdn. Bhd. v Carah Enterprise Sdn. Bhd. & Anor.*<sup>26</sup>

Breaching *S24(b) Contracts Act 1950*

In *Melatrans Sdn. Bhd. v Carah Enterprise Sdn. Bhd. & Anor*, Carah Enterprise executed a debenture in favour of the second respondent as security for banking facilities granted by the latter. This was followed by the execution and registration of a first legal charge under the then *National Land Code 1965* over the lease in favour of the second respondent. The second respondent later exercised their right under the said debenture and appointed a R&M over all of the assets and undertakings of Carah, including the immovable property of Carah.<sup>27</sup> The law report was silent on the reason for the appointment of the R &M; presumably, it was triggered by an event of default caused by the chargor(Carah).<sup>28</sup>

The appellant challenged the sale of the land by the R&M at the Federal Court, arguing that the sale was invalid because the R&M was not empowered to sell the land. To the disappointment of the appellant, their argument failed. Distinguishing *Kimlin*, the Federal

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order for sale, it is argued that the purpose of the decision emphasises the mandatory nature of the NLC.

<sup>25</sup> This argument was previously raised by the author in Mark Goh Wah Seng, 'Assessing the Legality of Selling Landed Properties Using a Debenture Despite a National Land Code Charge' (2022) 39(2) INSAF 225.

<sup>26</sup> *Melatrans Sdn. Bhd.* (n1)

<sup>27</sup> *Melatrans Sdn. Bhd.* (n1) 197 para C-F.

<sup>28</sup> "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.

Court in *Melatrans* held that since the sale was conducted by the R&M in his capacity as the *agent* (emphasis mine) of the chargor company, the provisions of the [then] *National Land Code 1965*, which relate to judicial sale, were inapplicable.<sup>29</sup> The Federal Court also rejected the argument that the ‘debenture was an attempt’ to circumvent the then *National Land Code 1965*’s provision on foreclosure proceedings.<sup>30</sup> Instead, the Federal Court found that the sale of the land under the debenture by the R&M was properly validated by the *Powers of Attorney Act 1949*.<sup>31</sup>

In my earlier article<sup>32</sup>, I had argued that the Federal Court’s perspective in *Melatrans* was misguided, likely because the argument was focused on the wrong issue of “contracting out of the NLC.”<sup>33</sup> It is submitted that the correct issue the Federal Court should have decided is as follows: whether the debenture in *Melantrons* was void under *S24(b) of the Contracts Act 1950*,<sup>34</sup> in particular, whether the debenture constitutes an agreement that would defeat any law. It is argued that the lender's main intention was to utilise the debenture as a tool to circumvent and defeat the complex and well-established foreclosure procedures in the *National Land Code 2020*. Such intention, it is further asserted, amounts to a breach of the *National Land Code 2020*, which in turn will invalidate the debenture under *S24(b) of the Contracts Act 1950*.

This view is supported by the following explanations.

#### a) Type of property secured

A lender may use different methods to secure loans which are given to a company based on the company's assets. Amongst the securities<sup>35</sup> which the lender may utilise include a company

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<sup>29</sup> “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.” *Melatrans Sdn. Bhd.* (n1) 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.

<sup>30</sup> *Melatrans Sdn. Bhd.* (n1) 201 para G.

<sup>31</sup> 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.” *Melatrans Sdn. Bhd.* (n1) 201 para G-H.

<sup>32</sup> Mark Goh (n25)

<sup>33</sup> “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.* (n1) 201 para G-H.

<sup>34</sup> Contracts Act 1950, s 24(b) ‘The consideration or object of an agreement is lawful, unless it is of such a nature that, if permitted, it would defeat any law.’

<sup>35</sup> Other securities which the lender may use include a pledge, assignment, liens, loan stocks and 3<sup>rd</sup> party guarantees. King & Wood Mallesons, ‘Taking Security in Malaysia’ (2023) <https://www.kwm.com/content/dam/kwm/insights/download->

charge (which can either be fixed or floating), a charge under the *National Land Code 2020* (NLC), or specific provisions in the debenture itself, which usually give the power to appoint a R&M. Where the security from the borrower company comprises wholly or partly of immovable property, it is argued that the appropriate method to secure the loan should be by way of a *National Land Code 2020* charge in addition to the appointment of a R&M via a debenture.

This argument is supported by the Federal Court decision in *K Balasubramaniam, Liquidator for Kosmopolitan Credit & Leasing Sdn. Bhd (In Liquidation) v MBF Finance Bhd. & Anor.*<sup>36</sup> In this case, one of the issues which the Federal Court had to consider was whether the principle enunciated by the Supreme Court in *Kimlin* (which states that Receivers and Managers appointed by a debenture must sell the property by way of an order for sale under the then *National Land Code 1965*<sup>37</sup>) should apply to *all* (emphasis mine) the borrower company's assets or should it be restricted to the immovable property of the company.<sup>38</sup>

Speaking on behalf of the Federal Court, her ladyship Siti Norma Yaakob FCJ, made a compelling distinction between the cases of *Kimlin* and *K. Balasubramaniam*. Her ladyship pointed out whilst the earlier case of *Kimlin* focused on a land charged under the then *National Land Code 1965*, the current case of *K Balasubramaniam* involved “an equitable charge over *movable property* (emphasis mine)”, which represents a totally different type of security.<sup>39</sup> Based on these fundamental differences, the Federal Court concluded that “...the principles of *Kimlin* should be restricted in scope and limited to the powers of the receiver and manager appointed under a power contained in an instrument to dispose of *lands charged under the code*

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[publication/global/2023/Taking\\_Security\\_in\\_Malaysia\\_English.pdf](https://www.malaysiakini.com/news/publication/global/2023/Taking_Security_in_Malaysia_English.pdf) (accessed 31 July 2025)

<sup>36</sup> *K Balasubramaniam, Liquidator for Kosmopolitan Credit & Leasing Sdn. Bhd (In Liquidation) v MBF Finance Bhd. & Anor* [2005] 2 MLJ 201 (FCt)

<sup>37</sup> “The provisions of the NLC as to the rights of chargors are designed for their protection and could not be waived nor could the chargor contract himself out of the NLC. It follows, therefore, that no power of sale could be conferred by a chargor under the NLC on a chargee himself by way of a debenture or power of attorney or otherwise, but proceedings must be brought by the chargee to obtain a judicial sale in accordance with the procedure laid down in the NLC. In such circumstances, any power of sale which purports to be conferred on a chargee himself, omitting all mention of notice and periods of default, by a debenture or power of attorney and the necessity for obtaining a judicial sale, would be invalid and ineffective to entitle a purchaser to be regarded as own.” *Kimlin Housing Development Sdn. Bhd.(Appointed Receiver and Manager) (In Liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805,823.

<sup>38</sup> “Following the dismissal of his appeal, the appellant obtained the leave of the court to refer the following six questions of law to the Federal Court: (2) Whether the principles enunciated by the then Supreme Court in *Kimlin Housing Development Sdn Bhd (Appointed Receiver and Manager) (in liq) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805 are restricted in scope and limited 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 had been created under the National Land Code (‘the Code’) or applies to all the assets, be it movable or immovable, of the company that is under liquidation and in respect of which a liquidator had been appointed” *K Balasubramaniam* (n35) 203. See also Kuek Chee Ying, ‘Receiver and Manager’s Power of Sale over Charged Land: Development after the *Kimlin* Decision’ (2012) 3 MLJ lxxxix, xcvi.

<sup>39</sup> “The issue of law raised in *Kimlin* was whether a receiver and manager appointed under a debenture can proceed to sell the charged land by just obtaining the leave of the court without taking any proceedings under the Code. Before us the subject matter is entirely different in that it involves the enforcement of an equitable charge over movable property.” *K Balasubramaniam* (n35) 221.

(emphasis mine). Those principles have no application to assets comprised in a fixed and floating charge contained in a debenture, regardless of whether such assets are movables or immovables, *provided that such immovables are [equitable]*.<sup>40</sup> A clearer explanation of equitable immovables was provided in *Mastiara Sdn Bhd v Motorcycle Industries (M) Sdn Bhd & Ors*, where the court described an equitable charge to mean a charge ‘outside the Code, [where] the Code does not apply. In such situations, the lender may enforce the remedy provided in the debenture.’<sup>41</sup> It is argued that this view will only apply if and only if the charge cannot be entered because the property itself cannot be registered in the landowner’s name, for example, a property pending the issuance of a strata title.<sup>42</sup> However, if the property is capable of being registered, the lender must ensure both the property and the charge are properly registered<sup>43</sup> under the *National Land Code 2020* before the loan is released. The lender cannot rely on the debenture to sell the property as an agent if the lender has failed to ensure that both the title and charge were registered in the first place.

Relying on the Federal Court case of *K Balasubramaniam*,<sup>44</sup> one can make the following conclusion: If the security provided by the borrower company includes land, whether wholly or partially, and a charge is registered under the *National Land Code 2020*, the R&M must sell the secured property in accordance with the *National Land Code 2020*. Selling the charge property through any other means will constitute a breach of the *National Land Code 2020*, rendering the debenture void under *S24(b) of the Contracts Act 1950* for defeating any law (in this case, the *National Land Code 2020*).<sup>45</sup>

b) Construing the Debenture and Power of Attorney Together.

In *Melatrans Sdn Bhd v Carah Enterprise Sdn Bhd & Anor*<sup>46</sup>, the appellant, Melatrans, provided a debenture in favour of the second respondent. This was followed by the registration

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<sup>40</sup> *K Balasubramaniam* (n35) 222.

<sup>41</sup> *Mastiara Sdn Bhd v Motorcycle Industries (M) Sdn Bhd & Ors* [1998] 3 CLJ 874.

<sup>42</sup> “As a chose in action, the assignment of rights by the assignor to the lender (usually the bank) is not considered as ‘dealings’ within the National Land Code. Hence, it does not come within the purview and control of the National Land Code nor the Strata Titles Act 1985. Instead, the assignment is a contract entered between the lender and the assignor.” Mark Goh Wah Seng, ‘Foreclosing on a Loan Agreement cum Deed of Assignment (Completing the Puzzle): A Review of the Federal Court Decision in *Damai Freight v Affin Bank Berhad*’ (2023) 46(1) *Journal of Malaysian and Comparative Law* 77, 80.

<sup>43</sup> “It will be seen that the act of registration per se is paramount and when registered a title becomes indefeasible and remains so unless and until declared otherwise by the court which can only be done if the title can be successfully challenged within the somewhat restricted scope of the exceptions stated in section 340.” *Teh Bee v K Maruthamuthu* [1977] 2 MLJ 7,10

<sup>44</sup> *K Balasubramaniam* (n35)

<sup>45</sup> See also Kuek Chee Ying, ‘Receiver and Manager’s Power of Sale Over Charged Land: Development After the Kimlin Decision’ [2012] 3 *Malayan Law Journal* lxxxix, xciv (pg 6). “In arriving its decision, the Federal Court limited the principles in Kimlin to its peculiar facts. It was held that Kimlin was concerned with land charged under the NLC but should not apply to assets comprised in a fixed and floating charge contained in a debenture where the assets may include movable and immovable properties provided, they are not charged under the NLC.

<sup>46</sup> *Melatrans Sdn. Bhd.* (n1)

of a first legal charge under the then *National Land Code 1965* against the lease in favour of the second respondent.<sup>47</sup> On or around February 1994, the second respondent exercised their rights under the debenture and appointed a receiver and manager over all of Carah's assets and undertakings, including the land owned by Carah.

Whilst the law report did conclusively state the reason for the appointment of the receiver and manager, it is safe to presume that the appointment was made pursuant to an event of default by Carah, the chargor.<sup>48</sup> In one of the arguments raised, the appellant challenged the R&M's authority to sell the appellant's lease through a private treaty. Dismissing the said challenge, the Federal Court held 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 the *agent of the chargor*."<sup>49</sup>[emphasis mine]. The argument that the power of attorney in the debenture was void because it was an attempt to circumvent the provisions of the NLC was also rejected by the Federal Court. On the contrary, the Federal Court upheld the validity of the said power of attorney, declaring that it was "satisfied that the said power of attorney [had] complied with sections 3(2) and 4(1) of the Powers of Attorney Act 1949" and hence, "the R&M could act and exercise the power under the debenture."<sup>50</sup>

It is argued that the Federal Court came to such a conclusion because the Federal Court was examining the power of attorney *independently* (emphasis mine) and without any reference to the debenture. This approach, it is submitted, is overtly simplistic and will likely lead to erroneous conclusions. The Federal Court, it is argued, should have examined the power of attorney in light of and in connection with the debenture.

In *Malayan Banking Bhd v Neway Development Sdn Bhd & Ors*<sup>51</sup>, the Federal Court found that the "subsequent instruments and documents, including the third party first legal charge" securing the term loan, which were linked to or arose from a sale found to be illegal, were also "tainted with illegality" because these documents were related to the original unlawful

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<sup>47</sup> *Melatrans Sdn. Bhd.* (n1) (197) [C-F].

<sup>48</sup> "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 cxxiv, cxxiv.

<sup>49</sup> *Melatrans Sdn. Bhd.* (n1) (201)[F]. The same view was held by Dr. Samsar Kamar Bin Hj Ab Latif in his article, "Power of Sales by Receivers and Managers over Land under a Debenture" [1998] 1 MLJ cxxix, cxliii.

<sup>50</sup> *Melatrans Sdn. Bhd.* (n1) (201) [G-H.] 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 BigraiseTelipokSdnBhd) & Anor* [2010] 4 MLJ 270; *Lim Eng Chuan Sdn Bhd v United Malayan Banking Corp & Anor* [2011] 1 MLJ 486.

<sup>51</sup> *Malayan Banking Bhd v Neway Development Sdn Bhd & Ors* [2017] 5 MLJ 180.

document.<sup>52</sup> Similarly, in *Dr. HK Fong Brain Builder Pte Ltd v SG-Maths Sdn Bhd & Ors*<sup>53</sup>, the High Court (whose decision was subsequently affirmed by the Court of Appeal) found that since the purchase of the native land was illegal ab initio, consequently, the subsequent instruments (in this case, the first legal charge and loan documents) were also found to be illegal. In reaching this decision, the court treated the three separate documents as constituting a “single composite transaction.”<sup>54</sup>

The Federal Court in *Melatran*<sup>55</sup> should have also applied the equitable principle that “equity looks at the intent rather than the form.” This equitable principle was aptly explained in the following manner by Lord Romilly MR, in *Parkin v. Thorold* in the following manner

“Courts of Equity make a distinction in all cases between which is matter of substance and that which is a matter of form: and, if they do find that by insisting on the form, the substance will be defeated, they hold it to be inequitable to allow a person to insist on such form, and thereby defeat the substance. In applying that doctrine, a court of equity and good conscience, cannot and will not allow the form of a secondary instrument, such as the Memorandum of Lease, to alter and change the nature and characteristics of the primary documents, being the 1st and 2nd Principal Agreements, and defeat the true intentions of the contracting parties.”<sup>56</sup>

Applying the said equitable principle, it is argued that the power of attorney (the form) should be interpreted in accordance with the substance of the debenture. Had the Federal Court done so, it would have discovered that the R&M’s essential duty is to protect the interest of the debenture holder (i.e financial institution), even though the debenture typically empowers the R&M to “exercise the power on the company’s behalf and the appointment is considered as having been made by the company itself.”<sup>57</sup> In his article entitled, “Receivership, Liquidation,

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<sup>52</sup> “...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.” *Malayan Banking Bhd* (n46) [22].

<sup>53</sup> *Dr. HK Fong Brain Builder Pte Ltd v SG-Maths Sdn. Bhd.&Ors* [2018] 11 MLJ 701 [42].

<sup>54</sup> “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 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, 573. In *Pang Mun Chung & Anor v. Cheong Huey Charn* [2018] 4 MLJ 594; [2018] 8 CLJ 663; [2018] AMEJ 0404,

the Court of Appeal noted at para 80 of its judgement that ‘... [in] [d]ealing... with the issue of illegality, we observe, at the outset, that the law in this regard can be segregated broadly into contracts that are illegal under statute (statutory illegality) or contracts which are illegal at common law....which must be grounded upon established heads of public policy.”

<sup>55</sup> *Melatrans Sdn. Bhd.* (n1)

<sup>56</sup> *Parkin v. Thorold* [1852] 16 Beav 59, 66; 51 ER 698, 701.

<sup>57</sup> 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

and Torrens Land: Mapping the Boundaries. Kimlin Housing Development Sdn. Bhd. v Bank Bumiputra' Malaysia Bhd.” published in the Singapore Academy of Law Journal, the author 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.’”<sup>58</sup> In the English case of *Expo International Pty Ltd & Anor v Chant & Ors*<sup>59</sup> Needham J held that a receiver’s right of possession over the chargor's property is primarily to allow the receiver to fulfil his duty to the mortgagee or lender, which means that the interest of the lender will prevail over that of the chargor.

It is respectfully submitted that if the Federal Court in *Melatrans* had applied the decisions 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 power of attorney superficially, the Federal Court in *Melatrans* would have concluded that the power of attorney was inserted in the debenture by the lender (financial institution) with the aim of defeating the *National Land Code 2020* and thus, it should be void under *S24(b) Contracts Act 1950*. This view finds its support also from the opinion of Loh Siew Cheang’s analysis in his article entitled “Eyes For Us To See: The Kimlin Decision”, where he rightly asserts that “...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 something contrary to the very legal idea of a system of land law which is exclusive and exhaustive.”<sup>60</sup>

This view is further strengthened by the decision of the Court of Appeal in *Lim Eng Chuan Sdn. Bhd. v United Malayan Banking Corp & Anor*<sup>61</sup>, where his lordship, Justice Low Hop Bing, had determined that the sale of the property conducted by the Chargee using the power of attorney in the debenture was void because it did not follow the process of the judicial sale, which was mandated by the then *National Land Code 1965*.

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making their security effective, to appoint a receiver 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.

<sup>58</sup> “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, 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 57), 417-418. See also Dr. Samsar Kamar (n9)

<sup>59</sup> ‘There is no doubt that a receiver, while he has a prior right to possession of the assets subject to the charge given to the person who appointed him over the right of the liquidator, nevertheless has possession for a limited purpose, namely, to comply with his duties to account to the mortgagee’ *Expo International Pty Ltd & Anor v Chant & Ors* [1979] 3 ACLR 888,890

<sup>60</sup> Loh Siew Cheang, ‘Eyes For Us To See: The Kimlin Decision’ [1998] 2 MLJ xxxix, xli.

<sup>61</sup> [2011] 1 MLJ 486

According to 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 affected in accordance with the provisions of the National Land Code pertaining to the charges. In other words, there should have been a judicial sale. Since the sale was not a judicial sale under the Code, therefore, the sale was invalid.”<sup>62</sup>

### C) Failure to Protect Subsequent Purchasers

The issues highlighted in part a) where the Receiver and Manager lacked the authority to sell the landed property that is charged under the *National Land Code 2020* and part b) where the sale of the property was in breach of *S24(b) of the Contracts Act 1950* will ultimately affect the legitimacy of the title of purchaser(s) who had acquired these properties.

This is because the title, which is registered in the purchaser’s name, is classified as a defeasible title under *S340(2) of the National Land Code 2020*, particularly *S340(2)(b)*.<sup>63</sup> As a result, the purchaser’s title will remain vulnerable to legal challenges until the title is subsequently transferred to a bona fide third party.<sup>64</sup> In *Subramaniam a/l NS Dhurai v Sandrakasan a/l Retnasamy & Ors*, the Court of Appeal affirmed that once the current proprietor's title is successfully challenged under any of the grounds in *S340(2)*, his title will be defeated.<sup>65</sup>

In cases where purchasers had acquired the title through a sale where the seller had no authority

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<sup>62</sup> [2011] 1 MLJ 486, 521.

<sup>63</sup> *National Land Code 2020*, s 340(2) ‘The title or interest of any such person or body shall not be indefeasible- (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.’

<sup>64</sup> *Kesarmal & Anor v Valliappa Chettiar*[1954] 1 MLJ 119b, 122 ‘Their Lordships are of the opinion that the words “the title of a proprietor ... shall not be indefeasible- mean that the title of a proprietor is liable to be defeated.’

<sup>65</sup> *Subramaniam a/l NS Dhurai v Sandrakasan a/l Retnasamy & Ors* [2005] 6 MLJ 120, 126: ‘...a plaintiff who challenges the title of the registered proprietor must, in order to succeed, bring his case within one or more of the three sub-paragraphs of s 340(2). Once he does that, the registered proprietor's title will be defeated.’

or where his authority was exercised in breach of the legislation (in particular the *Contracts Act 1950*), it is argued that the title would have been obtained through a void instrument and not an insufficient instrument under S340(2)(b).<sup>66</sup>

In affirming the High Court's decision in *Tan Tock Kwee v Tey Siew Cho*<sup>67</sup>, the Federal Court in *Malaysia Building Society Berhad v KCSB Konsortium Sdn Bhd*<sup>68</sup> decided that the word 'insufficient' and 'void' should be read disjunctively, which means that a title that is obtained by either an 'insufficient' or a 'void' instrument will be defeasible.

The superior courts have consistently ruled that documents which are found to be void will affect the acquirer's title.

In *Samuel Naik Siang Ting v Public Bank Bhd*.<sup>69</sup> The Federal Court concluded that because the sale and purchase agreements with the new purchasers are void ab initio, their corresponding transfer forms and hence their transfers were similarly void.<sup>70</sup> The same line of reasoning was also reached in *Tan Hee Juan v Teh Boon Keat*<sup>71</sup>. Here, the court decided that the transfer was void because the initial contract the minor had entered into was void under *S10 and S11 of the Contract Act 1950*.<sup>72</sup> A more relevant case to the issue at hand is *Puran Singh v Kehar Singh*.<sup>73</sup> Here, the court ruled that the title was defeasible because the donee of the power of attorney (whose power was earlier revoked by the donor) had subsequently acted beyond the authority granted to him, hence invalidating the transfer.<sup>74</sup>

Applying the authorities to the issue at hand, it can be safely concluded that buyers who have purchased properties through private treaty sales from R&M, whose authority was doubtful in the first place, are not secured, as their titles are susceptible to challenges.

Given the various conflicts that will arise when the R&M sells a charge property under the

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<sup>66</sup> See (n63)

<sup>67</sup> *Tan Tock Kwee v Tey Siew Cho* [1995] 4 CLJ 658

<sup>68</sup> *Malaysia Building Society Berhad v KCSB Konsortium Sdn Bhd* [2017] MLJU 208 (FC) [21].

<sup>69</sup> [2015] 6 MLJ 1(Fct)

<sup>70</sup> "In the present case, as we have shown earlier the undisputed facts of the case clearly show that the sale and purchase agreements as well as the deeds of assignment with the earlier purchasers are valid and enforceable; and the subsequent sale and purchase agreements with the new purchasers (including the appellant) are void ab initio and of no effect. It follows that their related transfer forms (Form 14A) must also be void and ineffective to create a registrable transfer. The agreed and undisputed facts of the case support the finding that there is sufficient evidence to show that the said Form 14A was in fact a void instrument." *Samuel Naik Siang Ting* (n69) (67) [70]

<sup>71</sup> [1934] MLJ 96; [1933-34] FMSLR 156

<sup>72</sup> "The Privy Council have held that the effect of ss. 10 and 11 of the Contract Act of India is that an infant cannot make a contract within the meaning of the Act, and that a contract made by an infant is not only voidable but void. (*Mohori Bibee v. Dharmodas Ghose*, 30 Calcutta 539). That decision of the Privy Council is binding on this Court, and therefore there can be no doubt whatever that those transfers are void."

<sup>73</sup> [1939] 1 MLJ 71.

<sup>74</sup> In *Puran Singh v Kehar Singh; Bahadur Singh* [1939] 1 MLJ 71,72 the court observed "As I have already stated, Mr. Jeff's argument for the plaintiff is that the registration of Kehar Singh as proprietor was obtained "by means of an insufficient or void instrument," viz., under an invalid power of attorney; and under section 42 (iii) of the Land Code the registration was consequently void."

*National Land Code 2020* as an agent, the following section of this article will propose a solution to reconcile the three contradictory legislative provisions in particular *S375(2)(a)* of *the Companies Act 2016*, *S24(b)* *Contracts Act 1950* and foreclosure provisions under the *National Land Code 2020*.

## **V) Reconciling S375(2)(a) of the Companies Act 2016, S24(b) Contracts Act 1950 and Foreclosure provisions under the National Land Code 2020**

Section *S375(2)(a)* of *the Companies Act 2016* is a reflection of the decision of the Federal Court in *Melantrans*.<sup>75</sup> In that case, 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 agent of the chargor.”<sup>76</sup> Codifying the Federal Court’s decision, *S375(2)(a)* states inter alia 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* [emphasis mine] of the company.”<sup>77</sup>

It is argued that *S375(2)(a)* of *the Companies Act 2016*, which serves as a general section governing the position of R&M in relation to debenture, must be read *subject to* (emphasis mine) the *National Land Code 2020* whenever the security of the lender comprises of landed property, either wholly or partially. In addition to fulfilling the requirements of registering the charge under the *Companies Act 2016*, it is imperative that R&Ms must also adhere to the condition(s) and/or regulations that are set out in the *National Land Code 2020*.

Three compelling reasons are provided in support of this argument. These reasons have been raised in my previous article entitled ‘Assessing the Legality of Selling Landed Properties Using a Debenture Despite a National Land Code Charge.’<sup>78</sup>

The first reason can be distilled from the case of *Abdul Samad Bin Hj Alias v The Government of Malaysia & Ors*.<sup>79</sup> In this case, the Federal Court held that where there are two conflicting provisions between two or more legislations and the question arises as to which of the two

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<sup>75</sup> *Melantrans*(n1)

<sup>76</sup> *Melantrans*(n1), 210.

<sup>77</sup> Companies Act 2016 (Malaysia), 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.’

<sup>78</sup> Mark Goh Wah Seng, ‘Assessing the Legality of Selling Landed Properties Using a Debenture Despite a National Land Code Charge’ (2022) 39(2) INSAF 225,258-262

<sup>79</sup> [1996] 3 MLJ 581 (Fct), 590

should govern the case, the court must determine which terms of the provisions are more appropriate in the circumstances of the case. The court employed the principle of linguistic cannons of construction on the use of legal maxims, 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 general.

In *Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn. Bhd, In Liquidation)*<sup>80</sup> the Supreme Court was tasked to determine the priority of payment between sales tax, preferential payments and the claims by the debenture holders, based on the applicable provisions in the then *Companies Act 1965*, *Sales Tax Act 1972*<sup>81</sup> and the *Government Proceedings Act 1956*.<sup>82</sup> Using the legal interpretative principle of *specialia generalibus derogant*, the Federal Court ruled that the then *Companies Act of 1965*, which specifically dealt with companies, took precedence over the more general provisions of the *Government Proceedings Act 1956*.<sup>83</sup>

Drawing from the insights of *Abdul Samad Bin Hj Alias*’ decision and the Supreme Court’s reasoning in *Ler Cheng Chye*, we can argue that where the security of the debenture comprises of land, the specific provisions of the *National Land Code 2020* should take precedence over the more general provision of *S375(2)(a) of the Companies Act 2016* which governs the rights of receivers and managers in terms of debentures.

This opinion is also supported by the Federal Court case of *K. Balasubramaniam*.<sup>84</sup> Making a clear distinction from *Kimlin*, the Federal Court highlighted that *Kimlin* was dealing with land that was subjected to a charge under the then *National Land Code 1965* (‘the Code’) while the security in *K Balasubramaniam* involved a combination of movable property<sup>85</sup> and equitable charges.<sup>86</sup> Consequently, it follows that any charge under the *National Land Code 2020* must be formally registered when the security encompasses immovable property that is capable of registration under the said Code, and, in the event of default, the sale should be conducted by way of the *National Land Code 2020*.

The final rationale for this opinion is rooted in the rule of harmonious construction. This rule,

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<sup>80</sup> [1995] 2 MLJ 600 (FCt)

<sup>81</sup> Sales Tax Act 1972ss 6(a), s22(2),s23, s69(1) and 70.

<sup>82</sup> Government Proceedings Act 1956 s 10(1),(2)

<sup>83</sup> “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* (n80),611

<sup>84</sup> *K Balasubramaniam* (n36)

<sup>85</sup> “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* (n35) [36]

<sup>86</sup> *K Balasubramaniam* (n39)

amongst others, states that different statutes relating to the same issue must 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)*,<sup>87</sup> the Court of Appeal held that

“[The] 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.”<sup>88</sup>

According to the Court of Appeal, this doctrine is activated when a conflict arises between different parts of the statutes or *between two or more statutes*. The Court of Appeal in *Tebin bin Mostapa* also emphasised caution in 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.*”<sup>89</sup> This approach was affirmed by the Federal Court on appeal when the Federal Court made the following ruling:

“In the particular circumstances of this case, we are of the considered view that the provisions in an enactment should be interpreted *purposively and harmoniously* (emphasis mine) and within the contextual background in which the provisions of statute present itself. Further, we do not think that statutory provisions should be interpreted in vacuo; statutory provisions are interpreted to be applied to the established facts of a case.”<sup>90</sup>

In *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi Mukhtar*,<sup>91</sup> the Federal Court emphasised that the doctrine of harmonious construction requires legislation to be construed in a way that would achieve a harmonious and coherent result in the law.

By examining the principle of harmonious construction between *S375 (2)(a) of the Companies Act 2016*, *S24(b) of the Contracts Act 1950*, the foreclosure provision in *National Land Code*

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<sup>87</sup> [2017] 5 MLJ 771 (CA)

<sup>88</sup> *Tebin bin Mostapa* (n85)[14]

<sup>89</sup> *Tebin bin Mostapa* (n85)[14]

<sup>90</sup> *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)* [2020] 4 MLJ 721 (FCt) [31]

<sup>91</sup> [2020] 1 CLJ 123 [79]. This principle was affirmed by the subsequent Federal Court decision in *Majlis Perbandaran Seremban v Tenaga Nasional Berhad* [2020] MLJU 1680.

2020, and the cases presented above, one could argue that the provisions of the *National Land Code 2020*, in particular the provisions governing foreclosure proceedings should apply where the lender's security involves land. Any other interpretation will undermine the effectiveness of the *National Land Code 2020*, effectively turning it into a 'useless lumber' or 'dead letter', as highlighted by the Court of Appeal decision in *Tebin bin Mustapha*.

### **Conclusion**

This article has not only conclusively demonstrated the various conflicts that will arise when R & Ms attempt to sell immovable properties under the authority of the debenture, but it has also provided a practical solution to this conundrum. R&Ms are expected to follow the proper processes that correspond with the nature of the property sold, and not merely sell their secured assets based on the claim that they are agents of the companies.