Power Knight Pte Ltd *v* Natural Fuel Pte Ltd (in compulsory liquidation) and others [2010] SGHC 75

Case Number	: Originating Summons No 111 of 2010
Decision Date	: 10 March 2010
Tribunal/Court	: High Court
Coram	: Judith Prakash J
Counsel Name(s)	: Manoj Sandrasegara, Tan Mei Yen and Mohamed Nawaz Kamil (Drew & Napier LLC) for the plaintiff; Lee Eng Beng SC, Low Poh Ling and Ang Siok Hoon (Rajah & Tann LLP) for the defendants.
Parties	: Power Knight Pte Ltd — Natural Fuel Pte Ltd (in compulsory liquidation) and others

Credit and Security

Insolvency Law

Land

10 March 2010 Judgment reserved.

Judith Prakash J:

Introduction

1 This is an application by the plaintiff, Power Knight Pte Ltd ("Power Knight"), pursuant to s 127 of the Land Titles Act (Cap 157, 2004 Rev Ed) ("LTA") seeking, *inter alia*, the removal of two caveats lodged by the defendants.

Background

2 The background to this application is not in dispute.

3 The first defendant, Natural Fuel Pte Ltd ("the Company"), is a private limited company whose principal business activities include the sale of solid, liquid and gaseous fuels, and the manufacture of petrochemical products.

4 On or around 15 April 2008, the Company entered into two Building Agreements with the Jurong Town Corporation ("JTC") in respect of two plots of land on Jurong Island, namely Private Lots A2173900 and A2173901 (collectively, "the Property"). Pursuant to the Building Agreements, the Company would be granted 30 year leases over the Property by JTC once certain conditions were satisfied. In the interim, the Company was given a licence "as if a lease had actually been granted" to build and operate, *inter alia*, an integrated production facility (consisting of a biodiesel production plant and a glycerine production plant) on the Property. To date, JTC has not granted a formal lease over the Property to the Company.

5 By a convertible loan facility dated 24 April 2008, Power Knight granted a loan of US$20 million to Natural Fuel Limited, the Company's Australian holding company, the proceeds of which were in

turn advanced to the Company for the construction and maintenance of the production facility.

6 As security for the loan to Natural Fuel Limited, the Company executed a Debenture dated 13 May 2008 which granted Power Knight, *inter alia*, a fixed charge over all the Company's interests in "any freehold or leasehold property or any other interest in real property including fixtures".

7 On 9 June 2008, the Debenture was duly registered in accordance with s 131 of the Companies Act (Cap 50, 2006 Rev Ed) ("the CA"). However, for reasons best known to it, Power Knight did not contemporaneously lodge a caveat in respect of the Debenture at the Registry of Titles which it could have done pursuant to s 115 of the LTA to notify third parties of its interest in the Property.

8 In early 2009, Natural Fuel Ltd faced financial difficulties, and was placed under voluntary administration in Australia on 9 April 2009. On 11 September 2009, Power Knight appointed Messrs Chee Yoh Chuang and Lim Lee Meng as receivers and managers of the company, but discharged them on 30 September 2009, appointing Messrs Ewe Pang Kooi and Farooq Ahmad Mann in their stead.

9 Meanwhile, on 28 September 2009, Rotary Engineering Limited, an unsecured creditor of the Company, filed a winding up application (CWU 134/2009) against the Company. A winding up order was made by the High Court against the Company on 23 October 2009, and the second and third defendants, Messrs Tam Chee Chong and Lim Loo Khoon ("the Liquidators"), were appointed the joint and several liquidators of the Company.

10 On 5 November 2009, the Liquidators lodged Caveat No IB/592668D ("the Liquidators' Caveat") in respect of the Property, claiming:

> … an interest in the land, for and on behalf of the unsecured creditors, of the Caveatee [the Company], who are collectively vested with all the beneficial interests in the land.

11 On 10 November 2009, the Liquidators, on behalf of the Company, lodged Caveat No IB/598527B ("the Company's Caveat"), claiming an estate or interest in the Property as:

> … trustee of the interests in the land for the benefit of the unsecured creditors of the company under a statutory trust arising as a result of the winding up application filed on 28 September 2009… and/or the winding up order dated 23 October 2009.

12 Power Knight lodged its own caveat (Caveat No IB/601038K) as holder of a fixed charge over the Property on 11 November 2009, and commenced this action to demand that the Liquidators and the Company show cause why their respective caveats should not be removed pursuant to s 127 of the LTA. It should be noted that it is accepted by Power Knight that because the Liquidators' and Company's Caveats were lodged before Power Knight's caveat they would, if they protect valid interests in land, have priority to Power Knight's caveat (see ss 48 and 49 of the LTA).

The Parties' Submissions

The Liquidators' submissions

13 Counsel for the Liquidators relies primarily on the authority of *Ng Wei Teck Michael and others v Oversea-Chinese Banking Corp Ltd* [1998] 1 SLR(R) 778 ("*Michael Ng*"), a decision of the Court of Appeal, as establishing that, upon the winding up of a company, a statutory trust arises to preserve the assets of the company for *pari passu* distribution among the unsecured creditors, who are in the nature of a *cestui que trust* with beneficial interests extending to all of the company's property.

Consequently, the unsecured creditors of the Company had the necessary "interest in land" for the purpose of lodging a caveat under s 115 of the LTA in respect of the Property.

14 The Liquidators also contend that, on the authority of *Michael Ng*, the subject matter of the statutory trust includes a company's encumbered assets, such as assets subject to a security interest which predates the winding up of the company, and therefore Power Knight's fixed charge does not preclude the Liquidators' and Company's Caveats.

Power Knight's submissions

15 Power Knight counters that the unsecured creditors of the Company have no caveatable interest, and that therefore the Liquidators' and Company's Caveats should be removed, on the basis that:

(a) the concept of the statutory trust has been criticised, particularly by the High Court of Australia;

(b) the statutory trust which arises upon the winding up of a company does not confer beneficial or proprietary interests of any kind on anyone;

(c) the statutory trust cannot encompass pre-existing encumbered assets, such as the Property, which do not form part of the pool of assets available for distribution among unsecured creditors; and

(d) *Michael Ng* was concerned with a different situation and therefore is distinguishable from the present case.

The Issues

16 The issues that therefore arise for my determination are:

(a) whether a statutory trust came into being upon the winding up of the Company;

(b) if so, what are the interests (if any) of the Company's unsecured creditors under the statutory trust, and whether they qualify as an "interest in land" under s 115 of the LTA;

(c) whether the Property fell within the ambit of the statutory trust, which encompasses assets available for distribution to the Company's unsecured creditors, notwithstanding the fixed charge granted to Power Knight.

17 I will, however, begin with issue (c), because if the Property does not fall within the Company's general pool of assets, it will, on orthodox principles of insolvency law, not be available for distribution to the unsecured creditors by the Liquidators, and cannot therefore be included in the statutory trust.

18 There is one other matter which, though not addressed by either party, raises an issue of some importance, and that is whether either the Liquidators or the Company had *locus standi* to lodge the respective caveats for the benefit of the unsecured creditors. Section 115 of the LTA states that a caveat may be lodged, *inter alia*, by "[a]ny person claiming an interest in land", and it is not apparent to me what interest is being claimed by the Liquidators or the Company if the beneficial interest in the Property resides with the unsecured creditors of the Company, as the Liquidators contend. Nonetheless, as I have not heard submissions on this point, I express no concluded view on the

matter.

Whether the Property Was Available for Distribution to the Unsecured Creditors notwithstanding Power Knight's Interest

Power Knight's interest

19 The nature of Power Knight's interest in the Property must be determined from the Building Agreements and the Debenture. Although JTC never granted the Company a lease under the Building Agreements, an agreement for a lease creates an equitable lease: *Golden Village Multiplex Pte Ltd v Marina Centre Holdings Pte Ltd* [2002] 1 SLR(R) 169 (per LP Thean JA at [12] and [15]). Under the terms of the Debenture, the Company charged its equitable leasehold interest to Power Knight as security, and this security interest was perfected when Power Knight registered the Debenture under s 131 of the CA on 9 June 2008. The material portion of s 131 reads:

> **Registration of charges**
>
> **131**. – (1) Subject to this Division, where a charge to which this section applies is created by a company there shall be lodged with the Registrar for registration, within 30 days after the creation of the charge, a statement containing the prescribed particulars of the charge, and if this section is not complied with in relation to the charge the charge shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company.
>
> …

20 Under s 131(3)(*e*), a charge to which s 131(1) applies includes "a charge on land wherever situate or any interest therein". As a result of registration, Power Knight obtained a security interest which would, ordinarily, be binding on the Company, the Liquidators, and any creditor of the Company.

21 There was some dispute as to the nature of Power Knight's security interest, with counsel for the Liquidators characterising it as a fixed charge while counsel for Power Knight described it as more akin to an equitable mortgage.

22 This is a vexed issue, as the terms "charge" and "mortgage" have often been used interchangeably: see *Goode on Legal Problems of Credit and Security* (Louise Gullifer ed) (Sweet & Maxwell, 4th Ed, 2008) ("*Goode*"), paras 1-51 – 1-52. Whether the Debenture gave rise to a charge or mortgage depends on the intention of the parties as objectively ascertained: *Swiss Bank Corporation v Lloyds Bank Ltd and others* [1982] AC 584 (per Buckley LJ at 595). It is clear from the Debenture that Power Knight could appoint receivers and managers, who were vested with extensive powers to manage, enter into possession and assume control of, as well as sell, the Property. Under the terms of the Debenture, Power Knight could itself exercise any of these rights, regardless of whether receivers and managers had been appointed.

23 One of the distinctions between a charge and an equitable mortgage is that the chargee is not entitled to avail himself of the self-help remedies of sale, possession or appointment of a receiver (though he may apply to the court for one of these remedies): *Goode*, para 1-51 (note 184), *Fisher and Lightwood's Law of Mortgage* (Wayne Clark ed) (LexisNexis Butterworths, 12th Ed, 2006), para 6.1 and 6.3.

24 Given that the parties intended that Power Knight should have all the remedies available to a

mortgagee, I am inclined to regard Power Knight's security interest as an equitable mortgage.

25 Nonetheless, I do not think that the technical distinctions between an equitable mortgage and an equitable charge make a difference to the issues in this case. Since a mortgage is a broader security and often includes a charge (see *Goode*, para 1-52), for convenience, I have referred, and will continue to refer, to Power Knight's interest as a "fixed charge".

Are secured assets available for distribution among unsecured creditors?

26 The distinction between a charge and a mortgage is immaterial in this case because both types of security interest clearly confer equitable property rights in the Property on Power Knight and make it a secured creditor. One of the defining characteristics of a secured creditor is that, on the debtor's insolvency, he is able to directly realise his security independently of the normal liquidation process. As Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell, 3rd Ed, 2005) ("*Principles*") notes (at para 3-04):

> In general, a creditor holding a security interest or other real right is unaffected by winding-up and may proceed to realise his security or assert other rights of property as if the company were not in liquidation.

This point is repeated by other learned commentators in the field of insolvency law (see *Goode*, para 1-71, and Keay, *McPherson's Law of Company Liquidation* (Sweet & Maxwell, 2nd Ed, 2009) ("*McPherson*"), para 11.003), and must be correct in principle, for the entire *raison d'être* of taking security is to ensure that the secured asset will not fall into the debtor's general pool of assets and will therefore be unavailable to the unsecured creditors.

27 The rule that upon liquidation only a company's unencumbered or free assets are available for distribution among its unsecured creditors has a long and distinguished pedigree. It was repeatedly emphasised by the English Court of Appeal in *Re Regent's Canal Ironworks Co, ex parte Grissell* (1875) 3 Ch D 411 (per James LJ at 427), *Re David Lloyd & Co* (1877) 6 Ch D 339 (per James LJ at 344 – 345) and *Re Pyle Works (No. 1)* (1890) LR 44 Ch D 534 (per Cotton LJ at 577 – 578), and was reaffirmed by the House of Lords in *Buchler v Talbot* [2004] 2 AC 298, where Lord Millet said at [51]:

> Bankruptcy and companies liquidation are concerned with the realisation and distribution of the insolvent's *free assets* among the unsecured creditors. *They are not concerned with assets which have been charged to creditors as security, whether by way of fixed or floating charge. Secured creditors can resort to their security for the discharge of their debts outside the bankruptcy or winding up* …
>
> [emphasis added]

28 The actual decision in *Buchler v Talbot* (that expenses properly incurred by the liquidator of an insolvent company are not payable out of assets subject to a floating charge) was statutorily reversed by s 1282 of the UK's Companies Act 2006 (c 46), and does not apply in Singapore by virtue of ss 328(1) and 328(5) of the CA, which provide that such expenses have priority over the claims of holders of a floating charge.

29 Nonetheless, the force of the reasoning employed by their Lordships in *Buchler v Talbot* (which in fact applies *a fortiori* to assets subject to a fixed charge) is not diminished, and the statutory provisions demonstrate that *but for* legislative intervention, the common law position is that upon a winding up, secured assets are not available for distribution by the liquidator among the company's

unsecured creditors.

30 Consequently, even if, as the Liquidators contend, a statutory trust arose on the winding up of the Company for the benefit of the unsecured creditors, in my judgment, the subject matter of such a trust could not include the Property, which was already validly encumbered by Power Knight's fixed charge and therefore unavailable to the unsecured creditors.

31 This view is strengthened by Lord Hoffmann's statement in *Buchler v Talbot* at [28] that "the [statutory] trust applies only to the company's property. It does not affect the proprietary interests of others." A similar conclusion is expressed by Lord Brightman in *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1983] 2 AC 192 at 208 where he states that:

> … the statutory duty of the liquidator in [a winding up] is to collect the assets of the company and to apply them in discharge of its liabilities… *The assets which the liquidator is able to collect and distribute are however necessarily those which are free from a charge*.
>
> [emphasis added]

32 Counsel for the Liquidators submits, however, that *Michael Ng* establishes that on a winding up, unsecured creditors obtain a beneficial interest in a company's property, *including* its encumbered assets. It is therefore necessary to examine *Michael Ng* in detail.

Michael Ng

33 The facts in *Michael Ng* were essentially the obverse of this case. A company had granted an equitable mortgage over registered land to the respondent ("OCBC"). OCBC lodged a caveat claiming an interest as equitable mortgagee in respect of the land but did not register the equitable mortgage under s 131 of the CA. OCBC enforced the equitable mortgage and obtained a court order authorising it to sell the land, but on 6 May 1994, before it could do so, the second appellants (the unsecured creditors) presented a winding up application. The winding-up proceedings took some time and on 13 April 1995 OCBC sold the land. The winding-up order was eventually made on 5 May 1995 and the first appellants were appointed liquidators of the company. The appellants then sought to claim that the equitable mortgage was void for want of registration under s 131, and that the proceeds of the sale of the land should be paid over to the first appellants.

34 The Court of Appeal was concerned with two issues. First, whether the equitable mortgage was void against the first appellants *qua* liquidators of the company; and second, whether the equitable mortgage was void against the second appellants *qua* unsecured creditors of the company. The Court of Appeal decided the first issue against the liquidators, and that portion of the judgment is not material to this case. However, the Court of Appeal held that, as regards the second appellants *qua* unsecured creditors, the equitable mortgage was void.

35 LP Thean JA, on behalf of the Court of Appeal, held that the reference to "any creditor" in s 131 of the CA did not include an unsecured creditor while the company was a going concern, as such a creditor had no interest in the company's property. It was only upon the presentation of a winding up petition that a statutory trust came into being for the benefit of the unsecured creditors, who thereby obtained a beneficial interest in the assets of the company, and could therefore be considered a "creditor" in the sense of s 131 of the CA.

36 The key portion of the judgment, upon which counsel for the Liquidators relies, is at [31], where LP Thean JA states:

> … On the basis of all the authorities which we have discussed, s 131(1) of the Companies Act does not apply in favour of an unsecured creditor and an unregistered charge is not void as against such a creditor, while the company is a going concern. This is because he is not entitled to prevent the company from paying off the debt secured by the unregistered charge or granting a confirmatory charge. An unsecured creditor has no interest in the assets of a company and is powerless to restrain it from dealing with its assets as it wishes. This state of affairs which prevails while the company is a going concern ceases on the presentation of a winding-up petition. As from that date, the company is no longer at liberty to pay off the debt owed or grant a confirmatory charge to the chargee. Under s 259 read together with s 255(2) of the Companies Act, any disposition of the company's property from the presentation of the winding-up petition is void unless it is sanctioned by the court. A statutory scheme comes into place to preserve the assets of the company for *pari passu* distribution among the unsecured creditors: see, *inter alia*, ss 258, 259, 260, 334 of the Companies Act; and the unsecured creditors of a company are in the nature of a *cestui que trust* with beneficial interests extending to all the company's property, including the subject matter of the unregistered charge. The avoidance of the unregistered charge would, after all, free the subject matter of the charge to swell the assets of the company for the benefit of the unsecured creditors. In our judgment, on the presentation of a winding-up petition, an unsecured creditor acquires sufficient interest in the subject matter of the unregistered charge so as to qualify as a "creditor" for the purposes of s 131(1).

37 Counsel for the Liquidator contends that, since the registration requirement under s 131 of the CA is required only to perfect the charge *vis-à-vis* other creditors (see *Goode*, para 2-22), the unregistered charge in *Michael Ng* was valid and enforceable as against the company, and since, according to LP Thean JA, an unsecured creditor must have an interest in the company's property before he can rely on s 131, the second appellants in *Michael Ng* must, on the presentation of the winding up have, had an interest in the land subject to the unregistered charge in order to invoke s 131 and avoid the charge. Therefore, *Michael Ng* demonstrates that encumbered assets are caught by the statutory trust.

38 This argument is ingenious but it is not, in my judgment, correct. I do not read *Michael Ng* as contradicting the well-established position (see [26] to [31] above) that unsecured creditors, on a winding up, have no recourse to the debtor's secured assets. In my opinion, what *Michael Ng* decides is that an unsecured creditor only has *locus standi* to invoke s 131 of the CA when a winding up petition is presented, as it is only from that date that he becomes interested in the property of the company, which will, once s 131 is relied upon, include the subject matter of the unregistered charge. The sequence of events therefore runs as follows: upon the presentation of a winding up petition, the unsecured creditors obtain a beneficial interest in the unencumbered property of the company. By virtue of that interest, an unsecured creditor obtains *locus standi* to invoke s 131 to avoid the unregistered charge, and the charged property is then freed from the charge, falling into the general pool of assets which is to be distributed among the unsecured creditors.

39 This reading is confirmed by LP Thean JA's statement that "[t]he avoidance of the unregistered charge would, after all, free the subject matter of the charge to swell the assets of the company for the benefit of the unsecured creditors."

40 Consequently, in this respect, the Liquidators derive no benefit from *Michael Ng*, which was concerned with whether an unsecured creditor had, upon the presentation of a winding up petition, standing to avoid an unregistered charge under s 131 of the CA. *Michael Ng* does not support the contention that an unsecured creditor, in and by virtue of a winding up, has a beneficial interest in property subject to a *registered* charge. That this cannot be the case is implicit in LP Thean JA's statement at [39] above: where a charge has been validly registered under s 131 of the CA (as in

this case) and cannot be avoided, the subject matter of the charge is *not* freed "to swell the assets of the company for the benefit of the unsecured creditors".

41 Therefore, I conclude that the unsecured creditors of the Company have no interest in the Property, the equitable leasehold interest in which has been validly charged to Power Knight. It follows that they do not claim "an interest in land" for the purposes of lodging a caveat under s 115 of the LTA, and the Liquidators' Caveat and the Company's Caveat must be removed.

42 That is sufficient to dispose of this case, but as counsel have submitted full arguments on the remaining issues, and it is likely that this judgment will be appealed, I will set out my views on the first two issues I alluded to in [16].

The Statutory Trust

Existence of the statutory trust

43 Although counsel for Power Knight pointed out that the statutory trust is not recognised in Australia after the High Court of Australia's decision in *Commissioner of Taxation of the Commonwealth of Australia v Linter Textiles Australia Ltd (in liquidation)* (2005) 220 CLR 592 ("*Linter Textiles*"), in my opinion this issue has clearly been decided in Singapore by *Michael Ng*.

44 Although not referred to in *Michael Ng*, the leading modern authority on the statutory trust is *Ayerst (Inspector of Taxes) v C & K (Construction) Ltd* [1976] AC 167 ("*Ayerst*"), a decision of the House of Lords. There, Lord Diplock confirmed the existence of the statutory trust on the basis that upon the making of a winding up order, by operation of the relevant provisions of the CA, a company loses all custody and control of its property, and all powers of dealing with the company's assets are transferred to a liquidator who is to act in accordance with the statutory scheme set out in the CA. Consequently, Lord Diplock held, by operation of statute, upon the making of a winding up order, a statutory trust comes into effect because the company, despite remaining legal owner of its property, loses all beneficial ownership to it.

45 As is clear from the judgment of LP Thean JA quoted in [36] above, the Court of Appeal in *Michael Ng* endorsed the concept of a statutory trust for essentially the same reasons as those given by Lord Diplock in *Ayerst*.

46 Although it is occasionally suggested that *Ayerst* only decided that a company was divested of "beneficial ownership" of its assets for the purposes of interpreting a specific provision of the UK's Finance Act 1954 (c 44) (see, for example, *Low Gim Har v Low Gim Siah* [1992] 1 SLR(R) 970, per Chan Sek Keong J at [23] – [26]), I do not, with respect, think it is possible to limit *Ayerst* in this manner.

47 First, Lord Diplock himself in *Ayerst*, at 179 – 181, relied on and endorsed earlier authorities (which predated the earliest Finance Act) which had recognised the existence of the statutory trust as a matter of common law. Second, *Ayerst* has been repeatedly cited as establishing, without qualification, that upon the winding up of a company, a statutory trust is established over the company's assets: *Buchler v Talbot* (per Lord Hoffmann at [28]), *Wight v Eckhardt Marine GmbH* [2004] 1 AC 147 (per Lord Hoffmann at [22]) and *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2007] 1 AC 508 (per Lord Hoffmann at [14]). Finally, exactly the same criticism may be employed against other landmark cases which, while ostensibly concerned with interpreting specific points of revenue law, have always been taken as representing the common law: for example, *Commissioner of Stamp Duties (Queensland) v Hugh*

Duncan Livingston [1965] 1 AC 694 ("*Commissioner of Stamp Duties v Livingston*") and *McPhail and others v Doulton and others* [1971] 1 AC 424.

Nature of the statutory trust

48 Notwithstanding the long line of authorities recognising the existence of the statutory trust, its exact nature has been a matter of some controversy. Although it is sometimes said that the statutory trust is created "in favour of" the general body of unsecured creditors (see *Re Yagerphone Ltd* [1935] Ch 392 at 396 and *Re Anglo-Oriental Carpet Manufacturing Company* [1903] 1 Ch 914 at 918), the prevailing view is stated in *Principles*, para 3-08 (see also *McPherson*, para 7.006):

> **Seventh principle: no creditor has any interest *in specie* in the company's assets or realisations**
>
> The statutory trust upon which the company in winding up holds the assets and realisations is not of a kind which confers on the creditors beneficial co-ownership or, indeed, a proprietary interest of any kind. Their rights are limited to invoking the protection of the court to ensure that the liquidator fulfils his statutory duties. Their position is analogous to that of residuary legatees in an unadministered estate. They have a right to compel performance of the executor's duties but no interest in the assets comprising the estate until completion of the administration, during which time beneficial ownership of the assets is in suspense. The company thus holds the assets for statutory purposes, not for persons …

49 I should point out, however, that the analogy to a residuary legatee was one of the considerations that prompted the High Court of Australia in *Linter Textiles* to hold that the statutory trust did not exist. In the case of an unadministered estate, it cannot be said until administration is complete what the residue will consist of or what its value will be, and so the requisite certainty of subject-matter for the existence of a trust is lacking. Consequently, the executor of an unadministered estate is not a trustee, but holds the legal and beneficial title to the testator's property in full right: *Commissioner of Stamp Duties v Livingston*. The High Court of Australia in *Linter Textiles* therefore preferred the view that upon winding up, a company remains full legal and beneficial owner of its property, but is statutorily disabled from enjoying that ownership. This view is attractive, as the analogy between the two situations is compelling: in neither administration nor liquidation can it be ascertained, until the exercise is completed, what residual assets (if any) are to be distributed to the residuary legatee or unsecured creditor. It might therefore not be appropriate to speak of a "trust" at all.

50 Nonetheless, although Lord Diplock was clearly aware of this point (see *Ayerst* at 176), he confirmed the concept of the statutory trust, pointing out that the word "statutory" indicated that "the trust does not bear all the indicia which characterise a trust as it was recognised by the Court of Chancery apart from statute".

51 Therefore, on this view, the "statutory trust" is a purpose trust, with the beneficial interest "in suspense". The company holds the legal title to its property on trust for the purposes of the statutory scheme administered by the liquidator. Since this scheme is intended to be for the benefit of the unsecured creditors, it may loosely be said that the statutory trust is "in favour of" the unsecured creditors. However, this is a misleading use of language, for it then becomes natural to regard the unsecured creditors as ordinary beneficiaries having beneficial interests in the company's assets, when in fact, during the course of the winding up, they have only a hope of obtaining such interests. In principle, therefore, I agree with the view that, notwithstanding that the making of a winding up order brings into existence a statutory trust, unsecured creditors have no proprietary

interests in a company's property: *Mitchell v Carter* [1997] 1 BCLC 681 (per Millett LJ at 686), *Re Calgary and Edmonton Land Co Ltd (in liquidation)* [1975] 1 WLR 355 (per Megarry J at 359), *Re A Caveat, ex parte The Canowie Pastoral Company Limited* [1931] SASR 502 (per Angas Parsons J at 505), *Ayerst, Bulcher v Talbot* (per Lord Hoffmann at [28]), and *Commissioner of Stamp Duties v Livingston*.

52 It follows that I respectfully disagree with the statement by the Court of Appeal in [31] of *Michael Ng* that, as from the presentation of a winding up petition, "the unsecured creditors of a company are in the nature of a *cestui que trust* with beneficial interests extending to all the company's property". Apart from its inconsistency with the nature of the statutory trust, there are difficulties in making, as *Michael Ng* does, the date of presentation of a winding up petition (as opposed to the date of the winding up order) the operative date from which the statutory trust commences: see Lee, "Unsecured Creditor Versus Unregistered Charge" (1998) 10 SAcLJ 241 at p 244.

53 However, as I am bound by the authority of *Michael Ng*, it is not open to me to hold that the unsecured creditors have no beneficial interests in the assets of the Company which are within the ambit of the statutory trust. As I have already decided (at [30] and [41] above), however, that these assets do not include the Property, which has been validly charged to Power Knight, whatever beneficial interests the unsecured creditors may have in the Company's assets do not include an "interest in land" for the purposes of lodging a caveat under s 115 of the LTA.

Conclusion

54 For the foregoing reasons, I grant Power Knight's application and order that the Liquidators' Caveat and the Company's Caveat be removed. I will hear the parties on costs.

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