There is one further ambiguity. *Chan*'s "lack of intention analysis" may differ sharply from Chambers's in one very important aspect. While Chambers is best interpreted as proposing that lack of intention to benefit the transferee is both a sufficient and necessary condition for a resulting trust to arise, *Chan* seems to read this requirement as only setting out a sufficient condition, contemplating the possibility that a resulting trust "may" arise even when the transferor intended to benefit the recipient (at para. [43]). But, if lack of intention to benefit were also a necessary condition as Chambers suggests, then a resulting trust could not arise where such intention to benefit is present. Practically speaking, Chambers's argument would conclusively deny a transferor's claim that a resulting trust exists in his favour where such an intention exists and is proven. By contrast, *Chan*'s holding that "a resulting trust *may not* arise if it can be shown that the transfer was indeed intended to benefit the recipient" excludes that possibility (at para. [43], emphasis). It leaves one wondering when resulting trusts *may* arise despite proof of intention to benefit the recipient – an odd possibility that will have to be addressed in a future case.

RACHEL LEOW AND TIMOTHY LIAU

THE UNCHANGING "DEBENTURE"

THE English Court of Appeal in *Fons Hf v Corporal Ltd.* [2014] EWCA Civ 304 has recently confirmed that the phrase "debenture" when used in a charge agreement should be given its ordinary wide meaning. Some caution should be attached to this holding. Although the word "debenture" commonly appears in legislation or in private contractual documents, the precise meaning that should be ascribed to the word varies with the context. But, if the decision in *Fons* can be taken as laying down a general definition of "debenture", then it seems that any contract or legislative drafter seeking to give it a narrower meaning would have to provide specifically for that.

Under clause 3.1 of a charge agreement, Fons charged "Shares" that it owned beneficially in Corporal Limited (in which Fons held both ordinary A and preference shares) as collateral to secure a loan from Kaupthing Bank Luxembourg SA. In turn, clause 1.1 defined "Shares" to generally include "stock, shares, debentures, bonds, warrants, coupons or other securities". The question was whether this covered the rights of the chargor, Fons, in two shareholder loan agreements (SLAs) under which Fons extended unsecured loans to Corporal (that were repayable only after Corporal's earlier secured facility arrangement with Royal Bank of Scotland). Fons was the sole lender under the first SLA, which was for £563,500. Under the second SLA, Fons jointly lent £1.5 million with another shareholder in proportion to their respective shareholdings in Corporal, which for Fons was 35 per

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cent. The Court of Appeal held that those unsecured loans were debentures owned by Fons and thus "Shares" that were part of the collateral which Fons had granted security over.

One preliminary argument was that the reference in clause 6.7 of the charge agreement to the need for Fons to be the "sole beneficial owner" of the relevant "Shares" meant that Fons was unable to grant a charge in respect of the second SLA. Patten L.J. held, however, that, as used in that provision, it referred to ordinary and preference shares and, even if it extended to the general definition of "Shares" in clause 1.1, Fons could charge its beneficial interest in the relevant chose in action even if not the underlying joint legal debt itself (at para. [22]).

The main issue therefore was whether the SLAs constituted "debentures" as illuminated by the phrase "or other securities" at the end of clause 1.1. At first instance, this was rejected by Mr. Mark Cawson Q.C. (sitting as a deputy judge of the High Court) who thought that an instrument satisfying the definition had to be transmissible or even bearer in nature, "or at least have about them a formality or quality demonstrative of making some underlying right more readily enforceable": [2013] EWHC 1801, at para. [77]. This did not include an unsecured loan agreement. The Court of Appeal unanimously reversed this decision, although Patten L.J., who delivered the main judgment, agreed (at para. [24]) with the deputy judge that the phrase "securities" was quite different from "security" over collateral used elsewhere in the charge agreement.

In some cases such as *Re MC Bacon Ltd*. [1990] B.C.L.C. 324, the security is referred to as a "mortgage debenture" or even just a "debenture" (there to secure an overdraft), but this may lead to some confusion. While security is a proprietary right to ensure payment of a loan, Patten L.J. saw "securities" as perhaps a form of investment, and debentures also in that light (at para. [43]). In *Fons*, Gloster L.J. also pointed out at that it is unusual today to call a loan or security document a "debenture" (at para. [53]).

However, Patten L.J. thought that the trial judge had attributed a narrower meaning to "debentures" than was warranted. His concern was "to give the words their natural and ordinary meaning derived from the context of the agreement and all other relevant facts indicating the nature and purpose of the transaction" (at para. [14]). Patten L.J. saw this particular charge document as one where there was no obvious error in the drafting; in such cases, contractual interpretation should be approached with "business common sense" (at para. [16]).

Patten L.J. followed the two well-known decisions of Chitty J. in *Edmonds v Blaina Furnaces Company* (1887) 36 Ch.D. 215 and *Levy v. Abercorris Slate and Slab Co* (1887) 37 Ch.D. 260 which had held that debentures are simply instruments that create or acknowledge a debt. In particular, Chitty J. specifically said that a single instrument could constitute a debenture (in *Edmunds* this was a loan agreement charging the

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undertaking and property of the debtor company and existing debentures held by its debenture holders, whereas *Levy* involved an agreement to pay a certain sum secured by some existing charges as well as a promise to execute a legal mortgage when called for). Patten L.J. acknowledged, however, that meanings could be influenced by the factual background and that in both cases it was for the purposes of section 17 of the Bills of Sale Act (1878) Amendment Act 1882 (which exempts secured debentures issued by a company from registration as a Bill of Sale – at that point it had still not been decided that the Act did not generally apply to companies: Tennekoon, *The Law and Regulation of International Finance* (1991), 126). Patten L.J. also referred to the judgment of Pollock M.R. in *Lemon v Austin Friars Investment Trust Ltd.* [1926] Ch. 1, 12–13, who pointed out that, even though Part 3 of *Palmer's Company Precedents*, 12th ed. (1922), 3–4 had suggested nine common characteristics of a debenture including it being "as a general rule, one of a series", that "it is not essential that these characteristics should all be present, and some indeed are almost the antithesis the one of the other". *Palmer* itself stated that debentures had an "elastic" meaning, and was clearer only when used in a statute.

It is likely therefore that the meaning of debentures remains contextual. Even at common law, negotiable instruments, deeds of covenant, and promises to purchase property at a future date are not considered debentures: *Handevel Pty Ltd. v Comptroller of Stamps (Vic)* (1985) 157 C.L.R. 177, 196. Consequently, despite Gloster L.J. (at para. [47]) expressly disapproving the view of Tennekoon that it is "an instrument issued in a series to enable persons to trade and deal with it in the markets", there may be specific instances where it does share these characteristics. One example was section 860(7) of the Companies Act 2006 which offered a list of company charges that had to be registered with the Companies House, one of which was "(c) a charge for the purposes of securing any issue of debentures". This provision was somewhat different from the others in section 860(7), where fixed charges given by a company were registrable depending usually on the nature of the underlying collateral with, for example, fixed charges over book debts being registrable and those over shares in other companies not (although in practice charges over dividends from those shares were registered). In subsection (7)(c), on the other hand, the focus was on the kind of debt being issued. Reading this as including a single unsecured debt would have rendered otiose the other subsections: Bennett, in Armour and Bennett (eds.), *Vulnerable Transactions in Corporate Insolvency* (2003), 244–45 (even if there were special provisions with respect to a debenture series provided by section 863). But things have been simplified in the UK, with the adoption since 6 April 2013 of a system where all charges are registrable, subject to exceptions, by virtue of Companies Act 2006 (Amendment of Part 25) Regulations 2013, SI

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2013/600. However, section 863 has been re-enacted, with some amendments, as section 859B.

Laypersons may think that debentures and bonds are longer-term tradable debt, whereas notes are shorter in duration. Patten L.J. did suggest (at para. [43]) that, if it were correct to see "securities" as synonymous with "investments", then the SLAs in *Fons* were "long term loan capital", as they were not repayable before the principal facility with the Royal Bank of Scotland. This lock-in quality is perhaps even more important when viewed from the perspective of prospectus disclosure for a public offer of securities as it heightens the need for investor protection. In *Culverden Retirement Villages Ltd. v Registrar of Companies* [1997] 1 A.C. 303, the Privy Council, on appeal from New Zealand, held that a debt security had been created in a sale and buyback of property where owners had to surrender their housing unit when they ceased to occupy it, even though the repayment price was possibly lower than the original payment they made (cf. *Handevel Pty Ltd. v Comptroller of Stamps (Vic)*, at p. 199, that, for stamp duty considerations, "a contingent future debt arising from a contingent obligation to purchase" was not a debenture).

Even this policy rationale must be properly understood when the issue is not simply one of whether a debenture prospectus is required, but whether a hybrid debt instrument has other characteristics which might trigger even more involved regulation. So, the notorious Lehman Minibond that was sold to the Hong Kong and Singapore public was registered as a debenture when it had elements of a derivative, insurance contract, and collective investment scheme (which section 235 of the Financial Services and Markets Act 2000 defines "in an open-textured way": *Financial Services Authority v Fradley* [2006] B.C.L.C. 616 at [32]). In these situations, the instrument, while clearly having a debt component, should perhaps also be subjected to a stricter regulatory regime (in the case of a collective investment scheme, for example, approval of the scheme and trustee/manager alongside prospectus disclosure). However, in a dispute between contracting parties with minimal externalities, perhaps even concerning legislation where words do not clearly dictate otherwise, it is likely that a court will, as a starting point, see debentures as "specific identifiable agreements embodied in written documents" (Patten L.J., at para. [37]) that create or acknowledge a debt.

HANS TJIO

MARRIAGE DISSOLUTION AS A PRE-REQUISITE FOR LEGAL GENDER RECOGNITION

IN *Hämäläinen v Finland* (Application no. 37359/09), 16 July 2014, the Grand Chamber of the European Court of Human Rights held that

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