RESEARCH ARTICLE

Statutory lien: pre- and post- 2016 amendments to the Malaysian National Land Code [version 1; peer review: 2 approved with reservations]

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Abstract

Background: A statutory lien is a non-registrable security dealing under the National Land Code (NLC) in Malaysia. Lien is usually used as a short-term collateral for a repayment of debt by the proprietor. Prior to the 2016 amendments, section 281(1) of the NLC stated that a proprietor may create a lien over his land by depositing the original title with the lender, as security for a loan; and the lender shall enter a lien-holder's caveat under section 330(1) to protect his interests. Case law has expanded the scope of section 281 to include an equitable proprietor under the definition of "proprietor" and a third-party loan with the proprietor's consent or authority under the definition of "loan". The 2016 amendments removed "for a loan" in sections 281(1) and 330(1). This triggers the analysis on the purposes of lien.

Methods: The research methodology adopted is doctrinal legal research. Relevant sections and case law together with the Bill and Parliament's Hansard record are examined to find the intention of the legislature and Parliament.

Results: The amendments allow the lien to be used not merely as security for a loan but also for other purposes (Explanation Note 47 to the Bill). Such deletions have created an ambiguous interpretation; and may be manipulated by fraudsters. In contrast, section 241(1) provides specific purposes such as the repayment of debt, non-debt, or payment of annuity or periodic sum, for the creation of statutory charge.

Conclusions: This research is only confined to the scope of lien within the Peninsular Malaysia and not the States of Sabah and Sarawak which have their respective Sabah Land Ordinance and Sarawak Land Code. A future comparative study could be made amongst the legislations. The research output may be useful for the draftsman to clear up the ambiguity in the relevant provisions.

Open Peer Review

Approval Status

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2. Nuarrual Hilal Md Dahlan , Universiti Utara Malaysia, Kedah, Malaysia		
Any reports and responses or comments on the article can be found at the end of the article.		

Keywords

Lien, title, purpose, for a loan, dealing.

This article is included in the **Research Synergy**
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Abbreviations

CA: Court of Appeal
 Cap: Chapter
 CLJ: Current Law Journal
 FC: Federal Court
 HC: High Court
 MLJ: Malayan Law Journal
 NLC: National Land Code

Introduction

Modern financial transactions are normally backed by security to secure the loan repayment. The common security transactions are charges, liens, mortgages, pledges, guarantees and assignments. Land is usually accepted as a security due to its immovable attributes and its permanent nature. The National Land Code (Revised-2020) (NLC)¹ [12] only recognises two types of security transactions as land dealings, i.e. registrable charges² [12] and non-registrable liens³ [12]. A non-registrable lien is preferred as a short-term collateral for loan repayment by the borrower. The NLC section 5 is silent on the definition of lien [12]. Malaysian courts have referred to the common law meaning of 'lien' as "a right ... in one person to retain that which is rightfully and continuously in his possession belonging to another until the present and accrued claims of the persons in possession are satisfied"⁴ [23].

It is essential that the document of title must always be kept with the lien-holder. A lien is a mere retention of title for security, thus if the title is surrendered by the lender, the lien has no more effect [21]. Section 281(1) reads together with section 330 of the NLC to provide the way for the creation and effect of liens.

By the National Land Code (Amendment) Act 2016 [10], the phrase "for a loan" in both sections 281(1) and 330(1) of the NLC 1965 were deleted [9]. Such deletion has opened to various interpretations on the purposes of lien and may lead to the misuse for an unlawful purpose. No similar provision in other jurisdictions can be referred to for review and comparison. This paper intends to analyse the purposes (pre- and post-amendments) for the creation of NLC lien.

Methods

This paper adopts doctrinal legal research. This method examines the intention of the legislature by referring to the pre- and post- amendments to the relevant sections from the NLC from the LawNet and CLJ Online database together with the Bill and Parliament's Hansard record. From 4 January 2021 until 21 May 2021, only Malaysian reported and unreported cases pertaining to the purpose "security for a loan" in sections 281(1) and 330(1) of the NLC 1965 were searched from LexisAdvance by using the following search terms namely "lien" and "security for a loan". Thereafter narrowed by the search term "section 281(1)" and timeline "from 1/1/1966 until 21/5/2021" within the results. The three authors read the relevant statutory provisions and the decided cases to identify and analyse the relevancy of the cases based on the case development and expansion of its scope of the law concerned.

The authors acknowledge receipt of the ethics approval for this project issued by the Research Ethics Committee (Multimedia University) bearing the Ethics Approval Number EA0492021 dated 25/06/2021.

Results

Preliminary results based on the search terms shows 1,153 Malaysian cases shortlisted, but after narrowed by the search terms stated above, there were only 26 relevant case reports [24].

Certain essential pre-requisites must first be fulfilled before a valid lien is created. Prior to the NLC Amendment Act 2016, a statutory lien must have satisfied three elements, i.e. (a) deposit with any other person the original issue of documents of

¹Act 828, with effect from 15 October 2020. This NLC has replaced the National Land Code 1965 first enacted in 1965 (Act 56 of 1965) ('NLC 1965'). Both NLC and NLC 1965 will be used in this paper since almost all cases were decided under the NLC 1965. Furthermore, the amendments made in 2016 was based on the NLC 1965 and not the current revised NLC although the content remains the same.

²Chapter 1-5, Part Sixteen of the NLC (ss 241-280).

³Chapter 6, Part Sixteen of the NLC (s 281), read together with sections 330 & 331. See also section 206(2)(b) of the NLC.

⁴Walder A, *Halsbury's Law of England – Liens*, Vol.68, 2021, para 902. Malaysian cases which quoted the earlier editions of the *Halsbury's Law of England* (with same definition) include: *ORMORM Manickavasagam Chetty v TJ McGregor* [1933] MLJ 295 at 296; and *Perwira Affin Bank Bhd. (formerly known as Perwira Habib Bank Malaysia Bhd.) v Selangor Properties Sdn. Bhd. & Ors* [2010] 3 MLJ 43 (CA) at [12].

title by the proprietor⁵ [9] (or in the case of duplicate lease, the lessee⁶) [9]; (b) purpose is to create a security for a loan; and (c) entry of a lien-holder's caveat in Form 19D.

Malaysian cases have interpreted and expanded the application of these sections, especially the terms of “proprietor”, “lien-holder”, “deposit”, “security for a loan” and “effect of entry and non-entry of a lien-holder's caveat”. For this paper, we shall limit the analysis on the “purposes”. Section 281(1) seems to suggest that the loan is for the proprietor or the lessee. However, Malaysian cases have expanded the scope of its purposes on two aspects, (i) the purpose of loan has been expanded to include forbearance of enforcement by the lender; and (ii) the loan can be granted to the registered proprietor, equitable proprietor or even a third party with the authority or consent of the proprietor. This is shown in (Table 1) below.

Although the outcome of the *Selangor Properties* case seems similar to that of the *Staghorn* case, the reasoning given is much commendable despite a clear definition of ‘proprietor’ in section 5 of the NLC to mean only a ‘registered proprietor’. This may open the floodgate of equitable principles in the Torrens system which places much emphasis on ‘registration’. The purpose of creating a statutory lien is much narrower compared with the registered charge under the NLC. Under section 241(1), a charge may be created for the purpose of repayment of debt [7], non-debt or payment of any annuity [6] or other periodic sum [12].

Discussion

The phrase “for a loan” in sections 281(1) and 330(1) of the NLC were deleted via sections 41 and 49 of the NLC Amendment Act 2016 [10]. Such deletion is unclear as to the intention of the parliament whether to widen or narrow the scope of the security to include for purposes other than for a loan, such as to create some “rights”, or as a security for “reimbursement”, as was prescribed by the Halsbury's Law of England. Alternatively, whether the purposes would be similar to those of a registered charge.

The Explanatory Note 40 and 47 (*Huraian*) in the Bill⁷ [18] merely says that a lien can be created as security not only for loan but for other purposes. This may suggest that any other purposes to include Islamic financing, licensed or unlicensed moneylending, or for even no purpose. If the land title is in the wrong hand for no purpose, this may lead to misuse or manipulation. As both charge and lien fall under the same Part Sixteen of the NLC, a possible analogy on the purposes can be drawn from the registered charge, i.e. for the repayment of debt, non-debt, or payment of annuity or periodic sum.

Table 1. Case development on “Purposes”.

Case name (Year reported)	Remarks
<i>Paramoo v Zeno Ltd</i> [14] (1968)	Intention to deposit the issue of document of title with the lender as a security for a loan but no other purpose.
<i>Heap Huat Rubber Co. Sdn. Bhd. v UOB</i> [2] (1992)	Purpose has been expanded to include forbearance by the lender from insisting on repayment of the overdue loan afforded good consideration for the additional security granted.
<i>PHBB v Loo & Sons Realty Sdn. Bhd. (No 1)</i> [16] (1996)	A third party (non-registered proprietor, unless empowered under a registered Power of Attorney) who has deposited the document of title with the lender is not allowed to request for the creation of a lien-holder's caveat in favour of the lender.
<i>Staghorn case</i> [3] (2008)	The loan can be advanced to a third-party borrower with the consent and authorisation from the registered proprietor.
<i>Selangor Properties case</i> [15] (2010)	An equitable proprietor is eligible to deposit the issue document of title to create a valid lien.
<i>UOB v UJA Sdn. Bhd.</i> [22] (2009) <i>Mahmud bin Hassan & Anor v CIMB Bank Bhd.</i> [5] (2018)	Lien may be created for the benefit of the registered proprietor and also a third-party borrower.

⁵Under section 5 of the NLC, the word “proprietor” means “any person or body for the time being registered as the proprietor of any alienated land”.

⁶Section 5 of the NLC defines “lease” to mean a registered lease or sub-lease of alienated land. The word “lessee”, although not defined, refers to any person or body for the time being a lease registered in his favour.

⁷See *Huraian* number 40 of Rang Undang-Undang Kanun Tanah Negara (Pindaan) 2016 which states that “40. Fasal 41 bertujuan untuk meminda seksyen 281 Kanun untuk membolehkan lien dibuat sebagai jaminan dan bukan semata-mata bagi tujuan pinjaman.” (in Malay). See also *Huraian* number 47 for section 49 of the NLC Amendment Act 2016.

The amendments have caused the lien to lose its original characteristic where the purpose of creating a lien is for the purpose of loan and not for any other purpose. Now, the deposit of the land title can be created for purpose which may not be related to the interest of the land, for example the lawyer may exercise his common law right of lien over his client's land title in the event that the client fails to pay the professional fees to the lawyer. Instances such as the possession of the land title may be obtained through fraud or misrepresentation, or the act of deposit is done without the consent and authorisation of the proprietor may likely to happen. In *Potensi Bernas Sdn. Bhd. v Lok Khi On* [17], the plaintiff contended that the 1st defendant was never authorised by them to deal with the 2nd defendant in creating a lien as a security. Such amendment has also departed from the spirit of the Torrens System where it invites malpractice and thus hugely undermines the security that the NLC seeks to protect.

Different outcomes may be reached like in *Minang Bina Sdn. Bhd. v Yahya bin Mohd Said & Lain-lain* [8], a lien for other purposes like safekeeping or to facilitate the subdivision of a piece of land may be allowed. "Security for share trading" as a loan under section 281(1) of the NLC which was not recognised in *Citra Tani Sdn. Bhd. v Public Bank Berhad* [1] may also be given due recognition. A third-party loan can be recognised without resorting to the principle in the *Staghorn* case [3].

The lien security need not necessarily be for a loan but for any other purpose. For instance, a father may deposit the land title to a society which would sponsor his daughter for tertiary studies. In return, the daughter has to serve a bond with the society upon graduation, failing which the society has a right to apply for an order for sale of the land. The title is deposited not for a loan to enable the daughter to further studies, but as security for the sponsorship that will be given to the daughter who in turn will provide services to the society upon her graduation. Thus, a lien is created to secure sponsorship not to the registered proprietor (father) but a third party, the daughter. The deletion of the words "for a loan" gives rise to the possibility of securing something other than a loan by using lien, and that extends to the security for a third party as well. The amendment has arguably widened the scope of purposes of lien.

Initially, the same word "for a loan" in Form 19D (Entry of a lien-holder's caveat) of the First Schedule to the NLC was not deleted following the amendment made to section 330. This omission had since been remedied by the passing of the National Land Code (Amendment of First and Fifth Schedules) Order 2017⁸ [10].

There is an underlying danger behind the not-so-well defined scope of the purposes of lien. This may lead to a manipulation of the lien. A case to note is *Lee Sean Ming & Ors v Pang Goh Kiong & Anor* [4] which concerns sale and purchase agreements entered into between plaintiffs and defendants with regard to land transactions, but in reality, were sham agreements to cloak an illegal money lending transaction between the parties. The court held that these sham sale and purchase agreements were loan agreement by looking at the lien-holder's caveat entered by the defendants on the lands.

Conclusions

The amendments seem to enlarge the scope of a lien which make it a very attractive option for the loan provider. This makes the difference between a statutory lien and a legal charge to be more distinct as the former can be used as security for some other purposes not necessarily for a loan, while the latter can only be used as security for a debt or other purposes as specified under section 241(1)(aa) or (bb) of the NLC.

The purposes of lien are not confined to "for a loan" but can include any other purposes. The effect of such amendments remains double-edged as it may bring along some drawbacks, in some illegal activities or any matters that are not related to the land.

This research is only confined to the scope of lien within the Peninsular Malaysia and not the States of Sabah and Sarawak which have their respective Sabah Land Ordinance [20] and Sarawak Land Code [19]. A future comparative study could be made amongst the legislations.

In short, the amendments brought by the NLC Amendment Act 2016 with regards to lien are meant to make people's life easier as there will always be instances where security is needed for something other than for a loan. It is perhaps too early at this stage to comment on whether the amendments are effective or not. Whatever the outcome is, the law can always be changed for the betterment of life. Perhaps the draftsman could clear up the ambiguity in the relevant provisions.

⁸P.U. (A) 247/2017 (w.e.f. 30 August 2017). The inconsistencies arose from NLC Amendment Act 2016 has been rectified where section 2(d) of the said Order was subsequently amended by deleting the words "for a loan" in paragraph (2) of the Lien-holder's Form in Form 19D.

Data availability**Underlying data**

The dataset is available in figshare DOI <https://doi.org/10.6084/m9.figshare.16411290.v1> [24].

This project contains the following underlying data:

1. Aaron Walder – Halsbury Law of England (Vol.68 2021)
2. Citra Tani Sdn Bhd v Public Bank Berhad (CA)
3. Hong Leong Bank Bhd v Staghorn Sdn Bhd (FC)
4. Heap Huat Rubber Sdn Bhd v United Overseas Bank Ltd (Ltd)
5. Judith Sihombing – National Land Code Commentary
6. Lee Sean Ming & Ors v Pang Goh Kiong & Ors (HC)
7. Mahmud bin Hassan & Anor v CIMB Bank Bhd (HC)
8. Majlis Perbandaran Pulau Pinang v Tropiland Sdn Bhd (HC)
9. Mayland Lending Sdn Bhd v Rosmaizati bt Mohamad (HC)
10. Minang Bina Sdn Bhd v Yahya bi Mohd Said (HC)
11. National Land Code 1965 (Act 56 of 1965) (before 2016 amendments)
12. National Land Code (Amendment Act) 2016)
13. National Land Code (Amendment of First and Fifth Schedules) Order 2017
14. National Land Code (Revised 2020)
15. ORMORM Manikavasagam Chetty v TJ McGregor (HC)
16. Paramoo v Zeno Ltd (FC)
17. Perwira Affin Ban Bhd v Selangor Proprieties Sdn Bhd
18. Perwira Habib Bank (M) Bhd v Loo & Sons Realty Sdn Bhd
19. Potensi Bernas Sdn Bhd v Lok Khi On (HC)
20. Rang Undang-Undang Kanun Tanah Negara (Pindaan) 2016
21. Sabah Land Ordinance (Cap.68)
22. Sarawak Land Code (Cap.81)
23. United Overseas Bank Sdn Bhd v UJA Sdn Bhd

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Acknowledgements

The authors would like to thank the Multimedia University's Siti Hasmah Digital Library for accessibility of the online databases.

References

1. *Citra Tani Sdn. Bhd. v Public Bank Berhad* [2020] MLJU 201 (CA).
2. *Heap Huat Rubber Co. Sdn. Bhd. v United Overseas Bank Ltd.* [1992] 3 CLJ 1589 (HC).
3. *Hong Leong Bank Bhd. (formerly known as Hong Leong Finance Bhd.) v Staghorn Sdn. Bhd. & Other Appeals.* [2008] 2 MLJ 622 (FC).
4. *Lee Sean Ming & Ors v Pang Goh Kiong & Anor.* [2014] 1 LNS 1780 (HC).
5. *Mahmud bin Hassan & Anor v CIMB Bank Bhd.* [2018] 8 MLJ 663 (HC).
6. *Majlis Perbandaran Pulau Pinang v Tropiland Sdn. Bhd.* [2003] 6 MLJ 387 (HC).
7. *Mayland Lending Sdn. Bhd. v Rosmaizati bt Mohamad & Anor.* [2015] 7 MLJ 216 (HC).
8. *Minang Bina Sdn. Bhd. v Yahya bin Mohd Said & Lain-lain* [1991] 1 CLJ 70 (HC).
9. National Land Code 1965 (Act 56 of 1965), section 5, Part Sixteen, and sections 241(1)(aa) & (bb), 281(1), 330(1) before 2016 amendments.
10. National Land Code (Amendment) Act 2016 (Act A1516), (w.e.f. 1 January 2017 in general except some sections), sections 41 & 49 and P.U.(B) 527/2016 & P.U.(B) 531/2016.
11. National Land Code (Amendment of First and Fifth Schedules) Order 2017 (P.U. (A) 247/2017).
12. National Land Code (Revised – 2020) (Act 828), section 5, Part Sixteen, and sections 241(1)(aa) & (bb), 281(1), 330(1).
13. *ORMORM Manickavasagam Chetty v TJ McGregor* [1933] MLJ 295 (HC).
14. *Paramoo v Zeno Ltd.* [1968] 2 MLJ 230 (FC).
15. *Perwira Affin Bank Bhd. (formerly known as Perwira Habib Bank Malaysia Bhd.) v Selangor Properties Sdn. Bhd. & Ors.* [2010] 3 CLJ 45 (CA).
16. *Perwira Habib Bank (M) Bhd. v Loo & Sons Realty Sdn. Bhd. & Satu lagi (No 1)* [1996] 3 MLJ 409; [1996] 4 CLJ 171 (CA).
17. *Potensi Bernas Sdn. Bhd. v Lok Khi On* [2020] MLJU 1004 (HC).
18. *Rang Undang-Undang Kanun Tanah Negara (Pindaan) 2016, Huraian 40 & 47.*
19. Sabah Land Ordinance (Cap. 68).
20. Sarawak Land Code (Cap. 81).
21. Sihombing J: *The National Land Code Commentary – Lien, Chapter 6 para 1375.*
22. *United Overseas Bank (M) Sdn. Bhd. v UJA Sdn. Bhd.* [2009] 6 MLK 857 (CA).
23. Walder A: *Halsbury's Law of England – Liens.* 2021; Vol.68, para 902.
24. Tay ES, Ling GY, Chung KW: Statutory Lien: Pre- and Post- 2016 Amendments to the Malaysian National Land Code. figshare. *Dataset.* 2021.
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Current Peer Review Status: ? ?

Version 1

Reviewer Report 21 March 2022

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Nuarrual Hilal Md Dahlan

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This article discusses the new amendment made on lien, pursuant to the amendment made to National Land Code.

The discussion is simply on the issue of the 'purposes' of the creation of lien. Through the amendment, the purposes of lien are not just limited to 'loan'. It will also cover other situations, i.e. non-loan transactions. This includes the contention of the authors to cover the situation of Islamic finance and banking transactions which the reviewer agrees. The authors should elaborate and explain this situation, i.e. the Islamic finance transactions that involve lien.

Explain the Islamic finance concept and why lien is not just restricted to loan transactions. In Islamic finance and banking, the Islamic bank provides facilities to customers. The facilities are not 'loans', but Islamic finance facilities that involve buying and selling and/or transactions that are acceptable under Islamic Law. The purpose of Islamic Law is to prevent the practice of riba' (usury) and other elements affronting the religion of Islam.

Further, the authors' view that the creation of lien to other 'non-loan' transactions can cause fraud, underlying danger, or other inequitable and unjust practices is not correct. The authors premise this on presumption. The reviewer does not share the same view. Thus, on this matter, the authors should provide more elaboration and provide proof and examples of the potential fraud, underlying danger, or other inequitable and unjust practices due to the widening 'purposes' of creation of lien.

The cases provided by the authors also are too succinct and simple. Please provide the relevant facts and relate the principles to the discussion of the paper.

Is the work clearly and accurately presented and does it cite the current literature?

Yes

Is the study design appropriate and is the work technically sound?

Partly

Are sufficient details of methods and analysis provided to allow replication by others?

Yes

If applicable, is the statistical analysis and its interpretation appropriate?

Yes

Are all the source data underlying the results available to ensure full reproducibility?

Partly

Are the conclusions drawn adequately supported by the results?

Partly

Competing Interests: No competing interests were disclosed.

Reviewer Expertise: Land Law

I confirm that I have read this submission and believe that I have an appropriate level of expertise to confirm that it is of an acceptable scientific standard, however I have significant reservations, as outlined above.

Reviewer Report 11 February 2022

<https://doi.org/10.5256/f1000research.77165.r121680>

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Hang Wu Tang

School of Law, Singapore Management University, Singapore, Singapore

General Comments:

In this article, the authors study the 2016 amendments of sections 280 and 330 of the National Land Code in relation to statutory liens. It would be helpful to set out the ambit of sections 280 and 330 of the National Land Code for the reader's convenience at an earlier stage. The authors point out that statutory liens used to be created "for a loan". But the recent amendments have deleted the words "for a loan". This leads the authors to postulate that statutory liens may now be procured for other purposes. While this is found in a later part of the article, it would be helpful for the authors to set out what other purposes might be allowed or disallowed pursuant to the amendments. These include a lawyer's common law right of a lien over his or her clients land title in relation to unpaid professional fees, security for share trading, liquidated damages (in the example of the father creating a statutory lien for the daughter's scholarship sponsor) and loans for third parties.

Several drawbacks to the widening of statutory liens were identified by the authors. The authors argue that such statutory liens may lead to circumstances where the lien is created pursuant to fraud, misrepresentation, illegality, or a situation where the landowner did not consent to the creation of the statutory lien. This line of argument needs to be developed to be sustainable. As currently drafted in the article, I am not convinced by this argument. If there is in fact of fraud, misrepresentation, illegality or *non est factum*, then this would be vitiating factors that will set aside the statutory lien. More intriguing is a question hinted at in this piece but not fully developed: Should the policy makers make it so easy for land to be used as security for other purposes apart from a loan? Would this give rise to the use of land in ways that might be unforeseen i.e. security for trading in shares, cryptocurrencies, etc? Would this lead to negative social implications where the landowner's family would be dispossessed when the lien is enforced?

For ease of reading, I would also suggest that the discussion of the case law be expanded. The relevant case law is dealt with in one liners, and I found it difficult to follow the authors' arguments and appreciate the significance of the cases.

Finally, I am not sure whether the conclusion is consistent with the main flow of the argument in the paper. The tenor of the argument in the paper appears to be against the expansion of the statutory lien. Yet, in the conclusion, the authors state that the amendments were "meant to make people's life easier as there will always be instances where security is needed for something other than for a loan". If the authors are in fact supportive of the amendments, then the preceding sections of the article should make this clearer.

The following work and literature should be considered and cited in this article:

- Wong Kim Fatt, "Twenty-Five Years of the Caveat System under the National Land Code 1965" ¹
- *Zeno Ltd. v. Prefabricated Construction Co. (Malaya) Ltd. & Anor* (1967) ² for the nature of the lien under the pre-cursor of the lien in the Federated Malay States

References

1. Twenty-five years of the caveat system under the national land code 1965 (Part I) (1991). *Singapore Journal of Legal Studies*. 1991. 233-267 [Reference Source](#)
2. *Zeno LTD V Prefabricated Construction Co (Malaya) LTD*. 1967. [Reference Source](#)

Is the work clearly and accurately presented and does it cite the current literature?

Yes

Is the study design appropriate and is the work technically sound?

Yes

Are sufficient details of methods and analysis provided to allow replication by others?

Partly

If applicable, is the statistical analysis and its interpretation appropriate?

Not applicable

Are all the source data underlying the results available to ensure full reproducibility?

Yes

Are the conclusions drawn adequately supported by the results?

Yes

Competing Interests: No competing interests were disclosed.

Reviewer Expertise: Land Law

I confirm that I have read this submission and believe that I have an appropriate level of expertise to confirm that it is of an acceptable scientific standard, however I have significant reservations, as outlined above.

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