Case Comment:

Kimlin Housing Development Revisited

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1. Introduction and pre-*Kimlin*

When chargors were unable to pay their dues, the chargee will liquidate the collaterals via the convenient means mutually agreed upon. On the other hand, it is normal for chargors to grip on the hope that if given more time they will be able to pay. The power of receivers and managers to sell charged land under National Land Code (NLC) by private treaty sale was laid down in the High Court case of *Soon Hup Seng.*[1] The chargee banks were armed contractually by a debenture to do so to avoid the rigours of a judicial sale of NLC charged land by public auction to reduce time and costs of the banks. In *Soon Hup Seng*, the chargor objected to the private treaty sale of the land by the chargee bank which was secured to the bank by a debenture coupled with a power of attorney under a fixed charge. The land was also secured by a NLC charge. S223 of the Companies Act was raised by the liquidator however the Court did not explain its application directly. The High Court allowed the private treaty sale as the chargee was entitled contractually to do what the parties had agreed to without having to go through the rigours of a judicial sale prescribed by the NLC.

2. *Kimlin*[2] case and its decision

Kimlin Development Sdn. Bhd the chargor company created NLC charges over several pieces of land and a debenture creating a fixed and floating charge over its movable and immovable assets to the chargee bank. The provisions of the debenture *inter-alia* empowered the chargee bank to appoint receivers and managers to sell the charged lands. The debenture did not have a power of attorney clause. The charges were registered under S108 of the Companies Act 1965. The chargor defaulted, the charge bank exercised its powers under the debenture appointed receivers and managers. Instead of resorting to the provisions of the NLC to obtain a judicial sale they applied to the high court for "leave to sell the lands". The chargor went into liquidation and the liquidator opposed the receivers and managers' application. The High court granted the order as prayed and the liquidator appealed. The Supreme Court reversed the High Court order and decided as follows:

- National Land Code (NLC) charged land must be sold by way of a judicial sale and not by private treaty sale as it is a complete code that provides *inter-alia* the procedures for judicial sale. Certain provisions are enacted for the benefit of the

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[1] United Malayan Banking Corp Bhd v Official Receiver & Liquidator of Soon Hup Seng Sdn Bhd. [1986] 1 MLJ 75.

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

chargor and cannot be waived nor contracted out by instrument of a debenture or power of attorney or otherwise. Any attempt to do so is void against public policy.

- S108 of the Companies Act is not an independent source for the creation of an interest in the land. Sale by debenture of NLC charged land is nowhere provided by the Companies Act 1965[3].

- Sale of company's property in liquidation by the receivers and managers is subject to S223 of the Companies Act.[4] The reason flows from the distinction between common law mortgages with NLC charges. In a mortgage, the ownership of the property is transferred to the mortgagee. Whereas a NLC charge creates a security interest in land in favour of the chargee, there is no transfer of ownership of the property. The ownership of the property remains with the chargor.[5]

- A receiver and manager is an "officer" of a corporation. Officers of a company are obliged to deliver all movable and immovable property of the company to the liquidator.[6] The liquidation of a company terminates the agency of a receiver and manager for the chargor and his powers on winding up, *since there is no estate for the receiver and manager to administer.*

This landmark decision caused consternation amongst bankers, corporate lawyers and receivers and managers. They were rudely awakened what they did for many years in disposing land by private treaty and without obtaining the 'validation order' under S223 were wrong in the eyes of the law.[7] *Kimlin's* decision 'throw a spanner in the works' to private treaty sales of NLC charged land. *Kimlin* which overruled *Soon Hup Seng* swung the pendulum of the law to the other extreme halting the then practice of private treaty sales aimed to fast track sale of the charged land.

3. The later Federal Court cases

The Federal Court in *Melantrans Sdn Bhd v Carah Enterprises Sdn Bhd & anor*[8] held that *Kimlin* did not apply to this case because of distinguishing features. In the instant case,

[3] The court further commented that S108 was enacted without appreciation of the difference between mortgages and the NLC charges.

[4] Any disposition of the property of the company made after the commencement of the winding up by the court shall unless the court otherwise orders be void.

[5] The case of Sowman v David Samuel Trusts Ltd [1978] 1 All ER 616 was distinguished and not followed due to the fundamental difference between a mortgage and a charge.

[6] S 4(1) (b) and S300 Companies Act 1965 respectively.

[7] It was reported that "an emergency but informal meeting had to be held on 17 June 1997 between Bank Negara and most commercial banks in Kuala Lumpur to consider the impact and grave consequences of Kimlin's decision on the banking industry as well as on the position of receivers and managers and find alternatives or solutions." See SY Kok, A review of the federal court decision of Kimlin [1997] 3 MLJ ci.

[8] [2003] 2 CLJ 86.

the chargor was not wound up and the debenture was coupled with an irrevocable power of attorney which empowers a receiver and manager appointed under the debenture to act as the lawful attorney of the chargor. In *Kimlin*, the chargor was wound up and the debenture did not have any express provision appointing the receivers and managers as attorney of the chargor. However, the Federal Court affirmed the correctness of the *ratio decidendi* of *Kimlin.*[9] The significance of this case is that it confirms that Kimlin is correctly decided. It is submitted the factual differences justified a different conclusion.[10]

In *K Balasubramaniam, Liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (In Liquidation) v MBf Finance Bhd & anor*,[11] the Federal Court again distinguished the instant case from *Kimlin* on the ground that the receiver and manager was appointed by the secured creditor and not by the chargor in liquidation. The Federal Court prefers *High Crest*,[12] instead of *Kimlin* and concludes that the receivers and managers are not the officers of the company in liquidation and not required to hand over the charged assets to the liquidator. Notwithstanding the receiver and manager ceases to be the agent of the company, the receiver and manager continues to retain possessory rights conferred by the debenture to take custody and control of all the assets charged under the debenture. The power of attorney in the debenture which provided for the appointment survives the winding up order against a company. Liquidator and receivers and managers and managers exist side by side exercising separate powers and duties conferred by the Act and the debenture respectively. The Federal Court went on to declare:

The principles in *Kimlin* should be restricted in scope and limited to the powers of a receiver and manager to sell NLC charged land. They 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 not charged under the Code. [13]

A secured creditor is not obliged to come under the liquidation on the combined effect of S291(1) and (2) of the Companies Act and S42 of the Bankruptcy Act 1967. However, the reliance on S291(1) and (2) of the Companies Act and S42 of the Bankruptcy Act 1967 to

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[9] "Thus, on the given facts, we have no reason to disagree with the ratio decidendi of the Supreme Court in Kimlin except to make one observation that the Supreme Court did not consider the position of the receiver and manager as the agent of the appellant company which went into liquidation." P 94 paragraph g.

[10] The decision did not violate Kimlin's principles if viewed in the following manner. It was just an ordinary private sale of a land encumber with the chargee bank's interest to a purchaser with the consent of the chargee and chargor. The receiver and manager was the deal maker as agent and not a sale arising from liquidation. Therefore, the issue of contracting out the protective provisions NLC did not arise. The issue of S223 did not arise as the chargor was not in liquidation. Whether the debenture was with a power of attorney or not would not have made any difference.

[11] [2005] 2 CLJ 201.

[12] An Australian case: Re High Crest Motors Pty Ltd [1979] 3 ACLR 564. Premised on 'unless the contrary intention appears' the Federal parted from Kimlin. In Kimlin, it is held a manager and receiver is an officer of the company .

[13] Code means NLC.

oust the application of S233 is untenable in the view of the dissenting judge at the appeal court in *Lim Eng Chuan.*[14]

In *Lim Eng Chuan Sdn Bhd v United Malayan Banking & anor*[15] *Kimlin's* principles were again mounted to challenge the private treaty sale. The full bench Federal Court unanimously distinguished *Kimlin* and held that it did not apply to the case where a debenture has an irrevocable power of attorney and the NLC charged land was given as security, therefore the sale by the receiver and manager by private treaty pursuant to the power of attorney is valid. The Federal Court pronounced that *Kimlin* was decided on its own facts. The Federal Court held that an irrevocable power of attorney coupled with the chargee's interest survives and is not nullified by a winding up order against the chargor. The judgment in *Kimlin* which referred to "power of attorney or otherwise" is only *obiter dictum*[16]. The Federal Court in the instant case ruled that S223 of the Companies Act 1965 does not apply to disposal of the charged land as security by a secured creditor is *not a disposition* following *Re: Margart Pty Ltd*[17]. It is submitted the justification based on Re: *Margarty Pty Ltd* is credible and impeccable. It is based on the cardinal principle of insolvency law that only *free assets*[18] of company in liquidation are available for distribution to the general body of unsecured creditors therefore subject to S233 of the Companies Act but not those assets encumbered with the prior rights of third parties.

4. Effects of decided cases on *Kimlin*

The common thread running through the later cases above appeared to hark on the debenture having an irrevocable power of attorney which contractually provided the power of sale to the receiver and manager to avoid *Kimlin.* The power of attorney appears to provide the receiver and manager unfetter authority to do including the disposal of the charged NLC land by private treaty and exclusion of S223 of the Companies Act. The later Federal Court

[14] Hishamudin Mohd Yunus JCA - "These provisions did not provide that a secured creditor is exempted from obtaining the winding up court's permission under S223 in the event he wishes to sell the security, be it pursuant to the provisions of the debenture or pursuant to a power of attorney".

[15] [2013] 5 CLJ 425. A full panel of 5 FCJJ heard the appeal from the Court of Appeal.

[16] It was declared only after two earlier Federal Court cases to wit Melantrans and K Balasubramaniam, with regards to" power of attorney or otherwise" is obiter. In Melantrans, it was considered as ratio. With greatest respect it appears to suggest the 'imperfect power of attorney' (the power of attorney was not registered with the High Court but was rectified) in Soon Hup Seng had escaped the then Supreme Court scrutiny before overruling Soon Hup Seng case.

[17] Re: Margart Pty Ltd (in liquidation) Hamilton v Westpac Banking Corp & Anor [1984] 2 ACLC 709 at pp. 710, 711 & 712-714 ……S368 has no application to assets that are not free assets of the company which the company is beneficially entitled to and which can be realised for the benefit of its creditors. In other words, S368 as is S223 of our Companies Act, is not intended to reach out to transactions by which a secured creditor receives assets covered by his security at a time when the creditor is entitled to have them. "It is clear from the above that the sale of the land by the first respondent to the second respondent is not a disposition within the meaning of S223 Companies Act 1965."

Whereas the same court in K Balasubramaniam, relied on the combined effect of S291, 292 of the Companies Act and S42 of the Bankruptcy Act to exclude the application of S223.

[18] Roy Goode - Principles of Corporate Insolvency Law. 1990, Chapter IV. Assets beneficially owned by others are not assets of the company.

decisions are minded to limit and contain the impact of *Kimlin* and most of the time relied on distinguishing rather than to confront *Kimlin's* principles as to where it fell short. Without disrespect any decision without justified principles albeit it is binding appears to render the decision less convincing.

The contentious issues remain.
(a) Contracting out protective sections of the NLC.
(b) Source of the power of receivers and managers.
(c) Application of S233 - Avoidance of dispositions of property.

(a) Contracting out protective sections of the NLC:

The later Federal Court decisions suggest that the protection provisions of the NLC can be waived or contracted out by a debenture coupled with a power of attorney clause. Firstly, there is nothing in the Power of Attorney Act 1949 that provides for the contracting out and the NLC is subordinated to it. Neither is it in the NLC. On the contrary, *Kimlin* ruled that the NLC protective provisions cannot be contracted out and any attempt to do so would be void against public policy. With due respect, none of the later Federal Court cases challenged *Kimlin* on this point. Instead avoided it by validating the instrument so that the receivers and managers are contractually clothed with the requisite powers.

(b) Source of the power of receivers and managers:

Kimlin pointed out that neither S108 nor the Companies Act provides the powers of disposition of charged NLC land where the receivers and managers can draw from. *Kimlin* went on to emphasise 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 registered as owner.[19] With the shadow of doubt cast by *Kimlin* with regard to the absence of the requisite powers of the receivers and managers in the Companies Act in dealing with NLC charged property, the uncertainty is going to remain until such time the lacuna is addressed.

(c) Application of S233 - Avoidance of dispositions of property:

Kimlin ruled that S223 has to be respected in that leave of court has to be obtained for disposal of the company's property in winding up. *Kimlin* has taken the pain to point out the difference between a mortgage and a NLC charge.[20]The later cases[21] of the Federal Court in unison held that NLC charged land could be disposed by the receiver and manager under the validly constituted instrument, S223 validation order did not apply. With due respect, it is not whether the receiver and manager appointed under the power of attorney incorporated in the

[19] Kimlin judgment p 298 para a.

[20] The ownership of NLC charged land remains with the chargor company unlike a mortgage.

[21] Melantrans case and K Balasubramaniam case.

debenture survives the liquidation or acting as agent for the chargor company or the chargee bank. The real issue is therefore whether the assets or NLC charge land belongs to the company. The decisions seem to circumvent by distinguishing rather than to challenge *Kimlin* on S223.

However, *Kimlin* did not differentiate property that belongs to company and which did not. As mentioned earlier, it is a cardinal principle of insolvency law only **free assets** of the company in liquidation are available for distribution to the general body of unsecured creditors. The section is enacted for a good purpose to prevent improper dissipation of the company's property in extremis.[22] Assets held by the company are not its property to the extent of any security interest it has given over them in favour of a creditor.[23] Only 15 years later, the Federal Court in *Lim Eng Chuan* brought a credible resolution to S223 confronting *Kimlin's* on this issue. The Court held that section is not intended to apply to disposal of secured assets including NLC charged land by manager and receiver. In other words encumbered assets which the bank has a prior interest are not subject to obtaining a validation order under S223. On the other hand, does S223 which *Kimlin* decided incompatible with the cardinal principle of insolvency law? On scrutiny it does not - for reason the secured assets do remain with the secured creditor but subject to a monitoring authority of the court to prevent abuse by secured creditors.[24] The validation order is a hindrance but it does not deprive the secured creditors' accrued rights prior to liquidation of the chargor.

The new Companies Act 2015:

Let us now examine the Company Act 2015[25] in what manner it brings resolution to the three issues raised by *Kimlin.* The 2015 Act sets out the new legal framework to replace the current 1965 Act. Only relevant sections brought about by *Kimlin* is discussed. For brevity any sections of the law cited in this part of the review *refers to the new Act unless otherwise stated.*

S374 and S375 *inter- alia* give statutory recognition to the appointment of receiver and manager under an instrument. The instrument includes a debenture or a debenture coupled with a power of attorney. S375 stipulates that the appointed receiver and manager acts as the company's agent unless expressly stated otherwise.

S383 clothes the receiver and manager with the powers expressly or impliedly conferred by the instrument. In additional to the powers in the instrument, they also have those express powers set out in the Sixth schedule of the Act or any other law. Amongst the powers is the power to dispose of the company's property[26]. For the first time the powers of receivers and managers are statutory provided and leave no doubt that they are authorised to

[22] Re: Wiltshire Iron Company, ex p Pearson [1868] 3 Ch App 443. Similar to our S223.

[23] Roy Goode, Principles of Corporate Insolvency Law 1990 – Only dispositions of the company's property are affected. p 191 referring to National Australian Bank v K.D.I. Construction Services Pty Ltd [1988] 12 A.C.L.R 663.

[24] This appears to the view of the dissenting judge of the Court of Appeal in Lim Eng Chuan.

[25] The Act is approved pending enforcement.

[26] The property of the company in relation to which the receiver and manager is appointed.

dispose the company's asset in liquidation including NLC charged land. The provisions in new Act is the source of the authority of the receivers and managers appointed by a debenture holder. It is a fortiori the power of the debenture holder comes from the Companies Act therefore displacing *Kimlin's ratio* that it comes from the NLC.[27] With the NLC out of the equation the contracting out of its protective provisions will not arise. Therefore, private treaty sale of NLC charged land is the given the green light to continue by the legislation. Comparatively, the 1965 Act has no provisions whatsoever about their powers.

S386 provides that receivers and managers may continue to act after commencement of winding up of a company in respect of property or assets secured under the debenture appointing them. S386 ascertains the position of receivers and managers survive the winding up of a company. Therefore it statutorily nullifies *Kimlin*'s pronouncement that the receivers and managers having no estate to administer and have to vacate and yield to the liquidator. Subsection (1) (b) of this section further provides the receivers and managers may exercise all their powers for the purpose of carrying on the business of the company if the liquidator consents if not with the consent of the court.

S223 of the 1965 Act vs. S472 of the new Act:

S223 of the 1965 Act and **S472** of the new Act pertain to avoidance of dispositions of property of the company after winding up is void without the dispensation of the Court. The relevant part of S472 is reproduced.

Avoidance of dispositions of property or certain attachment, *etc.***:**
S472 (1) - Any disposition of the property of the company, other than an *exempt disposition*…..made after the presentation of the winding up petition shall, unless the Court otherwise orders, be void**.** *"Exempt disposition"* means a disposition made by *a liquidator,* or by an *interim liquidator***.**[28]

The privilege of 'exempt disposition' is not given to the receivers and managers for selling secured assets for their bankers' clients. We may recall *Lim Eng Chuan* followed the decision of *Re*: *Margart Pty Ltd (in liquidation)* which held that S223 did not extend to assets given to creditors as securities. It was thought the decision has muted *Kimlin* on this issue. It appears S472 instead may have inadvertently resurrected it! It is abundantly clear that S472 has no exemption to disposition of assets by receivers and managers for secured assets. The new Act could have elucidated the application of S427 (current S223) that disposition of **free assets** by the company requires a validation order and assets encumbered with prior accrued interest by receiver and manager is exempted. Is it the intention to 'over-rule' *Lim Eng Chuan* and *K Balasubramaniam* that approval has to be obtained to have 'judicial oversight' over secured creditors? On reading S472 it is reasonably clear that any disposition of the company's assets in liquidation other than an exempt disposition is void unless the Court otherwise orders. On the other hand, is it the **legislation's intention** that S472 is subordinated to S383 and free from the shackle of S472?

5. Conclusion

[27] The NLC remains as one of the sources of power to dispose NLC charged lands under judicial sale.

[28] The emphasis is mine.

The decisions of the later Federal Court cases have effectively resurrected the practices of *Soon Hup Seng.* Sale of NLC charged land by secured creditors can take the route of private treaty sale and no prior dispensation under S223 is required. With this, financial institutions suffer less 'judicial interference' thus lesser costs and time expended.

Despite ventilation of the contentious issues through three successive cases the 'spirit of *Kimlin*' has not been fully subdued though its impact muted. *Kimlin's* spirit did not yield as the issues arose from the 'disconnect' of the NLC and the Companies Act. The Torren System which our land law is based is entirely different from English property law. Whereas our Company law has English company law origin. A security creature we call 'charge' from the NLC has a different 'legal DNA' from the security creature we also call 'charge' from the Companies Act. The source which the power to deal including sale of charged land comes from the NLC. Where the NLC permits there is no issue but issue arises when it prohibits 'contracting out of the protective sections of the NLC.' The later federal court cases declaring that *Kimlin's ratio* is limited to NLC charged land is conceding that the Companies Act is deficient in dealing with Company's asset consisting of land charged to the financier. It has been pointed out since *Kimlin,* the Companies Act 1965 ought to be amended to overcome its deficiency and to harmonise with the land law.[29]

The new Act arming receivers and managers with the requisite powers in its provisions effectively fixed the power to dispose NLC charged land and the issues of contracting out. On the other hand, S472 appears to cast a shadow on the issue of dispensation for sale of charged assets in the hands of receivers and managers acting as agent for the company under current 223 provision. If it is based on the established trend after *Kimlin,* the Courts appear more likely to conclude that approval is not necessary using *Margart Pty Ltd (in liquidation)* or using S383 as justification. However, to do so would appear to breathe into the statute 'additional words' to establish the 'elusive intention of the legislation.' To have finality to S472, we will have to wait for the Act to come into force and an opportunity to have the said section litigated.

[29] Loh Siew Cheang, "Eyes for us to see: the Kimlin decision" [1998] 2 MLJ xxxix, at p Ivi.